



REPUBLIC OF KENYA
IN THE HIGH COURT
AT KISUMU
Civil Application 202 of 2011

KEBIRIGO CONSUMERS CO-OPERATIVE SOCIETY..... APPLICANT

AND

DIOCESE OF KISII KIENYA, E. AFRICA..... RESPONDENT

(An application for stay of execution and/or injunction pending hearing and final determination of Civil Appeal No. 9 of 2010 lodged in Kisumu against the decision of the High Court of Kenya at Kisii (Wambilyangah, J) dated 19th March, 2001

in

HCCC NO. 925 OF 1989)

RULING OF THE COURT

This is an application under **Rule 5 (2) (b) of the Court of Appeal Rules** (the Rules) for an injunction pending the hearing and determination of the appeal. The prayer is as follows:

“1. THAT pending the hearing and determination of Civil Appeal No. 9 of 2010 lodged in the Sub-Registry at Kisumu on the 5th day of March, 2010, this Honourable Court be pleased to issue an injunction restraining the Respondent by itself, its agents, servants and/or employees from entering, demolishing, constructing or otherwise howsoever manner interfere with the occupants occupying and carrying business on land parcel No. **WEST MUGIRANGO/BONYAMATUTA/1051.**”

The applicant, **Kebirigo Consumers Co-Operative Society** (the Society) was at one time, in the late 1980s

and early 1990s, the owner of the property known as **West Mugirango/Bonya Matuta/1051** (the suit property) which is the subject of dispute in the intended appeal.

In July, 1988, the Society borrowed funds from the respondent, which, as at the date of the filing of the plaint on 14th December, 1989, amounted to KShs.251,474.80. The plaint and the defence are not part of the record before us, but it is stated in the judgment delivered by the High Court, and which is the subject of the intended appeal, that the applicant (defendant in the High Court) admitted the amount owed to the respondent, but strongly denied ever having refused to repay the same.

The respondent applied for, and obtained, judgment against the applicant for the said amount, and promptly attached the suit property, eventually selling it by public auction on 29th October, 1990. The respondent was itself the highest bidder at the public auction and became the registered owner of the suit property in 1990.

The Society then went to slumber for some eight years, and on 29th July, 1998, filed an application in the High Court under **Section 3A of the Civil Procedure Act**, and **Order 21 Rule 18 (1) (a) of the Civil Procedure Rules**, asking that the ‘purported’ sale be set aside, and the entry in the land registry be reversed. The High Court (Wambilyangah, J) dismissed the application, citing the doctrine of laches, among other things. It is that ruling that is the subject of an intended appeal, and in the meantime, the Society has filed this application dated 28th July, 2011 in which it seeks the order earlier referred to.

In his submissions before us, Mr G. K. Bosire, learned counsel for the applicant, submitted that the intended appeal was arguable because, in his view, the execution proceedings that led to the transfer of the suit property to the respondent were irregular; and that Land Control Board consent had not been obtained before the transfer was effected. With respect to the nugatory aspect, counsel argued that the property could be sold or demolished and the Society’s tenants’ were at risk of eviction.

The respondent, though served, did not appear to defend this application.

The principles applicable to the determination of applications under rule 5 (2) (b) of the Rules are well settled, as was observed by this Court in **Civil Application No. NAI 157 of 2006 in ISHMAEL KAGUNYI THANDE VS HOUSING FINANCE OF KENYA LTD** (unreported) in these terms:

“The Jurisdiction of the Court under rule 5 (2) (b) is not only original but discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.” {See Githunguri vs Jimba Credit Corporation Ltd, No 2 (1988) KLR 838, J. K. Industries Ltd vs Kenya Commercial Bank Ltd (1982-88)}. ”

The applicant’s counsel submitted that the appeal is arguable and that it has high chances of success. A copy of the memorandum filed in the appeal containing five grounds of appeal is annexed to the application. The respondent neither filed a replying affidavit nor attended the hearing of the application by counsel or otherwise.

Thus, the respondent has not contended that the appeal is not arguable. The appeal being **Civil Appeal No 9 of 2010**, has already been filed. In the circumstances, we refrain from commenting from the merits of the appeal lest we embarrass the Court which will ultimately hear the appeal. It is sufficient to say that, for purposes of this application, we assume that the appeal is arguable.

On the issue whether or not the appeal would be rendered nugatory if the application is not allowed, the applicant gives three reasons why the appeal would be rendered nugatory; first, that the respondent intends to enter into the suit premises with intent to demolish existing structures and construct another structure; that the respondent intends to start collecting rent from the tenants and thirdly, that the respondent intends to evict the applicant which has occupied the premises long before the purported sale

to the respondent by a public auction.

These acts, in our view, cannot render the appeal if successful, nugatory. The applicant does not say either in the application or in the supporting affidavit that the respondent intends to dispose of, alienate, charge or otherwise dispose of its interest in the suit premises. It follows that the suit properly will still be in existence and will still be registered in the name of the respondent at the time of the determination of the appeal.

Thus, the applicant has not shown that the appeal would be rendered nugatory unless the application is allowed.

In the result, we dismiss the motion dated 28th July, 2011, with no order as to costs.

Dated and delivered at Kisumu this 22nd day of March, 2012.

R. S. C. OMOLO

JUDGE OF APPEAL

E. M. GITHINJI

JUDGE OF APPEAL

ALNASHIR VISRAM

JUDGE OF APPEAL

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

DEPUTY REGISTRAR