



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CIVIL APPLICATION NO. 41 OF 2013

BETWEEN

MICHAEL KIMUTAI RONO 1st APPELLANT

ANNE JEROTICH RONO 2nd APPELLANT

ROSE CHEPCHIRCHIR RONO..... 3rd APPELLANT

AND

CONSOLIDATED BANK OF KENYA LTDRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisii (Sila Munyao, J) dated 24th September, 2013

in

ELDORET ELC No. 265 OF 2013

RULING OF THE COURT

By the Notice of Motion dated 30th October, 2013 brought under Rule 5 of this courts Rules and all other enabling provisions of the law, the Applicants Michael Kimutai Ronoh, Anne Jerotich Ronoh and Rose Chepchirchir Ronoh pray for orders:

“1. —

2. THAT an injunction do issue against the respondent restraining it whether by itself, its servants and / or agents from selling, transferring the land parcels known as:-

(a) ELDORET MUNICIPALITY / BLOCK 14/693 measuring 0.494 of an acre;

(b) KARUNA /SOSIAN BLOCK 8 (USWO) /476 measuring 21.86 acres and;

(c) KITALE MUNCIPALITY / BLOCK 15 (KOITOGOS) / 322 measuring 0.3641 Hectares pending the hearing and determination of this motion.

3. **THAT an injunction be issued against the respondent restraining it whether by itself, its servants and/or agents from selling, transferring the land parcels pending the hearing and determination of the intended appeal.....”**

The grounds upon which the Motion is based are that the intended appeal is arguable; that the intended appeal shall be rendered nugatory and that the application has been made without delay. There is an affidavit in support of the Motion sworn on 30th October, 2013 by Michael Kimutai Rotich on his own behalf and on behalf of the other applicants where it is deponed inter alia that the applicant filed an originating summons at the Environment and Land Court, Eldoret, being ELC No. 265 of 2013 where it was sought that the sale of the parcels of land cited in the Motion be postponed; that the originating summons was dismissed after hearing; that being aggrieved by that decision the applicants preferred an appeal to this court through Notice of Appeal lodged on 30th September, 2013; that the appeal raises substantial arguable issues which the applicant identifies as the following at paragraph 8 of the said affidavit:

“8. THAT the appeal raises substantial arguable issues such as:-

(a) Whether the court accorded a sound interpretation to sections 103 and 104 of the Land Act, 2012 in concluding that the said sections were in applicable to the applicants scenario?

(b) Whether the court gave a correct interpretation of section 103 of the Land Act, 2012 by concluding that the relief to be granted to a chargor was in respect of the exercise of the right of redemption?.

(c) Whether, had the court applied the mischief rule of construction of statutes it would have concluded that reference to section 85 (3) (a) and (b) in section 103 (1) of the Land Act, 2012 was an error and the correct reference ought to have been to section 90 of the said Act which provides for the chargees remedies?

(d) Whether the court erred in law and fact in considering the originating summons as a matter of stay of sale while no warrants of attachment and sale existed and deviated from considering a postponement of the chargee's statutory power of sale as provided for in section 104 (2) of the Land Act, 2012?

(e) Whether the court erred in failing to consider that sections 103 and 104 of the Land Act, 2012 were to be read together as section 103, granting the chargor a right of relief; while section 104 (2) of the Land Act, 2012 was to guide the court on the relief to be granted to an applicant exercising the right under section 103 of the Land Act, 2012?

(f) Whether the court properly exercised its jurisdiction in determining the summons by the applicants under sections 105 and 106 of the Land Act, 2012 instead of section 103 and 104 of the Land Act, 2012 and order 37 Rule 4 of the Civil Procedure Rules, 2010?

(g) Whether the court erred in failing to postpone the sale while the respondent had by admission in paragraph 12 of the replying affidavit conceded that it had no objection to the applicants marketing, advertising and selling the property known as KITALE MUNICIPALITY / BLOCK 15 (KOITOGOS) / 322?

(h) Whether the court erred in failing to find that the 1st applicant and the 2nd applicant were a husband and wife based on the certificate of marriage annexed to the affidavit in support of the originating summons and the respondent having advertised the land parcel known as ELDORETMUNICIPALITY / BLOCK 14 / 693 and quoted the 2nd applicant as the registered proprietor it meant automatically that the 1st applicant had an interest as a husband of the 2nd applicant therein in the 2nd applicant's share hence it was matrimonial property based on the share of the 2nd Applicant therein?

(i) Whether the court properly exercised its jurisdiction in declining to grant the postponement sought by the applicants when the statutory notice dated 21st November, 2012 annexed to the respondent's replying affidavit had in its 5th paragraph advised the applicants that they had the right to apply to the court for an injunction or temporary relief against the bank's exercise of the power of sale or any other remedy that it may opt to exercise to rectify the default or breach of covenant?

(j) Whether the court properly exercised its jurisdiction in failing to find that under section 103 (4) of the Land Act, 2012, the issue of service of notices, the expiry of the period of the notices, the breach by a chargor of a covenant were immaterial in seeking to postpone a sale?

(k) Whether the court properly exercised its jurisdiction declining to grant the relief sought on the basis that the land parcels KARUNA/SOSIAN BLOCK 8 (USWO) / 476 and KITALE MUNICIPLAITY / BLOCK 15 (KOITOGOS) 322 were not matrimonial property.?

(l) Whether the court erred in failing to determine the 2 questions posed in the originating summons?"

It is also deponed in the said affidavit that the intended appeal shall be rendered nugatory because the subject matter of the appeal would disappear if the sale took place; that the applicants would suffer loss of shelter and of their property and that the application has been presented without delay.

We will presume for purposes of the application before us that it is presented under Rule 5 (2) (b) of this Courts Rules.

The principles upon which an application for injunction or for stay of execution under the said Rule is to be entertained are now well settled as can be seen from the many decisions of this Court such as **Reliance Bank Limited v Norlake Investments Limited [2002] 1EA227; Sivestein v Chesoni [2002] 1EA 296** and **Bob Morgan Systems Limited & Anor. V Jones [2004] 1KLR 194**. For such an application to succeed an applicant has to satisfy the Court that the appeal is arguable which is the same as saying that it is not frivolous, and that if the order were not granted the success of the appeal, were it eventually to succeed, would be rendered nugatory.

The genesis of the matter was the originating summons which we have already referred to. In that summons the applicants, as plaintiffs, who identified themselves as chargors and guarantors to the respondent Consolidated Bank of Kenya Limited in respect of a loan facility advanced by the respondent to a company called Uday Patel & Company Limited, confirmed having offered their properties **Eldoret Municipality / Block 14 / 693; Karuna / Sosian Block 8 (USWO) / 476 and Kitale Municipality / Block 15 (KOITOGOS) / 32** as security for the said loan. The applicants posed the following questions in the summons on which they wanted a determination by the court:

“1. WHETHER the plaintiffs are entitled to a postponement of the sale of the aforesaid land parcels in order to pursue the right of redemption?

2. IF the plaintiffs are entitled to a postponement of sale to realise the right of redemption may they be granted a 6 months (sic) to pay the principal debtors indebtedness or such period as the Honourable Court may deem fit to grant?"

In the affidavit in support of the summons, it was deponed inter alia that the principal debtor Uday Patel and Company Limited had a duty to pay the loan; that the applicants had been served with a statutory notice because there was by then an uncleared balance of Kshs. 16,048,720/25 on the said loan; one of the properties offered as security for the loan was a matrimonial property; that the notice given to the applicants was short and the intended sale should be postponed to enable the applicants to find a buyer for another property in Machakos County. It was further deponed that Eldoret Municipality / Block 14 /693 comprised the matrimonial home and the applicants would be rendered destitute if the property was sold; that the applicants grew food for their sustenance at Karuna / Sosian Block 8 (USWO) /476 and that

the applicants got money for their daily expenses from Kitale Municipality / Block 15 (KOITOGOS) / 322.

The respondent filed a Replying Affidavit to the summons, in essence restating its statutory powers of sale and other rights under the charge.

Justice Sila Munyao heard the application and dismissed it.

The Motion came up for hearing before us on 21st November, 2013 and was urged by the learned counsel for the applicants Mr. J. I. Nyarotso who submitted that the learned judge erred in failing to hold for the applicants when their rights were protected by Sections 103 and 104 of the Land Act (No. 6 of 2012) as two of the parcels of land were owned by a husband and wife. Counsel also cited Section 106 of the said Act in support of his submission that consent of both parties was necessary if a jointly owned property was to be sold and urged us to grant the prayers sought because the appeal would be rendered nugatory if the applicants properties were sold.

Mr. Odhiambo Ouma, the learned counsel for the respondent submitted that the applicants had not disclosed any arguable issues on appeal. He cited Humphrey Kilambo Mcharo v Kenya Commercial Bank Limited & Anor 2005 eKLR for the proposition that damages would be an adequate remedy for the applicants. Counsel submitted further that the applicants could not benefit from an exercise of discretion when payment of the outstanding loan had not been made.

We have perused the judgement appealed from. The questions posed by the applicants in the affidavit in support of the Motion, which questions we have set out in this Ruling, will best be answered when there is a full address during the hearing of the appeal.

The learned judge addressed his mind to the issues raised before him. On the rights of a chargor under Order 37 Rule 4 of the Civil Procedure Rules, 2010, the learned judge recognized that a proposed sale through a statutory power would be interfered with by the court where it is shown that a chargee is guilty of breach of covenant.

Whether in the originating summons or in the Motion before us it is not alleged that the respondent has in any way breached any of the rights or obligations governing the charge.

The learned judge was of the view that the right of redemption had not been breached in any way at all by the respondent. The judge says:

“13. In our case, the plaintiffs are not seeking to pay the money ahead of time and neither are they seeking to redeem their properties before the expiry of the term of the charge. What they want, is a stay of the intended exercise of the chargee's power of sale, and an extension of time to enable them source for funds elsewhere, so as to pay the moneys owing to the Bank. This is not the kind of relief contemplated by Section 85 (3) (a) and (b) and in my view the provisions of Section 103 and 104 of the Land Act, 2012 are inapplicable to the circumstances of this case.”

The learned Judge also saw no evidence produced to show that any of the properties constituted a matrimonial home. It is not within our jurisdiction to consider the Judge's sentiments above as that will be at the time of full hearing of the intended appeal. We therefore make no conclusive decisions on them but having considered relevant issues and the submissions before us we are of the respectful opinion that the applicants have not satisfied either of the two limbs that would entitle them to an exercise of our discretion in their favour and the upshot is that the application has no merit and we dismiss it with costs.

Dated and Delivered at Kisumu this 24th day of January, 2014

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR