



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & ODEK, J.J.A)

CIVIL APPLICATION NO. NAI 163 OF 2018 (UR 132/2018)

BETWEEN

AFYARE ENTERPRISES COMPANY LIMITED.....APPLICANT

AND

GIDEON KIREMAH MUGAMBI.....1ST RESPONDENT

MAX GAS AND LOGISTICS.....2ND RESPONDENT

THE CHIEF LANDS REGISTRAR, NAIROBI.....3RD RESPONDENT

GLADYS KALUYU MUGAMBI.....4TH RESPONDENT

(An application for injunction pending the hearing and determination of the appeal arising from the

Environment & Land Court at Nairobi (B. M. Eboso, J.) delivered on 25th May, 2018 in E& LC Case No. 1626 of 2016)

RULING OF THE COURT

[1] This is an application for injunction brought under Rule 5(2) (b) Court of Appeal Rules to restrain the respondents...

“...from undertaking any development and/or construction and/or making any improvement to the building, transferring and/or registering any dealingand from dealing with parcel of land

number 36/VIII/403 original number 3618 otherwise known as Baraka Shopping Complex pending the hearing and determination of intended appeal.”

[2] The application is supported by the affidavit of **Hassan Abdi Warsame** – a director of the applicant to which various documents have been annexed. The application is opposed by the 1st, 2nd and 3rd respondents. The 1st respondent has filed a replying affidavit sworn on 13th December 2018. The 2nd respondent has also filed a replying affidavit sworn on 5th December 2018 by **Ahmed Mohamed Elmi**, the Managing Director of the 2nd respondent. The 3rd respondent did not file any response nor attend the hearing. The 4th respondent has filed a replying affidavit sworn on 11th October 2019. Lastly, the applicant has filed a further affidavit sworn on 14th November 2018.

[3.1] The facts germane to the present application are briefly as follows:

By an agreement of sale dated 1st September 2014, the 1st respondent agreed to sell to the applicant land parcel **LR. No. 36/VII/403 (original number 3618)** measuring approximately 0.2149 acres known as Baraka Shopping Complex situate at 1st Avenue Eastleigh (*suit land*), for a consideration of Shs. 112,000,000/-. Pursuant to the agreement, the applicant paid a total of Shs. 9,400,000/- to the 1st respondent on three occasions as deposit and the balance was to be paid in lumpsum on or before the 90 days completion date or upon successful registration of the conveyance. The deposit was to be utilised firstly, to clear the outstanding encumbrances on the title which were a mortgage dated 6th May, 1999 to Tripoil Petroleum (E.A) Limited for Shs. 3,000,000/-; secondly, to procure removal of a court order dated 6th May, 2006 in Civil Case No. 9 of 2005 (OS) ordering maintenance of status quo and; thirdly, removal of a caveat dated 10th September,

2011 by **Hussein Ibrahim Nuni**. Upon the execution of the agreement of sale, the applicant lodged a caveat against the title of the suit land claiming a purchaser's interest which was registered on 3rd October, 2014.

[3.2] At the time of the execution of the sale agreement, **High Court Civil Suit No. 9 of 2005 (OS)** filed by the 4th respondent herein against the 1st respondent herein, for division of matrimonial properties including the suit land was pending. An order for maintenance of status quo in respect of the suit property dated 6th July, 2006 given in that suit had already been registered as encumbrances against the title of the suit land. On 24th September, 2014 the 1st and 4th respondents entered into agreement of sale of the suit property to the 2nd respondent herein for a consideration of Shs. 95,000,000/-. By an application dated 12th January, 2016 the applicant sought to be joined in that suit as an interested party and the order was granted. Subsequently parties in that suit, except the applicant, signed a consent letter and a consent order was recorded on 19th April, 2016 in essence that the agreement of sale dated 24th September 2014 be completed. However, on 26th April 2016, the High Court stayed the orders of 19th April, 2016 pending the hearing of three applications which had been filed.

[3.3] On 23rd December, 2016 the applicant filed **Civil Suit No. 1626 of 2016** in the Environment and Land Court (E&LC) against 1st, 2nd and 3rd respondents herein. In the suit, the applicant alleged that the transfer of the land to the 2nd respondent was fraudulent and sought various reliefs including specific performance of the agreement of sale dated 1st September 2014. In addition, the applicant filed an application for interlocutory injunction dated 22nd December 2016 seeking an order of injunction in the same terms as in the application now before the Court.

[3.4] On 9th March, 2017, further consent orders were recorded in **HCCC No. 9 of 2015 (OS)** in terms:

1. **THAT the sale of L.R. No. 36/VII/403 Eastleigh (Baraka shopping Complex) to Max Gas and Logistics Limited be and hereby deemed complete.**
2. **THAT the deposit paid by the 2nd interested party on purported sale/purchase of LR No. 36/VII/403 (Baraka Shopping Complex) be returned to the 2nd interested party or its advocates.**
3. **THAT the balance of the proceeds of sale of LR. No. 36/VIII/403 be distributed as the applicant/respondent and 1st interested party have agreed."**

Mr. Nyaribo, an advocate who appeared for the applicant as 2nd interested party did not agree to the recording of the consent orders but he agreed to receive the money paid by the applicant without prejudice. By an application dated 4th July, 2017, the applicant applied for review of the consent orders of 9th March, 2017 relating to a refund of part of the purchase price to it and to payment of part of the purchase price in court, on the grounds that the applicant did not seek refund and its advocate acted without authority.

[4] The application for interlocutory injunction dated 22nd December, 2016 was considered by **Eboso, J.** who by a ruling dated 25th May, 2018 dismissed the application for reason that the applicant had not satisfied the criteria for grant of an interim injunction as laid in **Giella v Cassman Brown & Co. Limited [1973] EA 358**. The learned judge gave four reasons why the criteria was not satisfied. Firstly, that the suit land was a matrimonial property and at the time the agreement of sale was entered into, it was the subject of a matrimonial dispute in HCCC No. 9 of 2005(OS). Secondly, there was no evidence that the consent of the former wife of the seller, **Gladys Kaluyu Mugambi**, the 4th respondent herein, had been obtained. Thirdly, and most importantly, as the interest of the 2nd respondent Max Gas and Logistics Limited crystallized pursuant to a court order, it would be irregular for a court of equal status to issue an order whose tenor and import was to vacate the order of the High Court. Fourthly, it had been contended without denial from the applicant that the material agreement was terminated and a sum of Shs. 10,400,000/-paid to the applicant through its advocate

[5] The applicant being aggrieved by the ruling lodged a notice of appeal on 28th May, 2018 and subsequently filed the instant application on 31st May, 2018. The applicant has annexed a draft memorandum of appeal indicating that the intended appeal would be based on ten grounds.

[6] The applicants counsel relies on two decisions of this Court namely, **Hesbon K. Limited v Delilah Achieng Mathews & 2 Others – Civil Application No. NAI 134 of 2014 (UR 109/2014)** and **Ransa Company Limited v Manca Fransesco & 2 Others, Civil Application No. NAI 283 of 2008 (UR 185/2008)**. It is trite law that before the Court can exercise its discretion to grant an order of stay of execution or injunction, an applicant should demonstrate *inter alia*, that the intended appeal or appeal is arguable and that unless the order is granted, the appeal if it ultimately succeeds, would be rendered nugatory.

[7] The grounds on which the application is brought are stated in the body of the application and in the supporting affidavit. The applicant states in the pending suit in the E&LC that he is seeking amongst other prayers the nullification of sale and transfer of the suit land by the 1st respondent; that the intended appeal has overwhelming chances of success; that the applicant stands to suffer substantial loss or irreparable damage and; that the appeal could be rendered nugatory if the order sought is not granted. The supporting affidavit sets out the history of the dispute and demonstrates the errors that the trial judge allegedly committed.

[8] The 1st respondent in his replying affidavit supports the finding of the trial judge and states that the applicant has not met the threshold for grant of injunctive orders. He denied fraud and stated that he only exercised his rights under the contract. The 2nd respondent states in the replying affidavit, among other things, that it is a purchaser in good faith for value without notice; that it took possession of the suit land on 13th April 2016; that it is the registered owner and annexed a certificate of postal search showing that it was the registered proprietor as of 7th December 2016, that it has demolished the old premises and built a new shopping mall complex. Lastly, the 4th respondent states in the replying affidavit, *inter alia*, that the suit property was matrimonial property; that the 1st respondent – her former husband, had no capacity to

sell the property to the applicant; that the sale of suit property was sanctioned by court and that the applicant does not have an arguable appeal.

[9] We appreciate that the intended appeal is against a discretionary interlocutory order. The main suit, **E&LC Case No. 1626 of 2016** is still pending for hearing. The function of this Court in application of this kind is not to determine the contested issues of fact and law. Rather, its function is to determine whether or not the intended appeal or appeal raises arguable grounds fit for consideration of the Court, whatever the outcome would be. Indeed, that is trite law but we only restate it because the parties, particularly the applicant, have referred to facts relating to the dispute in great detail and has referred to numerous documents and prosecuted the application as if it were the appeal itself.

[10] We have considered the application. The plaint in **E&LC Case No. 1626 of 2016** impugns the sale of the suit land to the 2nd respondent on grounds of fraud. The particulars of fraud are stated in paragraph 14. There are nine in number. The applicant avers among other things that the sale to the 2nd respondent was fraudulent and that the consent orders recorded in **HCCC No. 9 of 2005 (OS)** was fraudulent. It is apparent from the impugned ruling that the learned judge made some final findings of fact at an interlocutory stage, for instance that the suit property was a matrimonial property, that spousal consent was not obtained and that the agreement of sale between the applicant and the 1st respondent was terminated. Further, the learned judge made a final finding of law that it would be utterly irregular for a court of equal status with the High Court to issue an order whose tenor and import is to vacate the order of the High Court.

[11] The draft grounds of appeal assail the findings of the court and in addition allege, *inter alia*, that the transfer was in breach of the court orders dated 26th April 2016 which granted a stay of execution of the consent orders; that the learned judge showed open bias in favour of the respondents; and that the consent orders recorded in HCCC No. 9 of 2015 (OS) were collusive and fraudulent. **Upon consideration of the material before the Court we are satisfied that the intended appeal is indeed arguable.**

[12] As regards the question whether the appeal if successful would be rendered nugatory, the subject matter of the dispute is a valuable city property. The suit property is now registered in the name of the 2nd respondent. It is probable that if the property is not preserved, it may change hands before the appeal is heard and determined. In the event that the appeal ultimately succeeds and the property has changed hands, the appeal is likely to be rendered nugatory.

[13] The terms of injunction sought embraces restraining the respondents from undertaking development construction and making improvements on the buildings. In the affidavit to support certificate of urgency dated 12th May, 2017 filed in the court below, the applicant stated that the 2nd respondent had embarked on massive demolition and excavation of the suit land with a view to undertaking massive development. The 2nd respondent now deposes that it demolished the building and constructed a new shopping centre. The applicant disputes that the construction had been completed and stated that it was still going on.

[14] In the absence of certainty that the construction is not completed, it would be inappropriate to grant an injunction stopping construction or use of the suit land. However, in the circumstances of the case, an injunction restraining the 2nd respondent from transferring, registering any dealings and from dealing in the suit property would be appropriate.

[15] For the foregoing reasons, the notice of motion dated 30th May, 2018 is allowed to the extent that an injunction is issued against the Max Gas and Logistics Limited (2nd respondent herein) and the Chief Land Registrar, Nairobi (3rd respondent herein) from transferring and/or registering any dealing or from dealing whatsoever in respect of Land Parcel No. 36/VII/403, original number 3018, pending the hearing and determination of the intended appeal.

The costs of this application shall be costs in the appeal. It is so ordered.

Dated and delivered at Nairobi this 11th day of October, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR