



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 43 of 2013

BETWEEN

ROSEMARY KINANU GITUMA.....1ST APPLICANT

MARK KINOTI GITUMA.....2ND APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

(An application for injunction pending the hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (J.B. Havelock) dated 30th January, 2013

in

HCCC No. 682 of 2012)

RULING OF NAMBUYE JA.

The applicants herein moved to the seat of justice vide Nairobi Milimani Commercial and admiralty division **Civil Suit No.682 of 2012** brought against the respondent seeking various reliefs among them protection of **LR. No. Nairobi/Block 106/97 (the Dam Property)** and **LR. No. Meru/Municipality /Block/202 (the Meru property)** which had been charged to the respondents to secure a loan facility in favour of the first applicant. The loan funds were allegedly partly advanced. The applicants defaulted on the loan repayment. The respondent moved to exercise its statutory power of sale over the subject properties.

The applicants upon filing of the plaint to premise on the plaint an interim application seeking an injunctive relief to restrain the respondent from exercising its power of sale. The interim application was opposed by the respondent. It was heard on its merits resulting in the ruling sought to be impugned dated 30th day of January, 2013. Two crucial orders were made, one in which the respondent's move to realize the security was faulted, but the respondent was given leave to restart the process. I have been informed at this interpartes hearing that the respondent has re-initiated the process to realize the above security effective the 5th day of April 2013. The notice served has a life of 90 days. The second condition of the injunctive order required the applicants to continue liquidating the indebtedness to the respondent at the rate of Kshs.274, 722/= monthly.

The applicants were aggrieved by that decision and they have filed a notice of appeal intending to appeal to this court against that decision. On the said notice of appeal, there has been premised an interim

application filed under certificate of urgency on the 22nd day of February, 2013. The certificate of urgency as declined by me in the first instance.

Learned counsel for the applicant then applied under rule 47(5) of the Court of Appeal rules to have the request for the issuance of the certificate of urgency heard *inter partes* hence the proceedings giving rise to this ruling.

On the day fixed for the hearing of the certificate of urgency *inter partes*, **Linus Thurania** appeared for the applicant, whereas **Walala Ronald** appeared for the respondent. In summary, learned counsel for the applicant has urged me to certify the matter urgent because properties sought to be protected are family properties and if realized and sold by the respondent the applicants family will be rendered homeless. Secondly that it will be highly prejudicial and unfair for the applicant to start meeting the monthly installments ordered before the intended appeal is heard and disposed off that the amount ordered represent liquidation installments for the full amount which ought to have been advanced by the respondent yet only half of the loan applied for was advanced. Thirdly that if the respondent moves to realize the properties before an interim reprieve is given to applicant pending hearing and determination of the applicants will be rendered remediless and the intended appeal nugatory.

In response learned counsel for the respondent opposed the certificate of urgency on the ground that all that the High Court did was to grant a conditional injunctive relief which the applicant was required to comply with; that the applicants have not complied with their part of the condition, whereas the respondent has complied with its part of the condition as they have restarted the process of realization of the security. That since it is admitted that some funds were advanced to the benefit of the applicants, it will be unfair for the applicants to benefit from the funds advanced and at the same time fail to meet the installments ordered by the High Court.

My jurisdiction has been invoked under rule 47(5) of this courts rules it provides:-

“The refusal by the Judge to certify an application as urgent under this rule shall not be subject to a reference to the court under rule 55, but the applicant may apply informally for the matter to be placed before a single Judge for hearing *inter partes*”

All that I have been called upon to do after hearing the rival arguments is to determine whether the pending application is urgent or not. I have thus been called upon to exercise my judicial discretion in favour of either stand. The principles that guide me in the exercise of my judicial discretion have now been crystallized by case law. These are that my exercise of judicial discretion is wide and unfettered, with the only fetter to it being that I have exercise it upon reason and judiciously. See the case of **CMC Holdings Limited versus Nzioki (2004) 1KLR173**. There is also a requirement that such discretion be exercised based on sound reason rather than whim, caprice or sympathy. See the case of **Bagallo versus Christian Childrens Fund in (2004) 2KLR73**. It must also be exercised for the interests of justice to both parties to the litigation. See the case of **Guthiaka versus Ndururu (2004)2KLR67**

I have borne in mind all the above principles and applied them to the rival arguments herein I am of the opinion that. Considering that the respondent has restarted the process of realization of the properties sought to be protected by the intended interim orders, sought in the application to be heard under certificate of urgency on the one hand, and consideration that the realization of the said property by the respondent may be effected at the expiry of 90 days from 5th day of April,2013, and in the process render the pending application nugatory, ends of justice to both parties demand that the pending application be fast tracked to enable parties know their correct positions with regard to the intended interim relief before the expire of the 90 days from 5th day of April,2013. In the premises I am satisfied that a case has been made out by the applicant to warrant my order that the application by way of notice of motion dated the 14th day of February,2013 be heard as a matter of urgency and it is so ordered. Costs in the application.

Dated at Nairobi this 26th day of April, 2013.

R.N. NAMBUYE
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JUDGE OF APPEAL

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

DEPUTY REGISTRAR