



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO, M'INOTI & ODEK, JJ.A.)

CIVIL APPLICATION NO. 67 OF 2015 (UR 56/15)

BETWEEN

COAST PROFESSIONAL FREIGHTERS LTD.....APPLICANT

AND

WELSA BANGE OGANDA.....1ST RESPONDENT

INDUSTRIAL & COMMERCIAL

DEVELOPMENT CORPORATION.....2ND RESPONDENT

NADHIA LIMITED.....3RD RESPONDENT

(An application for stay of execution, pending the hearing and determination of an intended appeal against the judgment and decree of the High Court of Kenya at Mombasa, (Kasango, J.) dated 21st August 2015

in

HCCC No 50 of 1998

RULING OF THE COURT

On 21st August 2015, the High Court at Mombasa, (*Kasango, J.*) delivered a judgment in a protracted dispute principally between *Welsa Bange Oganda (Oganda)* on the one hand, and the *Industrial & Commercial Development Corporation (ICDC)* and *Coast Professional Freighters Ltd (the applicant)* on the other, regarding the disputed ownership of the property known as *Mombasa/Block X/219 (the suit property)*, on which stands a four storied hotel complex comprising a bar/restaurant on the ground floor and lodging rooms on the upper floors. By her judgment, the learned judge ordered the applicant's registration as proprietor of the suit property to be cancelled and in lieu thereof Oganda to be registered as proprietor. The applicant was further ordered to hand over vacant possession of the suit property to the Oganda within 30 days from the date of judgment. Lastly the court entered judgment in favour of Oganda for Kshs 8 million jointly and severally against the applicant and ICDC. The two together with *Nadhia Limited (the auctioneers)*, were condemned to pay costs of the suit.

The judgment resulted from a suit filed by Oganda against the applicant, ICDC and the auctioneers contending that the sale and transfer of the suit property to the applicant was fraudulent, illegal, null and void. He therefore prayed for a declaration to that effect; an order for re-transfer of the suit property from the applicant to himself; eviction of the applicant from the suit property; general damages for breach of contract and in the alternative compensation for the full value of the suit property at the time of the purported sale or of the judgment.

The background to the dispute were several loans advanced to Oganda by ICDC for the development of a supermarket and flats on the suit property, which were secured by a charge over the suit property. ICDC claimed that the Oganda had defaulted in repaying the loans and instructed the auctioneers to sell the suit property by public action, which they did on 17th September 1997 purportedly to the applicant as the highest bidder.

In his suit Oganda contended that it was ICDC which was in breach of the loan agreements by failing to disburse the full loans; disbursing the loans in insignificant and uneconomical instalments; charging illegal rates of interest; exercising the power of sale without a valid prior statutory notice; and fraudulently selling and transferring the suit property to the applicant who was not the highest bidder and who did not pay both the deposit and the balance of the purchase price as advertised.

For its part, the applicant contended that it had lawfully purchased the suit property in the public auction of 17th September 1997 after it was declared the highest bidder and that it was a bona fide purchaser for value without notice.

In finding for Oganda, the learned judge held, among other things that the interest charged by ICDC was illegal; that the sale of the suit property by public auction was invalid because no statutory notice was served on Oganda; that the applicant did not participate at the public auction on 17th September 1997 and was not the highest bidder and that the purported sale and transfer of the suit property to the applicant was fraudulent, null and void.

Aggrieved by the judgment, the applicant lodged a notice of appeal on 25th August 2015. He also moved the High Court for an order of stay of execution of the decree pending the hearing and determination of his intended appeal. The High Court granted him interim stay of execution, which it extended from time to time until the hearing of the application now before us.

In the application now before us taken out under **rule 5(2)(b)** of the **Court of Appeal Rules**, the applicant prays for stay of execution of the decree of the High Court pending the hearing and determination of his intended appeal. The application is supported by two affidavits sworn by **Patrick Mutune Kiasyo**, a director of the applicant on 7th December 2015 and 9th December 2015.

To demonstrate that it has an arguable appeal, the applicant, through its learned counsel, **Mr. Mogaka** and **Mr. Munyithya**, relied on its draft memorandum of appeal, which raises some 13 grounds of appeal. It was submitted that the High Court did not have jurisdiction to entertain the dispute because the same was a dispute arising from a document of charge which by dint of **Article 162(2)** and **(3)** and **section 13** of the **Environment & Land Court Act** should have been heard exclusively by the **Environment & Land Court**; that in holding that the transfer of the suit property to the applicant was fraudulent the High Court erred by relying on proceedings in this Court and in the High Court arising from HCCC No. 113 of 1999, which were not admitted in evidence and in which both the applicant and Oganda were not parties; and that the trial court had further erred by failing to find that under **section 77** of the repealed **Registered Land Act**, Oganda's remedy was an award of damages.

On whether the intended appeal would be rendered nugatory if it was successful and stay of execution was not granted, it was submitted that Oganda had already drawn the decree in readiness for execution; that if the decree was executed the suit property could be transferred to third parties and thus put beyond the reach of the applicant; that the applicant has been in possession of the suit property for the last 16 years; that it had since invested heavily in the suit property and increased its value from Kshs 6 million in 1997

to Kshs 95 million in 2014; and that the applicant was running a lucrative business on the suit property and had employed 35 workers. Among the annexures to the application were two valuations reports by ***Paul Wambua Valuers Ltd*** and ***Tysons Limited*** vouching for the values of the suit property in 2014 and 1997 respectively.

On the authority of the decisions of this Court in ***GITHUNGURI V. JIMBA CREDIT CORPORATION LTD (NO. 2) (1988) KLR 838***, ***BUTT V. RENT RESTRICTION TRIBUNAL (CA NO. NAI 6 OF 1979)*** and ***CHRIS MUNGA N BICHAGE V. RICHARD NYAGAKA TONGI & 2 OTHERS, CA NO. 39 OF 2013 (KISUMU)***, among others, we were urged to find that the applicant had made out an arguable appeal which would be rendered nugatory if successful in the absence of an order of stay of execution.

Mr. Oganda vigorously opposed the application. On the basis of replying affidavit sworn on 9th December 2015, his learned counsel, ***Mr. Amuga*** submitted that the applicant's intended appeal was not arguable and if in any event it were ever successful, the same would not be rendered nugatory. Counsel submitted that the High Court had properly found that the sale and transfer of the suit property to the applicant was fraudulent, null and void as the applicant neither attended nor participated in the public auction; that the applicant did not pay the purchase price for the suit property and was instead unlawfully facilitated by ICDC and the auctioneers to obtain a loan to pay for the suit property using it as collateral; that in light of the foregoing the applicant was not an innocent purchaser for value; that upon purporting to have purchased the suit property by public auction the appellant had illegally disposed Oganda's tenant; and that Oganda intended to take over possession of the suit property and run the business himself.

Citing the ruling of this Court in ***FREIGHT IN TIME LTD V ROSEBELL WAMBUI MUTHEE, CA NO. NAI. 201 OF 2013 (UR 145/2013)***, we were urged to find that even if the applicant had an arguable appeal, in the circumstances of this case the same would not be rendered nugatory.

We have duly considered the application the supporting and opposing affidavits, the submissions of respective counsel and the authorities that they relied upon. The applicant has satisfied us that it has duly filed a notice of appeal and therefore we have jurisdiction to entertain this application. (See ***Rule 59(1)*** of the Court of Appeal Rules and ***SAFARICOM LTD. V. OCEAN VIEW BEACH HOTEL LTD. & 3 OTHERS, CA NO 325 of 2009***).

The two other issues that we have to determine are whether the applicant has *prima facie* presented an arguable appeal, which will be rendered nugatory if it succeeds, and in the meantime execution of the decree of the High Court is not stayed. (See ***GITHUNGURI V. JIMBA CREDIT CORPORATION LTD (NO. 2), supra***).

An arguable appeal is not one, which must necessarily succeed; rather, it is one which raises an bona fide issue worth of consideration by this Court (See ***KENYA RAILWAYS CORPORATION V. EDERMANN PROPERTIES LTD. CA NO. NAI. 176 OF 2012***). In the same vein, the applicant is not obliged to establish a multiplicity or arguable grounds; even one arguable ground will suffice. (See ***KENYA TEA GROWERS ASSOCIATION & ANOTHER V. KENYA PLANTERS & AGRICULTURAL WORKERS UNION, CA. NO. NAI 72 OF 2001***).

Among the issues that the applicant intends to argue in the intended appeal is whether the High Court had jurisdiction to hear this matter. While it is true that the issue was not raised before the High Court, it is a jurisdictional matter, which can be raised at any stage. (***MUHIA V. MUTURA [1999] 1 EA 209***). Having carefully considered the issues that the applicant intends to ask this Court to address on appeal, we are satisfied that they are not frivolous. We do not intend to say more in that regard because whether ultimately the appeal will succeed or not will be determined at the hearing of the appeal and we are obliged to say nothing that may prejudice or embarrass that determination.

On whether the intended appeal will be rendered nugatory if it succeeds absent an order for stay of execution, we reiterate that whether or not an intended appeal will be rendered nugatory depends on the circumstances of each case. (See ***RELIANCE BANK LTD V. NORLAKE INVESTMENTS LTD [2002]***

1 EA 227 and SILVERSTEIN V CHESONI [2002] 1 KLR 867). The purpose of this inquiry is to ensure preservation of the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual. (See **AHMED MUSA ISMAEL V KUMBA OLE NTAMORUA & 4 OTHERS, CA No. 256 of 2013**).

The applicant has run the business on the suit premises for the last 16 years and there is no dispute that it has invested substantial amounts of money and enhanced the value of the suit property considerably. It has also employed some 35 Kenyans whose livelihood depends on the continued operation of the business. On the one hand Oganda has a decree in his favour from the High Court. On the Other hand, the applicant has an undoubted constitutional right of appeal to this Court, whose outcome we cannot predict at this stage save to say that *prima facie* the intended appeal is not frivolous. In such circumstances, the decision in **BUTT V RENT RESTRICTION TRIBUNAL**, supra, requires that we exercise our discretion in such a manner as not to prevent the hearing and determination of the intended appeal. In these circumstances, we are therefore inclined to grant an order of stay of execution of the decree of the High Court dated 21st August 2015.

As it is possible, due to the nature the work in this station of the Court to have the intended appeal heard and determined promptly, and taking into account the fact that this dispute had been pending in the courts for the last 17 years, we direct the applicant to make haste and lodge the intended appeal expeditiously so that the same is heard and determined without further delay. Costs of this application shall abide the outcome of the intended appeal. It is so ordered.

Dated and delivered at Mombasa this 26th day of February, 2016.

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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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