



IN THE COURT OF APPEAL AT NAIROBI

CORAM: P. KIHARA KARIUKI, PCA, KIAGE & M'INOTI, JJ.A.

CIVIL APPLICATION NO. NAI 162 OF 2013 (UR 111/2013)

BETWEEN

TITUS GICHARU MWANGI.....APPLICANT

AND

MARY NYAMBURA MURIMA.....1ST RESPONDENT

SAMUEL MBURU KIBIRO 2ND RESPONDENT

(Application for an injunction pending the pending the hearing and determination of an appeal from the order of the High Court of Kenya at Nairobi (Mutungi, J) dated 11th June, 2013

in

HC ELC NO. 967 OF 2012)

RULING OF THE COURT

By a Motion on notice dated 9th July 2013, and expressed to be taken out under *section 3A and 3B of the Appellate Jurisdiction Act and rule 5 (2) (b) of the rules of this Court*, the applicant, **TITUS GICHARU MWANGI**, prayed for an injunction to restrain the respondents, **MARY NYAMBURA MURIMA** and **SAMUEL MBURU KIBIRO**, their agents, servants or employees from interfering or otherwise dealing with **PLOT NO C. 142 EMBAKASI/NJIRU UNITED ROAD ESTATE, BLOCK III KOMAROCK, NAIROBI**, (the suit property) until the hearing and determination of an intended appeal. The intended interlocutory appeal arose from a ruling and order of the High Court (Mutungi, J) dated 11th June, 2013 by which the learned judge dismissed with costs the applicant's application for a temporary injunction to restrain the 1st respondent from interfering with the suit property pending the hearing and determination of *Environmental and Land Court Case No. 967 of 2012*.

The application before us was supported by an affidavit sworn by the applicant on 9th July, 2013, in which he deposed that he had entered into an agreement with the 1st respondent to purchase from her the suit property for KShs.4.5 million; that in furtherance of the transaction he had paid to the 1st respondent KShs.2 million; that the 1st respondent subsequently reneged on the agreement and purported to sell the suit property to the 2nd respondent; that the applicant was ready and willing to deposit the balance of the purchase price of KShs.2.5 million in court; that he had already filed in this Court Civil Appeal No. 221 of 2013; that the High Court had erred in finding that the suit property had already been sold and transferred to the 2nd respondent; that if the injunction was not granted, the suit property risked being disposed of, rendering his appeal nugatory.

The respondents resisted the application through their respective replying affidavits sworn on 10th and 11th September, 2013. They also filed two further affidavits sworn on 24th February, 2014, which were admitted *ex post facto* by consent and with the leave of the Court. The respondents' answer to the application was that applicant had defaulted in the payment of the balance of the purchase price, that he had continued to default in payment even after extension; that he had failed to complete the transaction despite notice to complete; that the 1st respondent had subsequently sold and transferred the suit property to the 2nd respondent; that the applicant had been advised to collect his deposit of KShs.2 million from the 1st respondent's advocates; and that despite an order by the High Court issued on 15th March, 2013, directing the applicant to deposit the rent collected from the suit property into a joint account in the names of his advocates and those of the 1st respondent, he had deliberately failed to do so and was to that extent undeserving of a favourable exercise of discretion by this Court, or indeed the equitable remedy of an injunction.

Before us Mr Owaga and Mr Jaoko, learned counsel for the applicant and the respondents respectively, rehashed the above arguments. Though both counsel addressed the question whether the intended appeal was arguable, with respect, we did not, even after prompting counsel, hear any arguments on whether, if successful, the applicant's intended appeal would be rendered nugatory. This was not very surprising, as the Court noted and decried, that neither counsel cited any judicial authority to bolster the points they were pressing before us.

Be that as it may, the record shows that in the application before Mutungi, J. the applicant applied for an injunction against the 1st respondent only. In replying the affidavit sworn on 19th December, 2012, the 1st respondent deponed that she had sold and transferred the suit property to the 2nd respondent before the applicant had filed his application for injunction. The evidence of the sale of the suit property to the 2nd respondent was an agreement for sale dated 5th December, 2012, as well as a "**Plot Formalization Card**" issued by the City Council of Nairobi in which the 2nd respondent was entered as the allottee of the suit property. By an order dated 20th February, 2013, the 2nd respondent was enjoined as a party to the suit. However, the applicant did not amend his application to seek the injunction against the 2nd respondent. In the event, the learned judge dismissed the application for injunction on the basis that the 1st respondent, having sold and transferred the suit property to the 2nd respondent, could not be prohibited by an order of injunction from transferring the suit property, which she had already done.

In determining this application we bear in mind that the purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful from being rendered nugatory. (**CHARTERHOUSE BANK LTD V CENTRAL BANK OF KENYA & ANOTHER, Civil Application No. 200 of 2006 (unreported)**). In that regard, the principles that guide this Court in applications under *Rule 5(2) (b)* are too well settled to elicit dispute. The applicant is required to satisfy the Court first, that he has an arguable appeal or an appeal that is not frivolous and secondly, that if the order of injunction sought is not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. See **REPUBLIC VS KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS, [2009] KLR 31, NATION NEWSPAPERS LTD V PETER BARAZA RABANDO, Civil Appeal No 1 of 2007 (unreported), and RELIANCE BANK LTD (IN LIQUIDATION) V NORLAKE INVESTMENTS LTD (2002) 1 EA 227**. The applicant is obliged to satisfy both of those principles for it is not enough to satisfy only one of them. See **PETER MBURU NDURURI V JAMES MACHARIA NJORE, CA NO. 29 OF 2009 (UR 14/2009)**.

Further, the applicant is not obliged to establish a multiplicity of arguable grounds; even a single arguable issue will suffice. (**TRANSOUTH CONVEYORS LTD VS KENYA REVENUE AUTHORITY & ANOTHER, Civil Application No. 37 of 2007 (unreported)**). Lastly, the applicant is not required to show in an application under *Rule 5(2) (b)* that the appeal would definitely succeed or that the appeal has very high chances of succeeding. It is sufficient, if he can show that he has serious questions of law for submission to the Court hearing the appeal or that reasonable argument can be put forward in support of the appeal. (See **RETREAT VILLAS LTD V EQUATORIAL BANK LTD & OTHERS, Civil Application No. 40 of 2006 (unreported)**).

On the first limb relating to an arguable appeal, the applicant put forth two issues. The first was that the learned judge of the High Court had erred by finding that the suit property had been sold and transferred to the 2nd respondent, while there was no evidence of any consideration having been paid by the said respondent. Secondly, the applicant contended that the letter from the 1st respondent's advocates dated 16th November 2012, notifying him that the 1st respondent would refund his KShs.2 million and sell the suit property to another buyer, did not constitute a valid notice to complete. In the absence of a valid notice to complete, the 1st respondent could not terminate the agreement for sale between her and the applicant and enter into another with the 2nd respondent.

We are prepared to hold that the issue raised by the applicant whether the letter of 16th November, 2012, constituted a valid notice to complete within the meaning of the *Law Society Conditions of Sale*, is an arguable issue. The issues whether the 1st respondent had sold and transferred the suit property to the 2nd respondent and whether the applicant could have been entitled to an injunction when he had not sought any against the 2nd respondent, are issues for determination by the Court when it hears the interlocutory appeal. In **ROYAL MEDIA SERVICES LTD VS TELKOM KENYA LTD & OTHERS, Civil Application No. Nai. 66 of 2000** this Court noted that at the hearing of an application for injunction pending the hearing of the appeal, the Court of Appeal is not called upon and cannot be called upon to fully resolve the issues in dispute between the parties to the suit as it will be for the trial court to do so.

On the issue of whether the appeal, if successful will be rendered nugatory, absent the injunction sought, we have already noted that none of the parties bothered to address us on the issue. The burden of satisfying us on this aspect relies on the applicant. The dispute in this appeal involves a parcel of land whose purchase price is KShs.4.5 million. Nothing has been placed before us to suggest that the respondents cannot re-pay that amount in the event the applicant's appeal succeeds and the suit property has in the meantime been disposed of. The applicant has not satisfied us that his appeal, if successful, shall be rendered nugatory.

On the facts before us, we would still not have been inclined to exercise our discretion in favour of the applicant by granting him an injunction, purely because of his conduct and evident lack of candor. In paragraph 4 of his affidavit sworn on 9th July, 2013, in support of the motion before us, the applicant deposed as follows:

“4. At a later stage, after the 2nd respondent being granted leave to be enjoined in the suit vide an application he filed, the Superior Court granted an order by consent on the 15th March, 2013, that the rent from the property subject matter of this suit be deposited in a joint interest earning account in the names of the advocates of the parties herein. The said rent has been deposited since then.” (Emphasis added).

The respondents' further affidavits tell a totally different story. The monthly rent collected from the suit property is said to total to KShs.60,000. The bank statements in respect of the joint account show that the applicant, contrary to his above statement under oath, has not complied with the court order. In March 2013, he deposited a paltry KShs.750/-. In April 2013, KShs.18,700/- was deposited; and in May 2013, KShs.19,200/-. There was no deposit in June 2013. The last deposit of KShs.20,000/- was made in July 2013. Since then the statements reflect no further deposits.

A party that seeks the exercise of the discretion of this Court in his favour must be honest and truthful. The applicant has not only failed to comply with the court order; he has gone ahead to mislead this Court by deposing that he has deposited the rent as ordered by the court, well knowing that he has not. We strongly deprecate his conduct. The applicant, in addition, is seeking the equitable remedy of an injunction. His conduct in all matters relating to the suit must meet the approval of a court of equity before he can obtain an equitable relief. As this

Court stated in **DAVID KAMAU GAKURU VS NATIONAL INDUSTRIAL CREDIT BANK LTD, Civil Appeal No 84 of 2001**, an injunction, being an equitable remedy cannot be granted to party who has demonstrated openly by his conduct that he is undeserving of the equitable relief.

We find no merit in the applicant's motion dated 9th July, 2013, and the same is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 4th day of April, 2014.

P. KIHARA KARIUKI, PCA

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

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