



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, MWILU & OUKO, J.J.A.

CIVIL APPLICATION NO. NAI 61 OF 2013 (UR 40/2013)

BETWEEN

TOWHIDA AWO SHARIFF.....1ST APPLICANT

ISHA AWO SHERIFF.....2ND APPLICANT

MEHUBA GELAN KELIL Administrators of the estate of

AWO SHERIFF MOHAMED (DECEASED).....3RD APPLICANT

AND

ABDULKADIR SHARIFF ABDIRAHIM.....1ST RESPONDENT

ECO BANK LIMITED.....2ND RESPONDENT

SASA GENERAL INVESTMENT LIMITED.....3RD RESPONDENT

(An application for an injunction pending hearing and determination of intended appeal from the order of the High Court of Kenya at Nairobi (Harvelock, J.) dated 12th February, 2013

in

HCCC NO. 329 OF 2003)

RULING OF THE COURT

Towhida Awo Shariff, Isha Awo Shariff and Mehuba Gelan Kelil (applicants) have moved this Court by way of notice of motion dated 15th March, 2013 seeking as against the three respondents, **Abdulkadir Shariff Abdirahim, Eco Bank Limited and Sasa General Investment Limited** the following orders:

“that the 1st, 2nd and 3rd respondents their servants agents representatives successors or assignees be restrained by an order of injunction from discharging and or from presenting for registration or registering a discharge of charge entry number 24 of 5th November, 2008

presentation Book Number 215 of 5th November 2008 registered against title Number IR 15855 LR 37/262/3 at the Land Office Nairobi or selling or transferring the said charge or howsoever selling, charging and disposing off dealing with title number IR 15855 LR 37/262/3 in any manner prejudicial to or negating prohibitory order made herein or 22nd September 2008 and the applicants interests therein pending hearing and determination of the applicant's intended appeal."

The same is premised on a raft of twelve (12) grounds and supported by the 50 paragraph affidavit of Towhida Awo Shariff sworn on 15th March, 2013 which carries several annexures. It was strongly opposed by the 1st and 3rd respondents through their respective learned counsel Mr. Onindo and Mr. Luseno.

Although, we do not need to go into the details of the substantive suit before the High Court, a brief recapitulation of the circumstances leading to this application is necessary. The suit revolves around a property described as **Land Reference Number 37/262/3** registered in the name of **Abdulkadir Shariff Abdirahim** (1st respondent) on 8th August 2000.

Some years later, one Awo Shariff Mohammed (deceased) (whose estate is represented in this matter by Mehuba Gelan Kelil, one of the applicants, filed a suit **Nairobi Milimani Civil Case No. 329 of 2003** against the 1st respondent herein. Judgment was entered in favour of the plaintiff in that case on 16th day of February 2006, and the consequent decree was issued shortly thereafter. This decree was not satisfied and execution proceedings were taken out later. The honourable court gave orders that the 1st respondent's immovable property be attached in execution of the said decree.

Meanwhile, on 28th July 2008 the property in question was charged to EABS Bank Limited (later Ecobank 3rd respondent) for Ksh 25,000,000/= From the record before us the said charge was registered on 5th November 2008. When the property was advertised for sale in satisfaction of the decree of the court, Ecobank Kenya Limited (2nd respondent) filed objection proceedings. Several other applications and counter applications were filed by parties in respect of the same property. As stated earlier on, it is not our place to delve into those other applications and consequent rulings for purposes of this ruling. That is so because those rulings are outside the ambit of this application.

The ruling that is of concern to us for purposes of this application is the one rendered on 12th February, 2013 by Havelock J. The application giving rise to that ruling was seeking, inter alia, an order of review of the learned Judge's earlier ruling dated 21st November, 2011 on grounds that there was an error on the face of the record. The learned Judge heard the application but found that there were indeed no sufficient grounds for him to review his earlier ruling and dismissed the application. Aggrieved by the said ruling, the applicant filed a notice of appeal on 19th February, 2013 intending to appeal against the entire ruling.

That notice of appeal forms the basis of this application.

Mr. Wamalwa, learned counsel for the applicant addressed us at length on the procedure relating to registration of documents and other instruments under the Registration of Titles Act. The gravamen of his argument is that a prohibition had been duly registered against the Title in question and that being so, the property could not have been charged to the 2nd respondent. He admitted that the entries in respect of the prohibition orders had not been countersigned or sealed by the registrar but according to him once a document has been lodged at the land registry and entered in the register, it is deemed as registered. He went on to address us on the procedure for cancelling a document after it has been lodged at the registry which procedure he submitted was not followed in cancelling the prohibition orders in question.

Mr. Luseno learned counsel for the 2nd respondent in his submission which was wholly adopted by Mr. Onindo, learned counsel for the 1st respondent was nonetheless of a different view. His submission was that an entry is only registered after it is signed and sealed by the registrar. He urged us to find that indeed no prohibitory orders had been entered into the register in respect of the property in question to act as a bar against the charge in their favour being registered. He submitted strongly that there was no

error apparent on the face of the record in the ruling in question, and that if indeed the learned Judge failed to consider any points of law, then recourse lay in the appeal process but not by way of review.

He urged the Court to find the application before us lacking in merit and to dismiss the same as the intended appeal is not arguable.

We have considered these arguments. We are nonetheless of the view that those issues are clearly outside the ambit of this application. They are issues that can only be canvassed and determined at the hearing of the intended appeal or in the substantive suit before the High Court. Our only task for purposes of this application is to consider Havelock J's ruling and determine if indeed he failed to appreciate that there was an error apparent on the face of the record that would have compelled him to review his earlier ruling.

According to Mr. Wamalwa, the error on the face of the record was that Koome, J (as she then was) in her ruling had made a finding that the prohibitory order was duly registered and the charge in favour of the 2nd respondent ought not to have been registered; while Havelock, J made a finding that there was no registration of the prohibitory order.

It is our considered view that this cannot be said to be an error apparent on the face of the record which Havelock, J could be called upon to review. That could only be an issue to be canvassed on appeal as a substantive ground of appeal.

As explicitly pronounced by this Court in the case of **National Bank of Kenya Limited vs Ndungu Njau Civil Appeal No. 211 of 1996** (unreported)

“A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.” (emphasis supplied)

It is clear from the above that the issue of one Judge saying that there was registration and another saying that there was no registration is not an error apparent on the face of the record. It was a pertinent point of law that needed to be backed by serious argument and the law. It may well have been that one of the two Judges misinterpreted the law. That would not be a ground for review but for appeal. As stated earlier on, it does not fall on us in this forum to determine which of the two learned Judges was correct. All we can say is that we are not persuaded that there was an error apparent on the record which could have been rectified by way of review.

We are mindful of the fact that we can neither make any definite orders as to what amounts to registration of a document under the repealed Registration of Titles Act at this stage, nor can we make any findings as to whether the registration in question was fraudulent or not. This lies with the bench that will hear the appeal.

All we are required to do at this point in time is to confine ourselves to two simple issues.

Does the applicant have an arguable appeal in the light of what we have stated above and secondly, if the orders of injunction sought are not granted, will the applicants' intended appeal be rendered nugatory? Along with this, we have considered the submission of learned counsel for the respondent – which is not disputed to the effect that the applicants are not actually the owners of the property in question.

Can they justifiably be allowed to injunct the respondents from dealing with their property? Our answer to those two questions is in the negative. We are not persuaded that the applicants herein have an arguable appeal.

Even if, for the sake of argument, we found that their appeal is arguable, would it be rendered nugatory if the orders of injunction are not granted? Again, the answer to this is in the negative. As rightly submitted by Mr. Laboso, the applicant's claim against the 1st respondent is based on a decree. They can execute the same against any other property owned by the 1st respondent. There is paucity of evidence before us to show that the 1st respondent has no other property to satisfy the decree in question.

As explicitly and repeatedly pronounced by this Court in innumerable cases, (see **Reliance Bank Ltd vs Norlake Investment Ltd [2002] 1 E.A 128; IL Nwessi & 2 Others vs Wendy Martin, Civil Application No. Nai 291 of 2010 (UR) 203/2010**) in order for an application under **Rule 5(2)(b)** of this **Court's Rules** to succeed, a party must establish the twin principles of arguability of the appeal, and the nugatory aspect. The applicants herein have established neither of these principles.

In the circumstances, we find that the application before us must fail. We find no merit in the same and we dismiss it accordingly with costs to the 1st and 2nd respondents.

Dated and delivered at Nairobi this 8th day of November, 2013.

W. KARANJA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

