



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. NAI 83 OF 2014 (UR 68/2014)

BETWEEN

CHRISTOPHER MWENDIAH OWANDO APPLICANT

AND

KENYA INDUSTRIAL ESTATES LTD..... 1ST DEFENDANT/RESPONDENT

GEORGE MAINA 2ND DEFENDANT/RESPONDENT

(Being an application for stay of Orders of execution against the whole of the Ruling of the High Court of Kenya at Nairobi delivered on the 4th day of April, 2014 (Gacheru, J)

in

HIGH COURT CIVIL SUIT ELC. CIVIL SUIT NO. 442 OF 2013

RULING OF THE COURT

1. By his application dated 16th April 2014 presented to this Court on 17th April 2014, under rule 5 (2) (b) of the Rules of the Court, the applicant Christopher Mwendiah Omwando seeks an order to stay orders given by the High Court (L. Gacheru, J) on 4th April 2014 dismissing his application to the High Court under Order 40 of the Civil Procedure Rules for injunctive relief.

Background

2. By an instrument of legal charge dated 24th February 2004, the applicant charged his property known as Title Number

Kajiado/Kisaju/2664 (the property) to the 1st respondent, Kenya Industrial Estates Limited to secure the payment of the principal sum of Kshs. 500,000.00 and interest.

3. According to the 1st respondent, the applicant defaulted and persisted in default in the payment of the secured debt with the result that in exercise of its statutory power of sale the 1st respondent sold the property to the 2nd respondent at a public auction held on 8th June 2012.

4. On 16th October 2012 the applicant filed suit against the respondents in the High Court at Machakos (which was subsequently transferred to the High Court at Nairobi) seeking a declaration that the sale of the charged property was fraudulent, wrongful and unlawful; a permanent injunction to restrain the respondents from transferring the property and an injunction to restrain the respondents from interfering with his possession of the property.
5. Simultaneously with that suit, the applicant applied to the High Court for a temporary injunction under Order 40 of the Civil Procedure Rules to restrain the respondents from selling, disposing, transferring or dealing with the property pending the hearing and determination of the suit. After considering the application, the affidavits and arguments in support and in opposition to the application, the High Court (L. Gacheru J) delivered its Ruling on 4th April 2014 dismissing the applicant's application.
6. When dismissing the applicant's application, the High Court ruled that there was no doubt that the applicant was advanced money by the 1st respondent; that there was also no doubt that the applicant defaulted in payment after which the 1st respondent duly exercised its statutory power of sale after undertaking all contractual and statutory pre-requisites for the exercise of that power; that the applicant had therefore not established a prima facie case with any probability of success; that the applicant did not demonstrate that he would suffer irreparable damage which could not be compensated by an award of damages; that the 2nd respondent's title over the property in whose favour the property had already been transferred was protected under Section 98(4) of the Land Act 2012 and Section 26 of the Land Registration Act, 2012 that requires courts to take a certificate of title issued by the Registrar upon transfer as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and that the balance of convenience tilted in favour of the 2nd respondent. The learned judge concluded that:

“The 2nd Defendant is now the registered owner of the suit property. The applicant is not in occupation of the suit land, the event that the applicant intends to injunct has already happened. Since the 2nd Defendant is the registered owner of the suit land. The balance of convenience tilts in his favour. (See Mavoloni Company Ltd Vs Standard Chartered Estate Management Ltd Civil Application Number 266 of 1997, where the court held that:-

“An injunction cannot be granted once an event intended to be injuncted has been undertaken events.”
(sic)

Having now considered the Notice of Motion dated 16th October, 2012 the relevant laws and the submissions filed by the parties, I find that the application herein has not demonstrated that he is entitled to the remedies sought.”

7. Dissatisfied with that decision, the applicant filed a notice of appeal on 8th April 2014 intimating his intention to appeal to this Court. It is against that background, that the applicant has applied to this Court under Rule 5(2)(b) of the Rules of this Court for the orders of stay mentioned at the onset of this Ruling.

Submissions by counsel

8. At the hearing of the application before us the parties were represented by learned counsel. Mr. O. K. Osoro counsel for the applicant referred us to the record of application and submitted that prior to the exercise of the chargee's statutory power of sale under the instrument of legal charge the applicant was entitled to receive notice, which he did not receive; that it is not clear whether the public auction purportedly held on 6th June 2012 at which the 2nd respondent was allegedly declared purchaser, did in fact take place; that the condition of sale requiring payment of 25% of the purchase price on the fall of the hammer was breached as it would appear the entire purchase price was paid by a cheque dated 15th June 2012; that the property was sold at gross under value

having been sold for Kshs.900,000.00 against the stamp duty value indicated at Kshs.3.5 million which is itself evidence of fraud; that in the circumstances the status quo with regard to the property should be maintained until the hearing and determination of Civil Appeal number 86 of 2014 which the applicant has already filed; that the appeal is arguable because the applicant will demonstrate at the hearing that the learned judge erred in the exercise of her discretion in refusing to grant the interim relief to the applicant and in departing from established legal principles and that the appeal has merits.

9. Opposing the application Miss M. M Karanja counsel for the 1st respondent submitted that the sale of the property to the 2nd respondent was not fraudulent as alleged; that the public auction was duly advertised on 14th May 2012; that the sale was scheduled for 6th June 2012; that nothing prevented the applicant from attending the auction; that the highest bid of Kshs.900, 000.00 was accepted and

the charged property transferred to the 2nd respondent; that the orders sought are not available as the property is already transferred to the 2nd respondent and what is done cannot be undone.

10. On behalf to the 2nd respondent Mr. Mutiso Makau submitted that there is nothing for this Court to stay as the property is already

transferred and a Title Deed issued in favour of the 2nd respondent by the Land Registrar Kajiado; that the transfer to the 2nd respondent was done prior to the hearing of the application before the High Court where the applicant was asking for an injunction to restrain what had already been done; that the applicant has not demonstrated that he has an arguable appeal or that he will suffer substantial loss in the event of the application being refused.

Determination

11. We have considered the application and the submissions by learned counsel. The prayer in the applicant's application before us is that "*this Honourable Court be pleased to grant stay Orders in Nairobi High Court Land and Environment Case E. L. C. No. 442 of 2013 issued by Lady Justice L. Gacheru delivered on the 4th day of April 2014 pending the hearing and determination of the intended appeal...*"

12. To succeed in an application for stay under Rule 5(2)(b) of the Rules of this Court, the applicant must, in the words of this Court in **Ishmael**

Kagunyi Thande v HFCK Civil Application No. Nai 157 of 2006

"not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory."

13. Based on the material placed before the High Court the applicant readily accepted that he charged the property to secure his indebtedness to the 1st respondent and that he defaulted in payment of his debt to the 1st respondent. Material was also placed before the High Court of the steps taken by the 1st respondent towards the recovery of the debt and demonstrating the fulfillment of the pre-requisite statutory and regulatory requirements for the exercise of its statutory power of sale. Whereas we are not at this stage dealing with the appeal itself, having regard to the approach taken by the High Court in considering whether the applicant had demonstrated a prima facie case with a probability of success, amongst other considerations, we are not satisfied that the applicant has demonstrated to us that the intended appeal is arguable and for that reason we would dismiss the application.

- b. The other reason we decline to accede to the applicant's application is that although the applicant

says that he was prevented from seeking intervention by the High Court sooner on account of having been overseas for medical treatment, the effect of the delay in moving the High Court was that circumstances on the ground changed substantially with the transfer of the property to the 2nd respondent. The object for which we would exercise our discretion under Rule 5(2) (b) of the Rules of this Court, which in the words of Githinji JA in

Equity Bank Limited vs. West Link Mbo Limited Civil Application No. Nai 78 of 2011 is the “*preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals*” is in the circumstances of this case not attainable.

15. For those reasons, we reject the application. It is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 3rd day of October, 2014.

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR