



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, MWILU & M'INOTI, JJ.A.

CIVIL APPLICATION NO. NAI 264 OF 2013 (UR 1192/2013)

BETWEEN

STEPHEN WANYEE ROKI.....APPLICANT

AND

K-REP BANK LIMITED.....1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

DAVID WAWERU.....3RD RESPONDENT

(Application for injunction pending the hearing and determination

of an intended appeal from the ruling and order of the High

Court of Kenya at Nairobi, (Njagi, J.) dated 20th November 2012

in

HCCC NO. 10F 2011)

RULING OF THE COURT

On 1st October 2013 the applicant, **Stephen Wanyee Roki**, took out the Motion on Notice now before us under **rule 5(2)(b) of the Rules of the Court of Appeal**. In the Motion the applicant seeks an injunction to prohibit registration of **LR No. Dagoretti/Riruta 3753** and **LR No Dagoretti/Riruta 4724 (the suit properties)** in the name of **David Waweru**, the 3rd respondent, pending the hearing and determination of his intended appeal. The intended appeal arises from the ruling and order of the High Court, (**Njagi, J.**) dated 20th November 2012 by which the learned judge dismissed the applicant's interlocutory application for injunction to prohibit the respondents from advertising for sale, selling or alienating the suit properties pending the hearing and determination of the High Court suit.

In summary the background to the application before us is as follows. On 24th June 2005 the applicant won a tender for Kshs 5,331,191/= from the 2nd Respondent, **the City Council of Nairobi**, for the

construction/enhancement of **Korogocho/Ngunyumu Primary School** in Nairobi. To finance the project, the applicant obtained an overdraft facility of Kshs 1 million from the 1st respondent, **K-Rep Bank Ltd**, which was secured by a charge over the suit properties.

As it turned out, the applicant did not service the facility. He blamed the 2nd respondent for his inability to do so, claiming that the 2nd respondent had failed to remit payments due to him directly to the 1st respondent as agreed between the parties. On 10th November 2010 the 1st respondent served upon the applicant statutory notices under **section 74 of the Registered Land Act, cap. 300 (now repealed)**, evincing intention to realize the securities. Subsequently the 1st respondent advertised the suit properties for sale by public auction on 11th January 2011.

On 5th January 2011 the applicant filed High Court Civil Suit No 1 of 2011 seeking a permanent injunction to stop the sale of the suit properties and a declaration that he was obliged to repay the 1st respondent's overdraft only upon receiving his payment from the 2nd respondent. He followed the suit with an interlocutory application for a temporary injunction. On 11th January 2011 the suit properties were sold to the 3rd respondent for Kshs 3,000,000/=.

Njagi, J. heard the application for injunction and being satisfied that no *prima facie* case with a probability of success was made out, he dismissed the same in the ruling dated 20th November 2012. Aggrieved by the dismissal, the applicant filed a notice of appeal on 3rd December 2012. Undeterred, the applicant filed another application in the High Court for "stay of the orders of Njagi, J." That application was heard by **Kamau, J.** and suffered the same fate as the first application after the learned judge found that there was nothing to stay in the order by Njagi, J. The applicant then filed the application now before us.

The applicant, who represented himself, prosecuted the application before us on the basis of his affidavit sworn on 1st October 2013. He also made oral submissions to elaborate the averments in the said affidavit. The gist of his case is that he had already filed a Notice of Appeal, which entitled him to make an application under rule 5(2)(b) of the Rules of this Court. He contended that the suit properties were undersold and that the true market value was Kshs. 8.4 million. It was his further submission that he suspected that the parties had colluded in the sale because the 3rd respondent is a Member of Parliament and manager of **Faida Investment Bank Ltd**. The applicant contended that the statutory notices served on him were void, as they did not give him three months notice as required under the repealed statute.

The applicant concluded by submitting that he was still pursuing his payment from the 2nd respondent and that he would repay all moneys due and owing to the 1st respondent once the 2nd respondent paid him. To support his submissions the applicant relied on **GITHUNGURI V JIMBA CREDIT CORPORATION LTD (NO. 2) [1988] KLR, 838; MWANIKI NDEGWA V NATIONAL BANK OF KENYA LTD & 3 OTHERS, CA NO 141 OF 2009; GEORGE GITAU WAINAINA V KCB & 2 OTHERS, CA NO NAI 59 OF 2010 and PETER NG'ANG'A MUIRURI V PETER NG'ANG'A MUIRURI & ANOTHER, CA NO 78 OF 2009.**

Mr. Muriuki, learned counsel for the 1st respondent opposed the application on the basis of a replying affidavit sworn on 28th October 2013 by **Josephine Musembi**, the 1st respondent's Head-Legal and Procurement. Counsel contended that the suit properties had already been sold to the 3rd respondent by public auction and that there was no basis for the orders sought by the applicant. It was further argued that the overdraft facility was between the applicant and the 1st respondent and that the 2nd respondent was not privy to the same and therefore arrangements between the applicant and the 2nd respondent could not affect the 1st respondent. Learned counsel concluded by submitting that the applicant had not at all disputed the overdraft, but was merely seeking more time to repay the loan.

