



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, M'INOTI & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. NAI 325 OF 2013 (UR 239/2013)

BETWEEN

PASTUER DUKUZUMUREMYI.....APPLICANT

AND

ANTHONY MILIMU LUBULELLAH

T/A LUBULELLAH & ASSOCIATES ADVOCATES.....1ST RESPONDENT

KIWAKA GENERAL MERCHANTS.....2ND RESPONDENT

(Application for an injunction and stay of further proceedings pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi, (Waweru, J.) dated 18th October, 2013

in

HC MISC APP NO 949 OF 2007)

RULING OF THE COURT

The Motion on Notice before us, dated 2nd December, 2013, is taken out principally under Rule 5(2) (b) of the Rules of this Court and prays, on the main, for an order of injunction to restrain the respondents from selling, assigning, transferring, charging, demolishing (sic) or otherwise interfering with **LR No 1/1151 (Original Number 1/58/2/7)** (“the suit property”) pending the hearing and determination of an intended appeal. The application also craves stay of further proceedings in **High Court Miscellaneous Civil Application No. 949 of 2007**, from which the intended appeal to this Court arises.

The background to the application is an advocate-client relationship gone sour, resulting in the advocate attaching and selling the client’s property to recover his fees. Sometimes in 2005, the 1st respondent,

Anthony Lubulellah t/a Lubulellah & Associates Advocates, acted for the applicant, **Pasteur Dukuzumuremyi**, in **Nairobi High Court Civil Suit No. 230 of 2005**. After the applicant failed to pay his legal fees, the 1st respondent filed **High Court Miscellaneous Civil Application No. 949 of 2007**, in which he applied for taxation of his bill of costs. The costs were taxed at Kshs 225,596/- on 27th June, 2008, and a certificate to that effect was issued.

Subsequently the 1st respondent obtained a decree against the applicant and executed the same by attachment and sale of the suit property, which at the material time belonged to the applicant. The suit property was sold by public auction to the 2nd respondent, **Kiwaka General Merchants**, on 29th September, 2010. The sale was subsequently confirmed and declared absolute by the High Court on 24th November, 2010. On 14th November, 2011 the High Court, in **High Court Civil Suit No 486 of 2011**, ordered delivery of vacant possession of the suit property to the 2nd respondent. Thereafter the 2nd respondent took possession of the suit property and at the time of the hearing of this application, was in occupation of the same.

On 14th December, 2011, the applicant moved the High Court for various orders and reliefs, the one that primarily concerns us in this application, being an order to set aside the sale of the suit property to the 2nd respondent. That is the application that was heard and dismissed by **Waweru, J.** on 18th September, 2013, thus precipitating the present application before us.

The grounds upon which the injunction and stay of proceedings are sought, as set out in the application, the supporting affidavit sworn on 2nd December, 2013 by **Claude Hitimana Jean** and the oral submissions of **Ms Muraguri**, learned counsel for the applicant, are that the sale of the suit property by public auction to the 2nd respondent was irregular and fraudulent; that the taxation of the Bill of Costs had proceeded *ex parte*; that at the time of the sale, the amount of Kshs 225, 596/- had already been deposited in court; that the sale had been stayed by an order of the court; that there had been no fresh notification of sale of the suit property in violation of **Order 22 Rule 57** of the **Civil Procedure Rules** and **Rule 18** of the **Auctioneers Rules, 1997**; that the suit property was sold without valuation or reserve price in violation of **Rule 11(1)** of the **Auctioneers Rules, 1997**; and that **Africa Telecom Solutions Ltd**, the interested party in these proceedings, is presently the registered proprietor of the suit property, having purchased the same from the applicant on 3rd June, 2011 and a conveyance duly registered on 14th September, 2011.

Ms Muraguri submitted that all the foregoing issues are arguable rather than frivolous and that the applicant should get an opportunity to have the same adjudicated by this Court. It was learned counsel's further submission that unless the injunction and the stay of proceedings were granted, the applicant's intended appeal, if successful, would be rendered nugatory as the building on the suit property was likely to be demolished or the suit property transferred to other parties, thus placing the same beyond the reach of the applicant.

Ms Ngeresa, learned counsel for the 1st respondent opposed the application on the basis of a replying affidavit and a further affidavit sworn respectively on 14th January, 2004 and 4th February, 2004 by **Wilfred Akhoya Mutubwa**. Learned counsel submitted that the intended appeal was incompetent as the purported notice of appeal was not filed and served within the time stipulated respectively by rules 75 and 77 of the rules of this Court; that the intended appeal was therefore not arguable; that the applicant had not challenged the certificate of costs; and that the question of a service of fresh notice had not been raised before the High Court.

It was learned counsel's further submission that at the time of the public auction, the applicant had not fully paid the taxed costs; that the prayers sought were not capable of being granted against the 1st respondent who was not in possession and no longer had any interest in the suit property; that the purported sale of the suit property by the applicant to the interested party on 3rd June, 2011 when the suit property had already been sold to the 2nd respondent by public auction on 29th September, 2010 pursuant to an order of the court was fraudulent, null and void; and finally that the High Court had found that there

was no fraud or material irregularity in the publication and conduct of the sale by public auction, and that the applicant had not sustained substantial injury.

Learned counsel concluded her submissions by urging us to find that the intended appeal was not arguable and even if it was, the same would not be rendered nugatory if successful.

Mr Kago, learned counsel for the 2nd respondent, relying on an affidavit sworn by **Stephen Kimani Kamau** on 18th February, 2014, joined **Ms Ngeresa** in opposing the application. Counsel outlined the history leading to the sale of the suit property to the 2nd respondent, which we have already set out above and submitted that the 2nd respondent was the lawful and *bona fide* proprietor of the suit property, having purchased the same as the highest bidder for Kshs 10 million in a public auction sanctioned by the High Court. That public auction, counsel contended, was preceded by a valuation of the suit property by Messrs **Shelter (M) Valuers Ltd** which had placed the open market value at Kshs 12 Million and forced sale value at Kshs 9.6 million. **Mr Kago** added that the High Court had found that when the sale by public auction took place on 29th September, 2010, the order of stay of execution had already been vacated by the court on 17th September, 2010 and therefore the sale was not in violation of a court order. Learned counsel further submitted that the 2nd respondent had taken possession of the suit property pursuant to an eviction order issued by the High Court in its favour; that the 2nd respondent was presently in occupation of the suit property; and that the eviction order had never been appealed against or otherwise challenged.

It was **Mr Kago's** further arguments that the purported sale of the suit property by the applicant to the interested party was dubious and without legal basis, because at the material time, there was an order of prohibition against the title; that the 2nd respondent had no intention of disposing the suit premises; that instead the 2nd respondent was renovating the same to make it decent and enhance its value; and that having claimed to have sold and transferred the suit property to the interested party, the applicant could not sustain the present application.

Mr Odongo for the interested party supported the application on the basis of an affidavit sworn on 15th January, 2014 by **Ndizeye Leopold**, a director of **Africa Telecom Solutions Ltd**, the interested party. His position was simply that the suit property is now the property of the interested party by virtue of a conveyance registered on 14th September, 2011, although it was in the possession of the 2nd respondent. He prayed that the orders sought by the applicant be granted to protect the suit property.

In determining an application under Rule 5(2) (b) of the rules of this Court, we have to satisfy ourselves that the applicant has demonstrated that it 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 **RELIANCE BANK LTD (IN LIQUIDATION) VS NORLAKE INVESTMENTS LTD (2002) 1 EA 227**, and **REPUBLIC VS KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS [2009] KLR 31**). The applicant is obliged to satisfy both of those principles; 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)**).

The applicant is not obliged to establish a multiplicity of arguable grounds; even a single arguable issue will suffice. (See **TRANSOUTH CONVEYORS LTD VS KENYA REVENUE AUTHORITY & ANOTHER, Civil Application No. 37 of 2007 (unreported)**). Nor is the applicant required to show that the appeal would definitely succeed or that the appeal has very high chances of succeeding. It is sufficient, if it can show that it has serious questions of law or a reasonable argument, deserving of consideration by this Court (**SEE RETREAT VILLAS LTD VS EQUATORIAL BANK LTD & OTHERS, Civil Application No. 40 of 2006 (unreported)**).

The objection by the 1st respondent that there is no competent application before us by reason of non-compliance with Rules 75 and 77 of the Rules of this Court, is not a valid objection. On the face of it there is a notice of appeal on record. In **NATIONAL INDUSTRIAL CREDIT BANK LTD VS AQUINAS FRANCIS WASIKE & ANOTHER, CIVIL APPLICATION NO. NAI 238 OF 2005 (UR**

144/2005) this Court held that in an application under **Rule 5(2) (b) of the Court of Appeal Rules**, the Court does not have to determine the validity of a notice of appeal, because that rule does not require a **valid notice of appeal**. In any event, the Court further observed, there are other express rules under which the validity of the notice of appeal is to be determined, and if need be, struck out.

On the merits of the application before us, we are not satisfied that the applicant has presented a case that is arguable, simply because, by the affidavit of the interested party and the applicant's own admission, the suit property was sold, transferred and registered in the name of the interested party on 14th September, 2011. By the time the applicant filed the application before the High Court that gives rise to the intended appeal on 14th December, 2011, the applicant had no legal interest in the suit property and still has none that can be protected under **Rule 5(2) (b)** of the rules of this Court. Ms Muraguri candidly admitted that title to the suit property is now vested in the interested party, not in the respondents.

The undisputed fact, as of now is that the suit property is not registered in the name of either of the respondents. On what basis therefore does the applicant apprehend that they shall sell, transfer or dispose of the property to third parties while the same is registered in the name of the interested party? And why has the applicant failed to seek the orders against the interested party who it acknowledges to be the registered proprietor of the suit property? This application is plainly mischievous and the applicant is simply requesting this Court to issue orders in vain. If ever there was a party against whom the orders should have been sought, it is against the interested party who claims to be the registered proprietor of the suit property. But the applicant cannot seek such orders against the interested party, having purported to have voluntarily sold the suit property to it, even though the suit property had earlier been sold by public auction to the 2nd respondent. The confusion in this matter is the deliberate creation of the applicant, who, having sowed the wind, must now reap the whirlwind.

Even if there was an arguable case made out, we are not satisfied that the same would be rendered nugatory if it is ultimately successful. The burden of satisfying us on this score lies on the applicant. The 2nd respondent has deponed that it has no intention of disposing or parting with possession of the suit property, a deposition which is not challenged by the applicant, and in respect of which we have found that without being registered as proprietor of the suit property, the 2nd respondent lacks the legal capacity to sell or transfer the same. In any event, the applicant has not even alleged inability on the part of the 2nd respondent to pay the value of the suit property in the event of a successful appeal.

The applicant has not satisfied us that it has an arguable appeal which will be rendered nugatory in the absence of the orders prayed for. In the premises, the notice of motion dated 2nd December, 2013 is totally devoid of merit and the same is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 6th day of June, 2014.

P. N. WAKI

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

jkc