IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 27 OF 2014

BETWEEN

JARED SAGINI KEENGWE …..…….....…...…… APPLICANT

VERSUS

WALTER ONCHWARI ……..…….…….. 1ST RESPONDENT

EVALYNE ONCHWARI ……..…...……..…….. 2ND RESPONDENT

NATIONAL SOCIAL SECURITY FUND ….....…… 3RD RESPONDENT

(*Being an application for injunction pending appeal from the decision of the High Court of Kenya at Nairobi (Gitumbi, J.) dated 14th February, 2014*

in

Environment & Land Court No. 80 of 2013)

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RULING OF THE COURT

By an application dated 20th January, 2013 filed at the High Court of Kenya at Nairobi, Environment & Land Division, the applicant sought orders to restrain the 1st and 2nd respondents from disposing of the property known as **Land Reference no. 189/5** situate at Nyayo Estate, Embakasi, hereinafter referred to as **"the suit property".** The applicant also sought to restrain the 3rd respondent from releasing the title documents of the suit property to the 1st and 2nd respondents the pending hearing and determination of the suit that he had filed seeking orders for specific performance.

In the affidavit sworn in support of the application, the applicant deponed that on 30th November, 2010 he entered into a sale agreement with the 1st respondent vide which he purchased from him the suit property at a price of Kshs.4 million which the applicant paid in full. The execution of the agreement was in the presence of the 2nd respondent (the 1st respondent's wife) as well as one Grace Onchwari, the 1st respondent's sister. That notwithstanding, the 1st and 2nd respondents failed to hand over the possession of the suit property to him.

In response, the 1st respondent stated that the applicant was his brother in law and that sometimes in the year 2010 he had borrowed some money from the applicant to finalize a project he was undertaking. Because the applicant wanted assurance that the money would be repaid, they executed a sale agreement which indicated that the suit property, though valued at Kshs.9 million, had been sold to him at Kshs.4 million. He further stated that he was ready and willing to repay by reasonable instalments the amount loaned to him by the applicant.

The trial court dismissed the application for injunction. In the ruling dated 14th February, 2014 the learned judge stated, *inter alia*:

"In determining whether the plaintiff/applicant has established a prima facie case, I must consider whether he has shown that he has right to specific performance of the agreement for sale dated 30th November, 2010 between him and the 1st defendant which attests to his having paid Kshs.4 million to the 1st defendant being the purchase price of the suit property. Hence the issue to determine on a prima facie basis is whether the full performance of a party to a sale agreement for land entitles such party to specific performance of the agreement. Being an equitable remedy, specific performance would ordinarily be enunciated in case law. My study of the relevant case law has not unearthed any specific precedent which sets out this entitlement. Accordingly, I am forced to find that no such entitlement exists."

The learned Judge further held that the applicant could not rely on the sale agreement as he had not complied with the provisions of **Section 19(1) (b)** of the **Stamp Duty Act** since the sale agreement had not been duly stamped.

Aggrieved by that ruling, the applicant filed an appeal before this Court. He also filed an application under **rule 5 (2) (b)** of the **Court of Appeal Rules** seeking similar orders as he had sought in the High Court. The applicant's affidavit in support of the motion was more or less a rehash of his depositions made in the High Court application. Although the respondents were duly served with the application and hearing notice, none of them attended court when this application came up for hearing.

Mr. Nyamweya, learned counsel for the applicant, submitted that his client's appeal is arguable. He faulted the learned trial Judge for holding that the applicant, inspite of having paid the full purchase price in respect of the suit property, was not entitled to an order for specific performance and had therefore not made out a *prima facie* case to warrant grant of interim orders of injunction. Counsel further submitted that unless the Court grants orders to restrain the 1st and 2nd respondents from disposing of the suit property, they are likely to do so before the appeal is heard and determined, in which event the appeal will be rendered nugatory.

Lastly, Mr. Nyamweya submitted that although the sale agreement had not been stamped as required in law, there is a provision for its late stamping, which event would make the sale agreement admissible in evidence.

It is now settled law that in an application under **rule 5 (2) (b)** of the **Court of Appeal Rules,** the Court will only grant an interlocutory injunction if it is satisfied that the applicant has demonstrated that his intended appeal or appeal is arguable and that unless stay or injunction is granted the appeal or intended appeal, if successful, will be rendered nugatory. See **BOB MORGAN SYSTEMS LTD & ANOTHER v JONES [2004] 1 KLR 194.** We are therefore enjoined to consider whether the application before us meets these two conditions.

We have already stated that the applicant's main prayer in the suit before the High Court was for specific performance of the sale agreement dated 30th November, 2010 between him and the 1st respondent. There is evidence that the full purchase price has already been paid to the 1st respondent. From the material on the record of appeal, it appears that the suit property had been purchased by the 1st respondent from the 3rd respondent but the latter had not effected its transfer to the 1st respondent prior to 30th November, 2010. We think it is an arguable point whether the applicant has established a *prima facie*

case and thus merit him grant of interlocutory injunction.

Turning to the issue of failure to stamp the sale agreement and the ramifications thereof, **Section 19(1)** of the **Stamp Duty Act** states as follows:

"19. (1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—

a. ***in criminal proceedings; and***

(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.

(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped."

The applicant's counsel believes that his client can seek refuge in **Section 20** of the **Stamp Duty Act** that contains provisions of stamping out of time any document that is chargeable with stamp duty. We are satisfied that is another arguable point.

As to whether the appeal herein is likely to be rendered nugatory unless the orders of injunction as sought are granted, nothing stops the 1st respondent from selling and transferring the suit property to any third party, if he so wishes. If that were to happen the appeal will be rendered nugatory. The Court was told that the documents of title in respect of the suit property are held by the 3rd respondent. In the circumstances, we think that the orders of injunction sought against the respondents are warranted.

In conclusion, we grant orders of injunction as sought in prayers 4 and 5 of the applicant's application. The costs of the application shall abide the outcome of the intended appeal.

Dated and Delivered at Nairobi this 13th day of June, 2014.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

……..

JUDGE OF APPEAL

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

REGISTRAR

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