



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, M'INOTI & MURGOR, J.J.A)

CIVIL APPLICATION NO. 32 OF 2018 (UR 30/2018)

BETWEEN

MAXWELL HUDSON KADUKI DIGGS..... 1ST APPELLANT

EUNICE CATHERINE NYONGESA 2ND APPELLANT

AND

I & M BANK.....1ST RESPONDENT

GARAM INVESTMENT AUCTIONEERS 2ND RESPONDENT

ERIC ANANDA3RD RESPONDENT

(An application for stay of execution and injunction pending appeal from the ruling of the High Court of Kenya at Nairobi Milimani (Obaga, J.) dated 22nd January 2018 in *ELC Case No. 357 OF 2017*)

RULING OF THE COURT

The motion dated 8th February 2018 by the applicants **Maxwell Hudson Kaduki Diggs** and **Eunice Catherine Nyongesa** as crafted gives the impression that the suit property they occupy is in imminent danger of being sold.

It specifically craves;

“3. An order be and is hereby restraining the respondent, its agents and or servant from advertising, selling, alienating, or in any way interfering with the appellants quiet enjoyment of possession of the property LR No. 330/1374 pending the hearing of this application inter-parties.

4. An order be and is hereby issued restraining the respondent, its agents and or servant from advertising, selling, alienating or in any way interfering with the appellants quiet enjoyment of possession of the property L.R. No. 330/1347 pending the hearing of this appeal.”

The motion also contains in prayer 2 a plea for stay of the orders of Obaga, J. delivered on 22nd January 2018 “*pending the hearing and determination of the application inter parties.*” The prayer is spent though we must mention that this Court never issues *ex-parte* orders and seldom grants adjournments thus it is idle to seek any orders pending *inter partes* hearing. We need only add that Obaga, J’s order having been a dismissal of their application for injunction, a negative order, there would have been nothing to stay.

The application is based on grounds appearing on its face and they are basically to the effect that the applicants are aggrieved by the dismissal of their application which was erroneous in several respects including; the holding that the challenge to the statutory notice was an afterthought without a consideration of its propriety; relying on an outdated authority that the applicant’s only remedy was in damages; holding that they did not satisfy the principles for grant of injunction; holding that the property having been sold the remedy available to them was damages despite the sale being improper; and funding that they would not suffer irreparable loss by losing their matrimonial property. The grounds also state that their ‘arguable appeal’ would be rendered nugatory if the orders are not granted.

The application is supported by an affidavit sworn by the aforesaid Maxwell to like import and intent.

The 1st and 3rd respondents filed replying affidavits in opposition to the motion. **Musa Ndubuya**, the Debt Recovery Manager with I & M Bank Limited swore on 30th May 2018 that the applicants sought and were granted a home loan facility of Kshs. 20,400,000 with which they bought the suit property which they charged as security for repayment of the loan. In time they defaulted and they were given statutory notices first demanding payment and later of intended sale after the requisite periods. The property was duly valued in readiness for sale. The applicants acknowledged the outstanding debt but sought suspension of the auction scheduled for 21st March 2017 to enable them to sell the property to a potential buyer they had identified. They were duly indulged but neither sold the property nor repaid the money, leading to a re-advertisement and auction sale on 16th May 2017 to the highest of eight bidders, one **Erick Ananda Jackson**, who is the 3rd respondent. The purchase price was paid on the same date. The applicants filed the application that was eventually dismissed by the learned Judge after the sale had been concluded and the dismissal was warranted. He urged us to dismiss the application.

The 3rd respondent's replying affidavit was sworn on 30th May 2018 and he deponed that the current owner of the suit property is Trinity Prime Investments Ltd, and attached documents evidencing the same. He also attached a copy of statutory declarations attached to the charge in which the applicants had affirmed that the suit property was not matrimonial property. He accused Maxwell of failing to disclose that he was present on the day of the auction, but was unable failed to participate not having met the auction conditions. He termed the applicants trespassers who have remained on the property after the auction thereby depriving the owner of income at the rate of Kshs. 130,000 per month. He prayed that the application be dismissed.

Those are the rival positions that were propounded before us by learned counsel **Mr. Irungu** for the applicants; **Mr. Akoya** for the 1st, and **Mr. Aliku** for the 3rd, respondents. Mr. Irungu pressed that the statutory notices issued to the applicants were defective principally because they did not notify them of the exact amount they needed to pay, to rectify their default and that they therefore did not know how much they were required to pay, the demand having been for the full sum. He argued that the learned Judge was wrong to hold that damages would be an adequate compensation to the applicants, contending that it is the third party purchaser who ought to be compensated in damages.

On his part, **Mr. Akong'a** maintained that the alleged defectiveness of the notices was an afterthought and further that the applicants were guilty of concealment of the material fact that the auction had previously been put off at the applicants' request and that the property had been sold by the time they went to court. To him, the applicants could only be compensated in damages were the sale to be nullified after the trial.

Mr. Liko stated that the application ought to be dismissed because the applicants admitted the debt; they were given opportunities to rectify the default to no avail; they sent a representative to the auction; the property owner Trinity Prime Investments was not made a party herein; the default rendered the entire debt payable; the property was not matrimonial property and; finally, Maxwell did not exhibit authority of the 2nd applicant to act on her behalf.

Having considered this application and the submissions made before us, we find that its fate is dismissal. We have already stated that the manner of its framing is calculated to mislead that the suit property was in danger of being sold. In fact the affidavit in support of urgency was filed with that fiction being presented, which led to certification of the application as urgent. In truth, there was no threatened sale of the property. It had been auctioned more than a year previously, indeed, even before the applicants moved to the court below for the injunction application, which was declined. A party who by deliberate falsehood or calculated ambivalence or attempts to mislead the court is not deserving of favourable discretion. He who comes to equity must do equity, and equity demands absolute candour. The sale having occurred with a representative of the applicants being present, and the property having been transferred to a third party altogether, it is wanting for the applicants to have been anything short of fully candid about it. Such engagement with candour would in all likelihood have advised against filing an application that was doomed to fail, having been overtaken by events.

The debt having been admitted, the applicant having sought and been extended time and opportunity to redeem the property including by entering into a private treaty with a reported buyer for which a planned auction sale was on a prior occasion postponed, it is difficult to see how the learned Judge would have come to a conclusion different from the one he reached when he stated as follows in the impugned ruling;

“10. In the present case, the applicants are not denying being indebted to the 1st respondent. The applicants do not also deny that they were aware that the process of auction of the suit property had begun. In fact contrary to their claims that they approached the 1st respondent to accommodate them which pleas were ignored, it has emerged that the suit property was first advertised for sale on 6th March 2017 for an auction scheduled on 21st March 2017. The applicants pleaded that they be given 30 days to enable them sell the suit property themselves and repay what they owed the 1st respondent. The auction was put on hold go give them time to sell the suit property. They did not do as promised. When the property was re-advertised, the applicants sent a representative with a cheque of Kshs. 100,000/=. It was a condition of the auction that for anyone to participate they had to make a cash payment of Kshs. 100,000/= as deposit in order to be allowed to participate. It would appear the applicants did not meet this condition as their representative did not have cash. It is not therefore correct for the applicants to claim that they were not allowed to redeem the suit property.

11. The other complaint by the applicants is that the suit property was sold at a throw away price. Contrary to their allegations, the 1st respondent has demonstrated that there was a valuation which gave a forced sale value. The suit property was actually sold for more than the forced sale value. The applicants in their plaint pray for a declaration that the statutory notice and notice of sale issued were defective and tht the sale of the suit property was defective. They also pray for a permanent injunction.

*12. It is from the prayers in the plaint that a court ought to determine whether on the materials presented to court, an applicant has established a prima facie case with probability of success. It is clear that the applicants are basing their whole claim on the statutory notices issued. This is clearly an afterthought. When the suit property was first advertised for sale, there was no issue of defects in the statutory notices raised. The applicant sought for indulgence to sell the suit property themselves which they did not do. The property was re-advertised and during the auction, the applicants made an attempt to participate in the auction. The property has since been sold. I do not therefore see what prima facie case the **applicants have to warrant issuance of an injunction.**”*

It seems quite clear that the applicants' claim that they have an arguable appeal against the learned Judge's exercise of discretion is a bold but

fanciful one. They are obligated to demonstrate to us an arguable point by which is meant a genuine *bona fide* point to be raised and calling for an answer though it need not necessarily succeed. Try as we might, we see no such point. If it exists in this case, it is too hidden for our perception and we are thus unpersuaded. We say so while still cognizant that our opinion does not bind the bench that will ultimately hear the intended appeal.

Absent an arguable appeal, we need not consider the second limb on which an application must satisfy the Court, being that if the prayers sought are not granted the appeal would be rendered nugatory, useless or of no effect. See **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS [2013]eKLR** for a discussion of these principles. Suffice to say that there is a *bona fide* purchaser for value who now holds title to the suit properly. He is *prima facie* entitled to it while the applicants are not. Should the sale ultimately be found to have been in any way improper, the applicants can be compensated in damages. Once they commoditized the suit property by offering it as security for a loan, they opened it up for assessment in liquid terms. Nothing to render the appeal nugatory remains.

For those reasons this application fails and it is accordingly dismissed with costs.

Dated and delivered at Nairobi this 13th day July, 2018.

P.O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR