



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, WAKI & VISRAM, J.J.A.)

CIVIL APPLICATION NO. NAI. 124 OF 2011 (UR. 83/2011)

BETWEEN

NYANGATE GUTO ALIAS WATSON MOGERE MOGOKO ..... APPLICANT

AND

MAXWELL OKEMWA MOGERE ..... 1<sup>ST</sup> RESPONDENT

NATIONAL BANK OF KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT

*(Application for injunction and stay of execution pending the determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mbogholi Msagha, J.) dated 8<sup>th</sup> March, 2011*

in

H.C.C.C. No. 2287 of 2007)

\*\*\*\*\*

RULING OF THE COURT

In his notice of motion dated the 16<sup>th</sup> May, 2011 and lodged in the Court on the 23<sup>rd</sup> May, 2011, *Nyangate Guto alias Watson Mogere Mogoko*, hereinafter, “*the applicant*”, asks the Court for two basic orders, namely that:-

“1. Pending the lodging, hearing and determination of the intended Appeal in the Court of Appeal the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be restrained whether by themselves or by their agents, servants or otherwise howsoever from advertising, offering for sale, leasing, mortgaging, charging, transferring, assigning or taking possession of and/or otherwise dealing with the property L.R. NO. 209 Section III Nairobi.

2. Pending the lodging, hearing and determination of the intended appeal in the Court of Appeal, there be a stay of execution of the Decree for the payment of costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the proceedings in that regard.”

The 1<sup>st</sup> respondent is *Maxwell Okemwa Mogere*; he is the son of the applicant. The 2<sup>nd</sup> respondent is the *National Bank of Kenya Ltd.*

In 1973, the applicant purchased from one, **Sultanali Albin Lalji**, the property known as L.R. No. 36/III/209 situated in Eastleigh, Nairobi. The purchase price at the time of sale was Shs.32,000/=. The property was subsequently registered in the applicant's name. The applicant says he is still in possession of the property upto now and that he still pays rent and rates to the relevant authorities. The applicant swears that in 2007, he came to learn that certain fraudulent transactions had taken place over his property and among such fraudulent transactions which he discovered were:-

***(a)an indenture dated 17<sup>th</sup> April, 1996 and a conveyance dated 30<sup>th</sup> December, 1995 registering the property in the name of his son, the 1<sup>st</sup> respondent;***

***(b)a mortgage dated the 21<sup>st</sup> September, 2004 in favour of the 2<sup>nd</sup> respondent securing the sum of Shs.7,000,000/= granted as a loan to Mosasa Construction Ltd., a company in which the 1<sup>st</sup> respondent is a shareholder and a director;***

***and (c) a further mortgage dated the 24<sup>th</sup> March, 2005 in favour of the 2<sup>nd</sup> respondent to secure the sum of Shs.4 million advanced by the 2<sup>nd</sup> respondent to the same company, Mosasa Construction Ltd.***

The applicant's contention in the High Court and before this Court was that he never transferred his property to the 1<sup>st</sup> respondent and any such alleged transfer was fraudulent and, therefore, the purported mortgages were themselves unlawful. Msagha Mbogholi, J. by his judgment of 8<sup>th</sup> March, 2011 found against the applicant on these points with the learned Judge holding that:-

***“..... the question is whether or not the plaintiff executed the Indenture in favour of the 1<sup>st</sup> defendant in 1995. The plaintiff's evidence cited above is of no assistance to the court neither is the evidence of P.W.4 who said she did not know when the title to the suit property disappeared and also could not tell if the plaintiff executed the Indenture. In any case, the plaintiff was supposed to prove fraud and forgery on the part of the 1<sup>st</sup> defendant. The burden and standard of proof lies entirely within the province of the plaintiff. A standard of proof approaching proof beyond any reasonable doubt is required to establish fraud. And allegations of fraud must be strictly proved. Although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required .....***

***With respect, I am unable to say that the plaintiff has proved any fraud or forgery.”***

There was, in fact an indenture dated 30<sup>th</sup> December, 2005 which showed the 1<sup>st</sup> respondent as the registered owner of the disputed property and it was further agreed on the recorded evidence that the 2<sup>nd</sup> respondent had advanced two loans to the 1<sup>st</sup> respondent on the basis of the indenture showing the 1<sup>st</sup> respondent as the owner of the property. The applicant was alleging fraud and forgery on the part of the 1<sup>st</sup> respondent, but his evidence, prima facie, was very sketchy. The applicant says he has an arguable appeal. On the basis of the material on the record, we have our doubts about the arguability of the applicant's appeal. We, of course, cannot make conclusive findings in this kind of application and all we can do is to express our doubts on that point. Since we are not quite satisfied on the point of whether the appeal is arguable, we need not consider the second aspect of whether the appeal will be rendered nugatory if we do not grant a stay. It may be the applicant continues to pay rates as he says he does, but as the trial Judge pointed out payment of rates is not synonymous with ownership of the property.

We are not satisfied that we should grant to the applicant the orders which he seeks in his notice of motion. That motion fails and we order that it be and is hereby dismissed. The costs of the motion shall be in the appeal.

***Dated and delivered in Nairobi this 27<sup>th</sup> day of January, 2012.***

***R.S.C. OMOLO***

.....  
**JUDGE OF APPEAL**

**P.N. WAKI**

.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**