



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 23 OF 2015

BETWEEN

ERICK KIMINGICHI WAPANG'ANA1ST APPELLANT

MAGHARIBI MACHINERIES LIMITED2ND APPELLANT

AND

EQUITY BANK LIMITED1ST RESPONDENT

ANTIQUA AUCTIONEERS AGENCIES2ND RESPONDENT

(An Appeal from a Ruling of the High Court of Kenya at Bungoma, (Mukunya, J.) dated 16th December, 2014

in

H.C.C.C. NO. 91 OF 2011)

JUDGMENT OF THE COURT

1. The dispute giving rise to this appeal relates to an overdraft facility of Kes.7.8 million that the 1st respondent extended to the appellants in December, 2009. The facility was in the form of a letter of credit that the 1st respondent opened to enable the appellants to purchase 100 units of TVS motor bikes from Car & General (Trading) Ltd (Car & General). The facility was secured by a legal charge over the appellants' pieces of land known as **Title No. Ebukusu/South Kanduyi/13584**, and **Title Nos. Ebukusu/South Kanduyi/816 and 2741** as well as a chattels mortgage over the appellants' moveable assets.
2. The appellants claim that Car & General delivered to them only 62 units. They further claim that despite advising the 1st respondent of that delivery and instructing it to disburse only Kes.4 million being the value of those 62 units, the 1st respondent went ahead and disbursed the entire sum of Kes.7.8 million and debited the amount to the appellant's account. To make matters worse, on the instructions of the 1st respondent, on 30th April, 2011, the second respondent seized and sold the appellants' vehicles. When the 2nd respondent sought to auction the appellants' said

pieces of land on 19th September 2011, the appellants filed Bungoma HCCC No. 91 of 2011 and sought an injunction to restrain that sale as well as an order for accounts.

3. Contemporaneous with the filing of the suit, the appellants also filed an application and sought the same orders as those sought on the plaint, albeit on a temporary basis. On 12th October 2011, Muchelule, J. heard that application ex-parte and granted the orders sought. By their notice of motion dated July 2014, and brought under **Order 40 Rules 6 and 7** of the Civil Procedure Rules and **Sections 1A, 1B, 3A and 63(e)** of the Civil Procedure Act, the respondents sought a declaration that the said injunction order issued on 12th October 2011 had lapsed. This appeal is against Mukunya, J's ruling dated 16th December 2014 granting that application.
4. In both their grounds of appeal and submissions by their learned counsel Mr. Lunani, the appellants faulted the learned Judge for declaring that the said order of injunction had lapsed. Since the order read that "*pending the hearing and determination of the suit, the defendant, (sic) their servants, agents, (sic) be restrained by way of injunction from offering for sale or doing any act to sale (sic) the plaintiff's immovable assets namely E. BUKUSU/S. KANDUYI/13584, E. BUKUSU/S. NALONDO/618 and E. BUKUSU/S. NALONDO/2741,*" they argued that no extension was required under Order 40 Rules 6 and 7 of the Civil Procedure Rules. They therefore, urged us to allow this appeal.
5. In response, Mr. Makokha, learned counsel for the respondents, submitted that this application is incompetent for failure to obtain leave to appeal. On its merits, counsel dismissed this appeal as unmeritorious. He argued that the appellants, having not sought or obtained an extension of the life of the order of injunction, by dint of **Order 40 Rule 6**, the same lapsed after a period of 12 months. In the circumstances, counsel concluded, the Judge's order of 16th December 2014 was inevitable.
6. Having considered these rival submissions, we agree with counsel for the respondents that this appeal has absolutely no merit and is for dismissal on two grounds. One, **Order 43** of the Civil Procedure Rules lists other provisions of the Civil Procedure Rules in respect of which appeals can be preferred from orders made thereunder. Order 40 Rules 6 and 7, which we are concerned with in this appeal is not included in Order 43. In the absence of leave having been obtained, it follows that this appeal is incompetent.
7. Even if the appeal was competent, we agree with counsel for the appellants that the same is unmeritorious. Temporary injunctions are issued under Order 40 Rules 1 to 5. Rule 6 of that Order provides that:

"Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."
8. Rule 6 of Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months "*unless,*" as the Rule further provides, "*for any sufficient reason the court orders otherwise.*"
9. In this case there was no subsequent order extending the injunction. Having been issued on 11th October 2011, the injunction order therefore lapsed on 12th October 2012. We agree with counsel for the appellants that Mukunya, J's order of 16th December 2014 declaring that the injunction of 11th October 2011 had lapsed was inevitable.
10. For these reasons, we find no merit in this appeal and we accordingly 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

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR