



REPUBLIC OF KENYA
COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 31 OF 2012

STANLEY KANGETHE KINYANJUI.....APPLICANT

VERSUS

TONY KETTER.....1ST RESPONDENT

SALIM SULEIMAN.....2ND RESPONDENT

MAWJI PATEL.....3RD RESPONDENT

INNOCENT MAISIBA TOYO,

THE DEPUTY REGISTRAR HIGH COURT OF KENYA AT ELDORET....4TH RESPONDENT.

PAUL GICHERU OF GICHERU & CO. ADVS.....5TH RESPONDENT

COMMISSIONER OF LAND.....6TH RESPONDENT

(An Application for injunction and stay of proceedings appeal from the Ruling and Order of the

High Court of Kenya at Eldoret (J. R. Karanja, J.) delivered on 9th December, 2011

in

H.C.C.C. NO. 140 OF 1999)

RULING OF THE COURT

The applicant, **Stanley Ng'ethe Kinyanjui**, comes before us by way of notice of motion expressed to be brought under **Rules 1(2) and 5(2)(b)** of the Court of Appeal Rules for the following orders:

“1. That 1st, 2nd and 3rd respondents by themselves or by their agents, servants or otherwise howsoever be restrained from advertising, auctioning, offering for sale, leasing, mortgaging, charging, transferring, assigning, entering upon, trespassing on, taking possession of and/or otherwise dealing with property L.R. No. 7741/149 Kitsuru, Nairobi pending the lodging, hearing and determination of the intended appeal from the Ruling and Order made by the Superior Court on 9th December, 2011 in High Court Civil Suit No. 140 of 1999.

2. The proceedings in High Court Civil Suit No. 140 of 1999 be stayed pending the lodging, hearing and determination of the intended appeal from the Ruling and Order made by the Superior Court on 9th December, 2011 in High Court Civil Suit No. 140 of 1999.

3. The costs of and incidental to this application to abide the result of the appeal.”

What has given rise to this application is a ruling by the High Court (**J.R. Karanja, J.**) delivered on 9th December, 2011 in Eldoret H.C.C.C. No. 140 of 1999. Pursuant to an application brought by the 2nd respondent, **Salim Suleiman**, the learned Judge in the aforesaid ruling found, *inter alia*, that the 2nd respondent had beneficial interest in the suit property, L.R. No. 7741/149 Kitsuru, Nairobi having purchased it at Kshs. 20 million; that although the applicant also subsequently purchased the same property in a public auction in execution of a decree of the court, the sale and transfer to him were irregular, null and void for the reason that there was a subsisting stay of attachment and sale; and further that the auctioneer who conducted the sale was not authorised under the Auctioneers Act.

In the result, the learned Judge granted the 2nd respondent prayers 19 to 25 of the motion dated 17th June, 2011. The effect of that decision was that;

- i) The sale of the suit property and the subsequent transfer to the applicant were set aside.**
- ii) The register was ordered to be rectified by the removal of the name of the applicant as the proprietor of the suit property.**

The applicant being aggrieved by this decision intends to challenge it in this court. In the meantime he has brought the instant motion for orders set out at the beginning of this ruling. The application is premised on the twin principles of **Rule 5(2)(b)** of the Court of Appeal Rules, namely; that the applicant has an arguable appeal, and secondly that the appeal will be rendered nugatory if an injunction and stay of proceedings are not granted.

The application enumerates 19 grounds in support of the applicant's prayers in the motion. The 3rd and 5th respondents who are the plaintiff and his counsel in the main suit, Eldoret H.C.C.C. No. 140 of 1999, respectively are in support of this application. They have deposed that the intended appeal raises several arguable issues; that the learned judge failed to accord the 5th respondent an opportunity to highlight written submissions as a result of which the learned judge imported into the judgment matters not canvassed in the application or in the submissions. Likewise, it was argued, he overlooked the ruling of **Mwilu, J.** (as she then was) on the question of joinder of the applicant. The 3rd and 5th respondents have denied that there was an order of stay at the time the auction was conducted.

On behalf of the 1st respondent, it was submitted that the learned judge properly found that the applicant's title was unprocedurally obtained. Learned counsel for the 2nd respondent associated himself with these submissions and maintained that the appeal is not arguable, nor will it be rendered nugatory if the orders sought in this application are not granted.

To this background, we would like to add that the original suit (Eldoret H.C.C.C. No. 140 of 1999) was between the 4th respondent (**Mawji Patel**) as the plaintiff and the 6th respondent (**Tony Ketter**) as the defendant. The former was claiming from the latter monies due and owing in the sum of Kshs. 16,441,455/50. Judgment was accordingly entered in favour of the 4th respondent on 4th December, 2002 and execution commenced leading to the applicant purchasing the suit property in a public auction.

We reiterate that the applicant has invited us to exercise our discretionary jurisdiction under **Rule 5(2) (b)** of the Court of Appeal Rules to issue restraining orders of injunction against the 1st, 2nd and 3rd respondents stopping them from advertising, auctioning, offering for sale, leasing, mortgaging, charging, transferring, assigning, entering upon, trespassing on, taking possession of and/or otherwise dealing with the suit property pending the determination of the intended appeal, and finally that proceedings in Eldoret

H.C.C.C. No. 140 of 1999 be stayed until the intended appeal is lodged, heard and determined.

Starting with this prayer, we note that such an application is everyday fare in this Court and the principles on which the Court acts if invited to exercise that jurisdiction, is old hat. This Court, in accordance with precedent, has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be nugatory if these interim orders were denied. From the long line of decided cases (although none was cited by counsel, perhaps due to their notoriety) on **Rule 5(2) (b)** aforesaid, the common vein running through them and the jurisprudence underlying these decisions can today be summarized as follows:

- i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See **Ruben & 9 Others v Nderitu & Another** (1989) KLR 459.
- ii) The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
- iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. **Halai & Another v Thornton & Turpin (1963) Ltd.** (1990) KLR 365.
- iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. **David Morton Silverstein v Atsango Chesoni**, Civil Application No. Nai 189 of 2001.
- v) An applicant must satisfy the court on both of the twin principles.
- vi) On whether the appeal is arguable, it is sufficient if a single *bonafide* arguable ground of appeal is raised. **Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd**, Civil Application No. Nai 345 of 2004.
- vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. **Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others**, Civil Application No. 124 of 2008.
- viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. **Damji Pragji (supra)**.
- ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. **Reliance Bank Ltd v Norlake Investments Ltd** [2002] 1 EA 227 at page 232.
- x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
- xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. **International Laboratory for Research on Animal Diseases v Kinyua**, [1990] KLR 403.

In considering this application we shall bear in mind these principles. On whether the appeal is arguable, the applicant has deposed that;

- (a) the learned judge set aside the sale and transfer of the suit property, when it was clear the applicant was not a party in Eldoret H.C.C.C. No. 140 of 1999 and when the objection proceedings by the 2nd respondent had not been determined,

- (b) the 2nd respondent, whose application gave rise to the orders of setting aside of the sale and transfer of the suit property had no *locus standi* to bring the application as there was no evidence of sale of the property to him, or payment of the purchase price by him to the 1st respondent,
- (c) the learned judge found, without any basis that an order of stay of execution was issued on 30th October, 2009 and served on the auctioneer before the sale of the property when there is affidavit evidence that in fact no such order was served or even made,
- (d) the impugned ruling is contradictory in the finding that the automatic order of stay of execution was made and served on 30th October, 2009 while holding at the same time that the notice of stay under Order 21 Rule 54 of the Civil Procedure Rules was issued by the 4th respondent on 2nd November, 2009 after the sale of the property on 30th October, 2009,
- (e) the learned judge set aside the sale and transfer also for the reason that no sale and transfer would have been effected while there was a caveat, yet such a caveat could not have prohibited the transaction arising from execution of a decree of the court in respect of which a prohibitory order had been registered against the title of the property way back on 22nd February, 2008.

Although we are not required to set out more than one ground to show that the appeal is arguable, in our view these grounds raise arguable points.

Will the appeal be rendered nugatory if we do not grant an order of stay of proceedings and an injunction? It is deposed by the applicant that two applications are pending before the High Court, namely a notice of motion dated 18th November, 2009 and another dated 18th December, 2009 (we suppose it is the notice of objection to attachment dated 29th October, 2009 as we cannot trace in the file one dated 18th December, 2009). Apart from these pending proceedings, the sale and transfer having been set aside, the applicant who has paid Kshs.53 million towards the purchase of the property and is in possession stands, not only to lose the money but also to be dispossessed of the property by the 1st, 2nd and 3rd respondents. It is further averred that the 1st respondent is impecunious, while the whereabouts of the 2nd and 3rd respondents are unknown. These assertions have not been rebutted. Further, there is evidence that has not been controverted that the 1st respondent had attempted to avoid his obligations by seeking to be declared bankrupt..

These factors go to show that if the three respondents are not restrained and further proceedings are not stayed as prayed in the motion, the substratum of the intended appeal will disappear and the appeal will be rendered nugatory.

In the result we allow the application dated 16th January, 2012. Costs will be costs in the appeal.

DATED and DELIVERED at Nairobi this 22nd day of February, 2013.

W. KARANJA

.....
JUDGE OF APPEAL

W. OUKO

.....
JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR