



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A.)

CIVIL APPLICATION NO. 45 OF 2015

BETWEEN

ELSA ATIENO OBIERO APPLICANT

AND

AFRICAN BANKING

CORPORATION (K) LTD.....1ST RESPONDENT

KENNEDY ONYANGO OBIERO2ND RESPONDENT

(An application for injunction based on the dismissal of an application for injunction by the High Court of Kenya, Environment and Land Division at Kisumu, (Kaniaru, J.)

dated 20th August, 2015

in

H.C.E.L.C.NO. 156 OF 2013)

RULING OF THE COURT

1. On 20th August 2015, the Environment and Land Court (ELC) (Kaniaru, J.) dismissed the applicant’s application which had sought an injunction to restrain the 1st respondent from disposing of the property situate in Kisumu and known as **Title No. Kisumu/Ojola/4330** (the suit land) until her suit (Kisumu HCELC No. 156 of 2013) is heard and determined. Two days later, the applicant filed a notice of appeal thus evincing her intention to appeal against that dismissal. The applicant has now come to this Court with an application under the provisions of **Rule 5(2) (b)** of the Court of Appeal Rules for similar orders of injunction which the ELC declined to grant her.

2. The applicant’s case as set out in the grounds on the face of her notice of motion, the affidavit in support as well as from the submissions of her counsel, Mr. Onsongo, is that until August 2010, she was the registered proprietor of the suit land. On or about 6th August 2010, her son, Kennedy Onyango

Obiero, the 2nd respondent, stole from her residence the title deed to the suit land and fraudulently transferred the same to himself and thereafter charged it to the 1st respondent. She discovered this fraud only when she saw a notice in the newspapers advertising the suit land for sale. She immediately filed the said suit and applied for an injunction but as stated that application was dismissed thus provoking the present application.

3. Apart from the fraud allegedly committed against her by her son, the applicant also accused the 1st respondent of fraud in the registration of the charge against the title to the suit land. She claimed that the 1st respondent did not carry out any due diligence before registering the charge; that the 1st respondent did not seek or obtain the requisite Land Control Board consent to charge the property and that had the 1st respondent inspected the suit land, it would have known of her occupation of it.

4. The applicant further claims that the suit land is her matrimonial home and that if this application is not granted the same will be sold and she will be rendered landless. The applicant's counsel, Mr. Onsongo, arguing that the fraud the applicant has alleged against both the respondents has established an arguable appeal, entreated us to grant this application.

5. The application is strongly opposed by the 1st applicant. Mr. Maganga, learned counsel for the 1st respondent, dismissed this application as a stratagem devised by the applicant and her son, the 2nd respondent, to frustrate the 1st respondent's lawful exercise of its power of sale under the charge. Basing his submissions on the averments in the replying affidavit of Agatha Kiattu, the 1st respondent's Legal Manager, Mr. Maganga argued that there is no basis for the allegations of fraud against the 1st and even the 2nd respondents. He referred us to copies of the documents annexed to the replying affidavit which together show that the 1st respondent carried out due diligence after which it regularly and lawfully registered a charge against the title to the suit land. In the circumstances, counsel urged us to dismiss this application with costs.

6. It is now a well-established practice of this Court that for one to succeed in an application such as this under **Rule 5(2) (b)** of this Court's Rules, one has to demonstrate to the satisfaction of this Court that one has an arguable appeal and that unless the application is granted one's appeal or intended appeal will be rendered nugatory.

7. As the applicant's suit is pending hearing before the ELC, we are constrained to make no definitive findings that may colour the mind of the Judge who will try it. Suffice it therefore to state that having perused the application and the affidavits in support and opposition as well as the annexures thereto, we find that the applicant has failed to satisfy us on either of the above stated twin criteria for the grant of an application such as this.

8. On the first criterion, upon the material placed before us, we are unable to discern any fraud at least against the 1st respondent. The charge appears to have been regularly and properly registered. We therefore find that the applicant has not shown that she has an arguable appeal.

9. On the second criterion, we also find that the applicant's intended appeal will not be rendered nugatory. Any property offered as collateral for a financial facility becomes a commercial item, the loss of which can adequately be compensated by an award of damages. The 1st respondent is a bank which is capable of paying any damages that may be awarded against it if the applicant ultimately succeeds in establishing her claim against it either in the intended appeal or in the main suit before the ELC. She can also seek an order to compel her son, the 2nd respondent, to give her shelter if the suit land is sold.

10. Moreover, the applicant has also not offered any security for damages in event her appeal fails. What that means is that granting this application will expose the 1st respondent to great loss due to the escalation of interest on the amount due to the 2nd respondent which may not be fully recovered at a later

sale of the suit land.

11. We have said enough to show that this application has absolutely no merit. Consequently, we hereby dismiss it with costs.

DATED and delivered at Kisumu this 17th day of November, 2015

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR