



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OUKO, M'INOTI & MOHAMMED JJ.A.

CIVIL APPLICATION NO. 194 OF 2014 (UR 153/2014)

BETWEEN

SAMIYAN KAUR DEVINDER SINGH.....APPLICANT AND

SPEEDWAY INVESTMENTS LTD.....1STRESPONDENT

CFC STANBIC BANK LTD.....2ND RESPONDENT

(Application for an order for maintenance of status quo pending the lodging, hearing

and determination of an intended appeal from the ruling of the

High Court of Kenya at Nairobi (Ogola,J.)

dated 5th December, 2013

in

HCCC NO. 553 OF 2010)

RULING OF THE COURT

On 5th December, 2013, Ogola, J. delivered a ruling in which he dismissed an application by the applicant, **Samiyan Kaur Devinder Singh**, for an injunction to restrain the respondents, **Messrs Speedway Investments Ltd** and **CFC Stanbic Bank Ltd**, from selling, transferring, alienating, charging, wasting, damaging, disposing off or otherwise interfering with her ownership and enjoyment of **Apartment No C6** on **LR No. 330/667, Masanduku Lane, Lavington, Nairobi**, (the suit property) pending the hearing and determination of **HCCC No. 553 of 2010**.

In a postscript to the ruling, the learned judge made some startling disclosure and made a further order in the following terms:

“I further direct that this matter should henceforth be heard before a different judge. I have realized in the cause (sic) of these proceedings that I have had a contractual relationship with this 1st defendant, and I may not bring the required independence in the discharge of further duties herein.”

Aggrieved by the dismissal of her application, the applicant filed a Notice of Appeal and followed it up with an application under **rules 1(2) and 5(2)(b) of the rules of this Court**, seeking an order for the maintenance of the status quo pending the hearing and determination of her intended appeal. It was common ground, after hearing both **Mr. Naeku**, learned counsel for the applicant and **Mr. Ogunde**, learned counsel for the 2nd respondent, that the status quo, the maintenance of which the applicant seeks, is her continued quiet possession and occupation of the suit property pending the hearing and determination of the appeal.

The applicant's draft memorandum of appeal lists seven grounds of appeal. The very first ground of appeal faults the learned judge for continuing to hear and determining the application that was before him, even after he had realised that he had had a contractual relationship with one of the parties in the dispute before him. The applicant contends therefore that her intended appeal is arguable and is not frivolous as it raises a fundamental question whether her right to a fair hearing by an independent and impartial tribunal guaranteed by Article 50 of the Constitution was violated.

The short background to the application before us is as follows. On 6th October 2006 the applicant entered into an agreement with the 1st respondent for the sale of the suit property. The agreed purchase price was Kshs.6,200,000, which the applicant subsequently paid in full before taking possession of the suit property.

The dispute between the parties was triggered by the 1st respondent's failure to register the lease in respect of the suit property in the name of the applicant. As it turned out, the 2nd respondent who was the financier of the 1st respondent, advised the applicant that it held a legal charge over the suit property and therefore the same could not have been sold to her by the 1st respondent without the consent of the 2nd respondent. The latter consequently demanded that the applicant should pay for the suit property the prevailing market price of Kshs.12,500,000, failing which she would be evicted therefrom and the suit property sold to other buyers. This threat prompted the applicant to file HCCC No 553 of 2010 in which she sought the injunction earlier referred to.

Ogola, J. found that as of the date of the sale agreement between the applicant and the 1st respondent, the suit property was free of all encumbrances and that the 2nd respondent's security documents over the suit property were registered after the sale agreement. However the learned judge further found that the sale agreement reserved to the 1st respondent the right to charge the land on which the suit property stood as security for financing the development, and that without registration of the lease in the name of the applicant, she had no proprietary right over the suit property. Accordingly the learned judge concluded that there was no prima facie case made out to justify an injunction and proceeded to dismiss the application.

Before reaching that conclusion, the learned judge expressed himself as follows regarding the conduct of the 1st respondent:

"I must, however, note that the 1st defendant's conduct in this matter appears shrouded in mystery and fraud. The

1st defendant must account to the plaintiff in terms of the sale agreement between it and the plaintiff dated 6th October, 2006. This Court cannot and shall not sanction commercial theft, regardless of how it is couched."

In opposing the application before us, **Mr. Ogunde** contended that the 2nd respondent holds a legal charge over the suit property and that upon default by the 1st respondent in payment of the debt secured by the charge, the 2nd respondent was at liberty to realize the security. Learned counsel further submitted that although the 2nd respondent's charge over the suit property was registered after the sale agreement between the applicant and the 1st respondent, the applicant had not noted her interest on the title and therefore the 2nd respondent had no notice and was not bound by the applicant's alleged interest. **Mr. Ogunde** concluded by submitting that in the circumstances of this application, granting the orders sought by the applicant would amount to an undue restriction of the right to enforce a

legally registered security and would be inimical to the interests of justice.

In this application, as in all applications under Rule 5(2)(b), the applicant has to establish that she has an arguable appeal, one that is not frivolous and which stands to be rendered nugatory, in the event it succeeds and there is no preservative order. (See **TRUST BANK LIMITED & ANOTHER V INVESTECH BANK LTD & 3 OTHERS, CIVIL APPLICATION NO. NAI 258 OF 1999** and **EAST AFRICAN POWER MANAGEMENT LTD V THE OWNERS OF THE VESSEL "VICTORIA EIGHT", NBI CIVIL APPLICATION NO. 245 OF 2009**. She does not have to establish a multiplicity of arguable issues; even one bona fide arguable issue will suffice.

(See **KENYA HOTEL PROPERTIES LTD V WILLISDEN INVESTMENTS LTD & OTHERS, CIVIL APPLICATION NO. NAI 24 OF 2012**). It must also be remembered that an arguable appeal is not necessarily one that must succeed on appeal. It is an appeal that ought to be heard on merit. (See

JOSEPH GITAHU GACHAU & ANOTHER V PIONEER HOLDINGS LTD & 2 OTHERS, CIVIL APPEAL NO. 124 OF 2008).

We have anxiously considered the application before us. The same is brought principally under Rule 5(2)(b) of the Court of Appeal Rules. Under that rule the Court has power to issue an injunction or to order stay of execution or stay of proceedings. The applicant could not apply for stay of execution of the order of Ogola, J. because the same was a negative order, one that dismissed her application for injunction and thus incapable of being executed. (See **RFS V. JDS, CIVIL APPLICATION. NO NAI 114 OF 2014 (UR 89 OF 2012)**). She could have applied for an injunction, but for reasons that we cannot fathom she opted to apply for an order for the maintenance of the status quo. The challenge of issuing such an order normally lies in its uncertainty because what constitutes the status quo at any given time is highly contentious and contested. In this case however, it is common ground that the applicant seeks quiet possession and occupation of the suit property pending the hearing and determination of her intended appeal.

In addition to **rule 5(2)(b)** the applicant has also invoked **rule 1(2) of the Court of Appeal Rules, 2010** which provides that nothing in the Court of Appeal Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In the circumstances of this case, we do not consider the applicant's prayer for an order for maintenance of the status quo pending the hearing and determination of the intended appeal fatal. If we are satisfied that the ends of justice will be best served by issuing a preservative order pending the hearing and determination of the intended appeal, we have basis under Rule 1(2) to issue such an order. (See **DHIMAN V. SHAH (2008) KLR, 165**).

Whether or not an intended appeal will be rendered nugatory depends on the particular circumstances of each case. (See **RELIANCE BANK LTD V. NORLAKE INVESTMENTS LTD (2002) 1 EA 227**). In the application before us the applicant has paid in full the agreed purchase price and has been in possession of the suit property for the last five years. She is threatened with eviction unless she pays the current market price for the suit property, which is several times more than the agreed purchase price, which she has in any event paid in full. It is a bit simplistic in our view to assert that merely because her ultimate loss is quantifiable in monetary terms, she should lose the suit property as she waits for her appeal to be heard and determined. The Court has to consider the respective inconvenience and hardship that each of the parties stands to be exposed to. (See **ORARO & RACHIER ADVOCATES V. CO-OPERATIVE BANK OF KENYA LTD, C.A NO NAI. 358 OF 1999**).

We are satisfied that the applicant has placed before us an arguable appeal, one that cannot by any stretch of imagination be described as frivolous. The primary issue that she has raised regarding her right to a fair trial by an independent and impartial tribunal is a substantial issue, granted the disclosure by the learned judge that he had contractual relationship with one of the parties in the application before him and still proceeding to hear and determine the application. There is a fundamental question

whether in light of the disclosure by the learned judge, justice was done and seen to be done in this case.

We have concluded that the applicant's intended appeal implicates a fundamental principle of our justice system to such an extent that we would be abdicating our responsibility if we do not grant a preservative order. As **Lord Buckmaster** stated in **SELLAR V. HIGHLAND RAILWAY CO.**1919

S.C. (H.L.) 19:

“The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the Judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured.”

More recently, this Court in **SERAH NJERI MWABI V. JOHN KIMANI NJOROGE, C.A NO 314 OF 2009 (MOMBASA)** reiterated the principle in these terms:

“It is a tenet of a fair trial that all parties to a dispute must have the right to due process of law in order to resolve the dispute, and due process of law requires that the parties be given a hearing before an unbiased and impartial decision maker as part of the resolution process. The reason is clear to us. In a constitutional order like ours, grounded on the rule of law, it is imperative that judges make decisions according to law, unclouded by personal bias or conflicts of interest. Accordingly, this in our view is the basis upon which when a Judge is appointed to the bench, he/she takes an oath to uphold the Constitution and administer justice without fear or favour. Public confidence in the administration of justice is indispensable. It is not enough that judges be impartial, the public must perceive them to be so.”

Accordingly, we order that the applicant shall continue in quiet enjoyment and possession of **Apartment No C6 on LR No. 330/667, Masanduku Lane, Lavington, Nairobi**, pending the hearing and determination of the intended appeal. Costs of this application will abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 3rd day of October, 2013

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

jkc