The application was also opposed by **Mr. Kuria**, learned counsel for the 2nd respondent. Counsel adopted

the submissions made on behalf of the 1st respondent and emphasized that the suit properties had already been validly sold to the 3rd respondent for valuable consideration and that an injunction would serve no purpose so late in the day. It was also contended that if the applicant's intended appeal were ultimately successful, the same would not be rendered nugatory, as damages were a sufficient remedy.

On the authority of SITAKHA V MWAMODO & 4 OTHERS [1986] KLR 445; TANUI & 4 OTHERS V BIRECH & 11 OTHERS [1991] KLR 510 and HUMPHREY KILAMBO MCHARO V KCB LTD & ANOTHER, CA NO NAI 51 OF 2005, we were asked to find that there was no arguable appeal capable of being rendered nugatory and to accordingly dismiss the application.

Lastly **Mr. Adira**, learned counsel for the 3rd respondent joined the other respondents in opposing the application. Relying on the 3rd respondent's replying affidavit sworn on 6th November 2013, counsel submitted that the applicant had not denied his indebtedness to the 1st respondent and that in the circumstances he could not be heard to say that the power of sale had not accrued. It was further contended that the statutory notice had been duly served upon and acknowledged by the applicant and that the 3rd respondent was a bona fide purchaser for value at the public auction held on 11th January 2011. Upon the sale of the suit properties to the 3rd respondent, it was argued, the equity of redemption was extinguished and that the applicant could not be afforded further time to redeem the suit property as he sought to do.

Finally we were urged to find that the intended appeal, if successful, would not be rendered nugatory since the suit premises had a pecuniary value as indicated in the valuation reports and that the applicant would be adequately compensated by an award of damages. It was submitted that the applicant had not suggested that the respondents would be unable to pay any money that may be found to be due to him in the event of a successful appeal. The decisions of this Court in PRISCILALH KROBOUGHT GRANT V KENYA FINANCE CO LTD & 2 OTHERS, CA NO NAI 27 OF 1995; DOWNHILL LTD V HARITH ALI EL-BUSAIDY & ANOTHER, CA NO 254 OF 1999 and JOSEPH OKOTH WAUDI V NATIONAL BANK OF KENYA, CA NO 77 OF 2004 were cited for the proposition that the remedy of a party aggrieved by the exercise of the power of sale lies in an award of damages.

In an application under rule 5(2)(b) of the Court of Appeal Rules, an applicant is obliged to satisfy two conditions. First he must demonstrate that he has an arguable appeal or an appeal that is not frivolous. Second, he must demonstrate that if successful, his intended appeal will be rendered nugatory. (See GITHUNGURI V JIMBA CREDIT CORPORATION LTD (NO. 2), supra). An arguable appeal is not one that must necessarily succeed but rather is one that raises an issue or issues deserving of consideration by the Court. (See KENYA TEA GROWERS ASSOCIATION & ANOTHER V. KENYA PLANTERS & AGRICULTURAL WORKERS UNION, CA NO NAI 72 OF 2001). To that end, the applicant is not obliged to establish a multitude of issues. It will suffice if he raises a single *bona fide* issue worthy of consideration by the Court. (See AHMED MUSA ISMAEL V KUMBA OLE NTAMORUA & 4 OTHERS, CA NO. 256 OF 2013). The applicant is not entitled to an order under rule 5(2)(b) merely because he has satisfied one of the conditions. He has to satisfy both conditions. (See REPUBLIC V KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS [2009] KLR 31).

As regards what may render a successful appeal nugatory, this Court in STANLEY KANGETHE KINYANJUI V TONY KETTER & 5 OTHERS, CA NO 31 OF 2012 stated as follows:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved”.

Has the applicant presented an arguable appeal, one that is not frivolous? The appellant's main argument in the intended appeal is that the suit properties were under sold for Kshs 3,000,000 while the true market value was Kshs 8.4 million. He does not challenge the validity of the charge, his indebtedness to the 1st respondent, or the due service and receipt of the statutory notice preceding the sale of the suit property by the public auction. The statutory notice was served on 10th November, 2010 while the public auction was

on 11th January, 2011, after a period of three months. By the time this application was filed the suit properties had already been sold to the 3rd respondent.

We are not satisfied that the alleged under-valuation by and of itself would be sufficient ground to issue the injunction sought for the simple reason that no forced sale ever fetches the market value. Although the applicant alleges there was collusion in the sale of the suit property to the 3rd respondent, there is nothing on record to substantiate the allegation, save the applicant's "suspicion". Having listened to the applicant carefully, all he seeks is more time to pursue the 2nd respondent for his payment for the school construction/enhancement project so that once he has been paid he can settle his indebtedness to the 1st respondent. In the meantime the suit properties have been sold to the 3rd respondent, on the face of it a *bona fide* purchaser for value.

We are not satisfied that there is an arguable appeal before us. However, even if we were to find that there was an arguable appeal, which we have not, the same, if successful cannot possibly be rendered nugatory. In the event of a successful appeal, an award of damages would be an adequate remedy. Indeed the applicant has not even remotely suggested that the respondents are incapable of paying whatever damages are found to be due to him.

As the applicant is obliged to satisfy both conditions under rule 592)(b), we find that he has failed to do so. Accordingly this application fails and the same is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 13th day of February 2015.

R. NAMBUYE

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

