IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. 64 OF 2015

BETWEEN

JULIUS MUSILI KYUNGA.....APPLICANT

AND

KENYA COMMERCIAL BANK LTD.....1ST RESPONDENT

JOEL TITUS MUSYA T/A MAKURI ENTERPRISES.....2ND RESPONDENT

JAMES MURIUKI KARAYA.....3RD RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal against

the ruling and order of the High Court of Kenya at Mombasa, (Omollo, J.) dated 30th October 2015

in

HCCC No. 324 of 2008)

****

RULING OF THE COURT

The Motion on Notice before us is expressed as taken out by the applicant, ***Julius Musili Kyunga,*** under ***rule 5(2)(b)*** of the ***Court of Appeal Rules***, ***Sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act*** and ***Article 159*** of the Constitution. The relief sought is formulated as follows:

> ***"Pending the hearing and determination of the intended appeal there be issued a conservatory order for status quo to ensure that:***
>
> ***(a) the 1st and 3rd respondents are restrained from registering a transfer over Plot LR No 2812/1/MN in the name of the 3rd respondent and/or the nominee of the 3rd respondent or otherwise;***
>
> ***(b) the Interested Party by himself, his servants and all agents do not evict or in any manner physically remove the applicant from Plot LR No 2812/1/MN."***

The history behind the application is somewhat checkered, the applicant having made three previous unsuccessful attempts, twice in the High Court and once in this Court, to prohibit the transfer of the suit property to the 3rd respondent. The dispute originates from agreements between the applicant and the 1st respondent dating back to the early 1990s by which the applicant executed 4 charges over the suit property in favour of the 1st respondent to secure loans totaling in aggregate a maximum of Kshs 2.6 million.

Subsequently the 1st respondent contended that the applicant had defaulted in repayment of the loans as agreed. In August 2008 it served upon him a statutory notice evincing its intention to exercise its statutory power of sale and after advertising the suit property for sale by auction, sold the same to the 3rd respondent on 11th November 2008 for Kshs 5.5 million. On 13th November 2008, the applicant instituted ***Mombasa HCCC No. 324 of 2008*** together with an application for an order of injunction to restrain the 1st respondent from selling the suit property or transferring it to any other person pending the hearing and determination of the suit. The reliefs were sought on the basis that no money was ever advanced by the 1st respondent to the applicant; that the applicant had fully paid its overdraft facility with the 1st respondent; that the statutory notice was defective and that the sale of the suit property was fraudulent.

Ojwang, J. (as he then was) heard the application and by a ruling dated 28th May 2010, dismissed the same having found that the applicant had failed to establish a *prima facie* case with a probability of success at trial. In any event, the learned judge also held that the sale had already taken place before the applicant filed his suit and that an order of injunction could not issue to stop what had already happened.

Undeterred, the applicant filed an interlocutory appeal in this Court, namely ***Civil Appeal No. 3 of 2013,*** challenging the decision of the High Court. By a judgment dated 12th February 2015, this Court upheld the High Court and dismissed the appeal with costs, after finding in addition that the appellant had lost the right to redeem the suit property and that in any event his remedy, if any, lay in damages.

A month after the judgment of this Court the appellant went back to the High Court and by a Notice of Motion dated 16th March 2015, applied for leave to amend the plaint and for a conservatory order worded in the terms set out above. Although it was claimed that a conservatory order is different from and broader than an injunction, on the facts of this case there was little doubt that the choice of the remedy of a conservatory order was to escape the reality that the applicant had previously unsuccessfully applied for an order of injunction. The amendment to the plaint was intended to plead damages arising from the sale of the suit property and to introduce a claim that the sale was a violation of the applicant's constitutional right to property under ***Article 40*** of the Constitution.

The respondents opposed the application contending that the issues raised were *res judicata* and that there was no basis for the claim that the sale of the suit property by public auction upon the applicant's default in repayment of the loan was a violation of his constitutional right to property.

By a ruling dated 30th October 2015, Omollo, J. granted the applicant leave to amend the plaint but dismissed the prayer for conservatory order for lack of merit, holding that the issues in the conservatory application were the same issues addressed earlier by the High Court and this Court. The applicant filed a notice of appeal on 2nd November and followed it up with this application, which by consent of the parties was urged by written submissions and limited oral summation.

Mr. Munyithya, the applicant's learned counsel submitted that pending the hearing and determination of the applicant's intended appeal, it was desirable for this Court to issue a conservatory order that would ensure that the applicant is not evicted from the suit property and that the same is not transferred to the 3rd respondent. He invoked the rulings of the Supreme Court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others, Application No. 5 of 2014*** and the High Court in ***Centre for Rights Education and Awareness & 7 Others v Attorney General, Petition No. 16 of 2011*** and submitted that this Court has jurisdiction to issue conservatory orders.

Contending further that the intended appeal was arguable, counsel submitted that the amended plaint challenges the constitutionality of ***section 69(B)*** of the repealed ***Transfer of Property Act*** as well as the sale of the suit property to the 3rd respondent. Accordingly, due to the introduction of the constitutional dimension, it was submitted, the learned judge erred by holding that the application was *res judicata*. For good measure, it was submitted that the applicant had conducted private investigations and established that the 3rd respondent had not paid the balance of the purchase price to the 1st respondent and therefore the transfer of the suit property to should be stopped.

Regarding whether the intended appeal would be rendered nugatory if it were to succeed, it was submitted that without the conservatory orders the suit property will be transferred to the 3rd respondent and that an award of damages would be an insufficient remedy because the suit property is the applicant's only source of livelihood.

Mr. Adalla, learned counsel for the respondents who also held brief for ***Mr. Maundu*** learned counsel for the interested party, opposed the application contending that the intended appeal was not arguable because the application for conservatory order was *res judicata*. In counsel's view, masking the application before the court as an application for conservatory orders could not change the fact that it was for all intent and purpose an application for injunction. The High Court having held that the applicant was not entitled to an injunction and this Court having affirmed that position, it was argued, the applicant could not re-open the issue by baptizing the application one for conservatory orders.

Counsel further submitted that the constitutional issue now raised by the applicant ought to have been made a ground of attack in the former applications and is therefore deemed to have been a matter directly or substantially in issue. The applicant, it was argued, was obliged to present his whole case before the court instead of presenting it in bits and pieces or by instalments. The respondents relied on the judgments of this Court in ***Uhuru Highway Development Ltd v. Central Bank of Kenya & 2 Others, CA No. 36 of 1996*** and ***Mburu Kinyua v. Gachiri Tuti [1976-80] 1 KLR 790*** to argue that *res judicata* applies equally to suits and applications and on ***John Florence Maritime Services Ltd & Another v. Cabinet Secretary for Transport & Infrastructure & 3 Others, CA No. 42 of 2014 (Mld)*** for the proposition that *res judicata* applied even in constitutional applications.

Lastly it was submitted that the intended appeal, if successful, would not be rendered nugatory as the respondents were capable of paying any damages, if any, awarded to the applicant.

We have anxiously considered the application before us. The applicant is obliged to satisfy us on two issues. Firstly that his intended appeal is arguable and secondly that it will be rendered nugatory if it succeeds in the absence of the order sought. (See ***Jaribu Holdings Ltd v. Kenya Commercial Bank Ltd CA. No. 314 of 2007).*** While ordinarily under rule 5(2) (b) of the Rules of this Court the remedies available are stay of execution, stay of proceedings and an order for injunction, the Court held in ***Njuguna S. Ndung'u v. Ethics & Anti-Corruption Commission & 3 Others, CA No. Nai. 304 of 2014,*** that in an appropriate case and pursuant to its inherent jurisdiction, the Court can issue a conservatory order. The Court extrapolated on the issue thus:

> ***"A proper reading of this Court's decision in EQUITY BANK LTD Vs. WEST LINK MBO LTD (supra) shows that the Court has never been antipathetic towards the grant of what may be called conservatory orders in proper cases the aim being to preserve the substratum of the appeal, to maintain the status quo and to avoid a scenario where parties exercising their undoubted right of appeal are embarrassed by harm having been visited on them pending the appeal. It is accepted that other than flowing expressly from the Rules, the power to order a stay of execution in inherent in the Court and it may, in appropriate cases, invoke and deploy the same ex-debito justiae. We have gone into some length over this issue if only to underscore that whereas Rule 5(2) (b) provides for specific species of orders that are grantable, namely stay of execution, injunction and stay of proceedings, there appears to us to be no impediment in doctrine or practical good sense to the issuance of what the applicant has called "conservatory orders" under the same Rule as read with Sections 3A and 3B of the Appellate Jurisdiction Act on the overriding objective ("the oxygen principle") and the Constitution."***

The argument that the applicant has an arguable appeal is premised on the amended plaint in which it is claimed that the exercise of the 1st respondent's power of sale was unconstitutional and in violation of the applicant's right to property. The respondents contend in reply that the issue is deemed to have been raised in the earlier application in the High Court and is therefore *res judicata*. They add too that the suit property has already been sold to the interested party for many years and the applicant's right of redemption has been extinguished since 2008.

We are satisfied that the applicant has raised at least one arguable issue, which in any event, need not necessarily succeed at the hearing of the appeal. (See ***Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union CA. No. Nai. 72 of 2001).***

Will the intended appeal be rendered nugatory if we do not grant the orders sought? We do not think so. The applicant has not placed before us any material from which we can conclude that in the event of the appeal succeeding, it will amount to a mere pyrrhic victory. If the applicant is able to demonstrate that section 69B of the repealed Transfer of Property Act was unconstitutional and that the exercise of the 1st respondent's statutory power of sale was in violation of his constitutional rights, an award of damages will be an adequate remedy. The applicant does not suggest, in any event, that the respondents are incapable of paying such damages.

To the extent that the applicant has not satisfied us that the intended appeal will be rendered nugatory if we do not issue the orders sought, and further to the extent that he is obliged to satisfy the two tests under rule 5(2) (b), this application fails and it is hereby dismissed with costs. It is so ordered.

Dated and delivered at Mombasa this 22nd day of April, 2016

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR