



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MWILU & KIAGE, JJ.A)

CIVIL APPLICATION NO. 141 OF 2014 (UR 114)

BETWEEN

STEPHEN BORO GITHIA APPLICANT

AND

NICHOLAS RUTHIRU GATOTO 1ST RESPONDENT

NDARUGU MERCHANTS 2ND RESPONDENT

RURAL URBAN CREDIT FINANCE

(Under receivership) 3RD RESPONDENT

(Application for stay of execution of the judgment and decree of the High Court of Kenya at Nairobi (Ogolla, J.) dated 23rd day of January, 2014 in H.C.C.C. NO. 4275 OF 1994

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COURT

By his motion taken out on 19th June 2014 under **Rule 5 (2) (b)** of the Rules of this Court and **Sections 3A** and **3B** of the Appellate Jurisdiction Act, Cap 9, the applicant **STEPHEN BORO GITIHA** seeks from this Court the following orders:-

“1. THAT there be a stay of the implementation of the decision of the order of cancellation of the sale of L.R. No. KIGANJO/KIAMWANGI/208 and restoration of the original thereon (sic).

2. THAT any other preservatory order for the preservation of the *status quo* on the ground to issue as may be just in the circumstances.

3. THAT the cost of the application be provided for.”

The motion bears on its face a number of grounds aimed at demonstrating that the applicant has an arguable appeal which would be rendered nugatory, absent relief. It is also supported by the applicant's affidavit expressed as sworn on the said 19th June 2014.

The gist of the applicant's case from the motion and the submissions of Ms. Rashid, his learned advocate, is that he purchased the suit property on 30th June, 1994 at a public auction and proceeded to occupy and undertake "immense development(s)" thereon. The public auction was conducted by the 2nd respondent at the instance of the 3rd respondent which was exercising a power of sale of the property charged to it by the 1st respondent. That sale was challenged by way of suit filed at the High Court by the 1st respondent which culminated in a judgment on 23rd January 2014 by which Ogolla, J. nullified and cancelled the transfer of the sale of the property to the applicant and ordered the restoration of the original charge by the 1st respondent in favour of the 3rd respondent. The applicant, being aggrieved by that judgment, filed a notice of appeal and has on the motion mentioned a number of respects in which he believes the learned Judge to have erred. He avers that his appeal would be rendered nugatory should the judgment of the High Court be implemented and so beseeches the Court to grant orders that would stay execution and "*maintain the status quo on the ground*" until the appeal is heard and determined.

The 1st respondent, **NICHOLAS RUTHIRU GATOTO**, strenuously opposes the application. He filed a replying affidavit sworn on 30th September, 2014 in which he sets out in great detail his attachment to the suit property which he alleges was illegally acquired by the applicant. He avers that the applicant does have other sources of income and in fact lives on a different parcel of land with his family which belies the claim that the applicant would be rendered destitute if the prayers sought were not granted and also rules out the alleged threat of eviction from the suit property that the applicant claims to fear.

The 1st respondent's learned counsel Mr. Thuku also relied on his list of authorities to make the submission that the applicant does not in fact have any arguable appeal as the sale by auction was found to be illegal and null for non-service of the mandatory statutory notice under **Section 74** of the Registered Land Act, Cap 300 (now repealed). He specifically cited the case of

OCHIENG & ANOR Vs. OCHIENG & OTHERS [1995-98] 2 EA 260 where the Court held that once a chargee fails to prove service of a statutory notice upon a chargee, any sale of the charged property is void and incapable of conferring proprietorship or title to any purchaser such as the applicant herein.

Counsel emphasized that once no arguable appeal exists, and he maintained none exists herein, then a stay of execution is not grantable. At any rate, he further urged, the applicant has also failed to demonstrate the nugatory aspect since he does not reside on the suit property but elsewhere as found by the High Court in dismissing the applicant's application for stay of execution.

Having perused the material placed before us in this application and considered the rival submissions and the authorities cited, we have come to the conclusion that the application must fail. This Court exercises its jurisdiction under **Rule 5 (2) (b)** on settled principles. (See **GITHUNGURI Vs. JIMBA CREDIT CORP. LTD** [1988] KLR 83, **MAGNATE VENTURES LTD Vs. E.N.G. KENYA LTD** [2009] KLR 538). First, the applicant must show that he has an arguable appeal, one that is not frivolous or trifling but rather raises at least one point for genuine enquiry on appeal. Second, and it behoves an applicant to satisfy both requirements, the applicant must show that his appeal would, in the absence of a stay, be rendered nugatory by which is meant an appeal which, if successful is in effect useless, futile, of no value or merely academic and representing a shallow, pyrrhic victory.

Does the applicant have an arguable appeal? We are not convinced that he does. The failure by the 3rd respondent to show before the High Court that it did serve the statutory notice under **section 74 (1)** of the Registered Land Act (repealed) appears to us to present an insurmountable difficulty to the appeal and we agree with Gicheru, Tunoi and Shah, JJ.A, (as they then were), in

OCHIENG & ANOR. Vs. OCHIENG & OTHERS (supra) that in the absence of proof of service, a

sale by auction is void and is incapable of passing a valid title to the purchaser. The applicant, if so minded, may still attempt to otherwise persuade the bench that will hear the appeal proper but on our part, we stand unpersuaded.

Whereas our finding that there is no arguable appeal suffices to dispose of this application without the necessity of considering the nugatory aspect, (See **DAVID MATUMA & 21 OTHERS Vs. LUKENYA RANCHING & FARMING CO-OP SOCIETY LTD** [2001] e KLR) we find that on that aspect too, the application fails. The 1st respondent has by his replying affidavit very categorically averred that the applicant does not reside on the suit property but elsewhere. He went further to depose to the fact that it is he, the 1st respondent, who is in possession having moved in once the applicant's application for stay was dismissed by the High Court. He attached photographs of himself on the property. These averments the applicant did not deign to challenge or controvert by affidavit or otherwise. We take them to reflect the correct position on the ground. This goes to demonstrate the mischief that could so easily arise from pleas to "**preserve the status quo**" such as made by the applicant herein on the face of contested versions of it.

In sum this application is without merit and it is accordingly dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 6th day of February, 2015.

G.B.M. KARIUKI

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR