IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OUKO & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. 141 OF 2009 (UR 95/2009)

BETWEEN

MWANIKI *WA* NDEGWA ……..…… APPLICANT

AND

NATIONAL BANK OF KENYA LTD. ….....……1ST RESPONDENT

MARY MBUKI MUGAMBI ……..……2ND RESPONDENT

WAMWA TRADING CO. LTD. ……..……3RD RESPONDENT

MICHAEL THAIRU T/A SPUR HINTERLAND FREIGHT …… 4TH RESPONDENT

(Application for leave to punish for contempt of Court Orders granted on 25/9/2009 and to set aside the transfer of the suit property L.R. No. 3734/198 effected on 10/03/2014 by the 1st respondent to the 3rd respondent in violation, disobedience and contempt of the orders of this Hon. Court pending the hearing of C.A. 124 of 2008

in

H.C.C.C. 86 OF 2000)

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RULING OF THE COURT

The applicant has framed the instant application thus:-

> **"An application for injunction and stay in relation to the suit property L.R. No. 3734/198 under the orders granted by this Honourable Court on 25/09/2009 pending the hearing and determination of C.A. 124 of 2008 arising from HCCC 86 of 2000."**

It is premised on the provisions of **sections 3 (2)** of the Appellant Jurisdiction Act, **sections 1A, 1B and 3A** of the Civil Procedure Act and **Rules 5**

(2) (b) and **42 (1)** of the Court of Appeal Rules.

The Civil Procedure Act and by extension the rules made thereunder applies to proceedings in the High Court and the subordinate court. See **section 1** of the Civil Procedure Act. The provisions of the Civil Procedure Act and rules cited in this application are therefore inapplicable. We shall return to the other relevant provisions shortly. From what we have set out above, the application seeks an;

> **"……..injunction and stay in relation to the suit property**
>
> **……under the orders granted by this Honourable Court."**

A curious prayer. But the following background will explain it. Following a default on the part of the applicant to service financial accommodation extended to him by the 1st respondent (National Bank of Kenya, the bank), the former instituted in the High Court, HCCC No. 86 of 2000 against the bank to restrain it from exercising its statutory power of sale over the suit property. The suit was determined in favour of the bank. It would appear that after this, the suit property was sold to the 3rd respondent, Wamwa Trading Co. Ltd. A third party, Michael Thairu T/A Spur Hinterland Freight (not a party in this appeal), who attended the auction sale, also contended that he took part in the auction and was infact the highest bidder.

The applicant challenged the decision dismissing his application for injunction in Civil Appeal No. 124 of 2008. Pending the determination of that appeal the applicant moved the Court for an injunction under **Rule 5 (2) (b)** to restrain the bank and the 3rd respondent – the purchaser from advertising, transferring or disposing of the suit property. He also sought orders to stay execution of the judgment and decree of the High court and all consequential orders specifically for recovery of costs. The Court was satisfied that the twin principle requirements for the grant of orders of stay were met, namely, that the appeal was arguable and that if successful, it would be rendered nugatory if the injunction and stay sought were not granted. The application was, therefore, allowed but on condition that:-

> **"2. The applicant shall pay the sum of Kshs. 150,000/= per month with effect from 30th September, 2009 and at the end of each succeeding month into an interest bearing account to be opened jointly in a reputable bank by the counsel for the applicant, the counsel for the 1st respondent (National Bank of Kenya) and the counsel for the 3rd respondent (Wamwa Trading co. Limited).**
>
> **In default of payment of any one instalment this application shall stand dismissed."**

The applicant defaulted ten times, according to Musinga, JA in his majority decision in a subsequent application. Upon the default and in terms of the default clause (3) in the aforesaid ruling of 25th September 2009, the application for stay and injunction stood dismissed and the injunction and stay orders discharged. The property was consequently transferred to the 3rd respondent.

The applicant then brought another motion in Civil Appeal No. 141 of 2009, for leave to commence contempt of court proceedings against the respondents and their advocate, a declaration that the transfer of the suit property to the 3rd respondent was in violation of the orders of 25th September, 2009 and an order for the setting aside of the transfer. In the majority decision alluded to earlier, the court found that there was no merit in the application because of the clear default by the applicant of an express order; that after the default the application for stay stood dismissed automatically and the subsequent transfer was lawful.

With that background, we now turn to the present application.

We have said that the procedure adopted to bring this application and the relief sought are rather

strange and bear repeating here. The applicant applies that:-

> **"2. That this Honourable Court do maintain the orders of injunction and stay in relation to the suit property LR No. 3734/198 and maintain the orders given on 25/9/2000 for the applicant to continue depositing the rental income from the suit property into the joint Account No. SD-200-0077819 at Housing Finance pending the hearing and determination of C.A 124 of 2008 so as to protect the substratum of the main appeal.**
>
> **That the transfer of the suit property L.R No. 3734/198 effected and/or registered on 10/3/2014 by the 1st respondent to the 3rd respondent be maintained and no further transactions be conducted on the suit property pending the hearing and determination of C.A 124 of 2008.**

Clearly under the Court of Appeal Rules, there is not provision for what the Court is being asked to do hence the invocation by the applicant of the inherent jurisdiction of the Court. **Rule 5 (2) (b)** is inapplicable because the Court is *functus officio* having exhausted its jurisdiction in its ruling granting a stay on terms.

Jurisdiction of a court is derived from the Constitution and the statutes. Inherent jurisdiction enacted in **sections 3A** and **3B** of the Appellate Jurisdiction Act does not *per se* confer jurisdiction on the court. It simply reserves the jurisdiction which inheres in every court; a repository power. See **Ryan Investments Ltd & Another V. United States of America** [1970] EA 675. The inherent jurisdiction is only invocable for the purpose of making orders that may be necessary for the ends of justice and to enable the court to maintain its character as a court of justice. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just and equitable to do so to ensure the observance of the due process of the law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them. The discretion must be exercised within the law. See **The Matter of the Estate of George M'Mboroki,** Meru HCCC No. 357 of 2004.

This Court cannot issue an injunction or order for a stay outside **Rule 5 (2)**

(b). The prayer for the maintenance of earlier orders of injunction given on terms by this Court is untenable in view of the subsequent findings of the Court. In any case, the status of the suit property on the ground has changed so much so that there can be no order reverting to the position the parties were in when an injunction was granted on terms. It has been averred by the director of the 3rd respondent that the tenants who were in occupation of the suit property have voluntarily vacated it and the 3rd respondent taken possession with effect from 23rd January, 2015; that the 3rd respondent has a new tenant on the property.

On what basis can this court maintain the orders of injunction and stay of execution in relation to the suit property or restrain the 3rd respondent from disposing of the suit property as sought in this application? So many years ago in 2009 this Court, (Tunoi, as he then was, Aganyanya and Visram, JJ.A) gave the applicant a lifeline to reclaim the property by granting him a stay but he failed to comply with the conditions upon which the stay was given, even after observing that;

> **"It is obvious therefore from the pleadings before us that the most prejudiced parties in the protracted dispute are the bank, i.e. the 1st respondent and the purchaser i.e. the 3rd respondent. They would obviously suffer greater frustration if the applicant and his other surrogate parties will be engaged in the institution of multiplicity of endless suits and applications as has so far been exhibited."**

Last year on 18th December, 2014, this Court (Musinga, Gatembu JJA) in a majority decision found

as follows;

> **"There is therefore no basis of setting aside the transfer of the suit property to the 3rd respondent as sought by the applicant. The 3rd respondent lawfully purchased the suit property at the public auction held on 22nd May, 2009. It has paid the full purchase price and the transfer was lawfully effected.**

We find no basis, indeed, no jurisdiction, not even inherent, to grant the prayers in the application. The applicant and his counsel have *"fought a good fight, finished the race and kept the faith"* in the circumstances of this dispute. The numerous applications must now come to an end. This one was brought in clear abuse of the court process. It has no merit and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 17th day of April 2015.

R.N. NAMBUYE

…….

JUDGE OF APPEAL

W. OUKO

……

JUDGE OF APPEAL

J. MOHAMMED

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR