



IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, KARANJA & OKWENGU, J.J.A)

CIVIL APPLICATION NO. NAI. 72 OF 2010 (UR. 50/10)

BETWEEN

WARDPA HOLDINGS LIMITED.....1ST APPLICANT
PATRICK KANG'ETHE NJUGUNA.....2ND APPLICANT
EDWARD KANG'ETHE NJUGUNA.....3RD APPLICANT
GEORGE KANG'ETHE NJUGUNA.....4TH APPLICANT

AND

EMMANUEL WAWERU LIMA MATHAI.....1ST RESPONDENT
HOUSING FINANCE CO. (K) LIMITED.....2ND RESPONDENT

*(Being an application for stay of execution and/or further proceeding spending the hearing and determination of an intended appeal from the entire Ruling and Order of the High Court of Kenya at Milimani (Hon. Justice Kimaru) dated 9th February, 2010
in*

H.C.C.C. NO. 634 OF 2008)

RULING OF THE COURT

1. *Wardpa Holdings Limited, Patrick Kang'ethe Njuguna, Edward Kang'ethe Njuguna and George Kang'ethe Njuguna*, (hereinafter referred to as the 1st, 2nd, 3rd and 4th applicants) have moved this court under **Rule 5 (2) (b)** of the **Court of Appeal Rules** seeking orders as follows:

(i) That the ruling and order made on the 9th day of February, 2010 in High Court Milimani Civil Suit No. 634 of 2008, Emmanuel Waweru Lima Mathai ~vs~ Housing Finance Company of Kenya Limited and 4 Others, sentencing the 2nd, 3rd and 4th applicants to a fine of Kshs. 1,000,000/- each or in default each to serve Ninety (90) days in prison for contempt of court, and requiring them to compensate the plaintiff and the court to assess the same, together with all consequential orders in respect of the matter, be stayed pending the lodging, hearing and determination of the applicant's intended appeal.

(ii) That there be a stay of any further proceedings in High Court Milimani Civil Suit No. 634 of 2008 Emmanuel Waweru Lima Mathai ~vs~ Housing Finance Company of Kenya Limited and 4 Others pending the lodging, hearing and determination of the applicant's intended appeal.

(iii) That the costs of and incidental to this application abide the result of the appeal.

(iv) That such other and/or further relief be granted as the Honourable Court may deem fit and just to grant in the peculiar circumstances of this matter.

2. The background to the application before us as is evident from the affidavit filed in support of the application, is that **Emmanuel Waweru Lima Mathai** (hereinafter referred to as the 1st respondent), filed a suit in the superior court against **Housing Finance Company of Kenya Limited** (hereinafter referred to as the 2nd respondent), the 1st, 2nd, 3rd and 4th applicants. The subject of the suit was land known as LR. No. 209/489/22 (hereinafter referred to as the suit property). This property belonged to the 1st respondent who had charged it to the 2nd respondent. The 2nd respondent purported to have sold the suit property to the 1st, 2nd, 3rd and 4th applicants in exercise of its statutory power of sale. The 1st respondent disputed the sale and therefore filed the suit in the superior court seeking *inter alia* a declaration that the sale is illegal and unlawful. On 27th October 2008, the 1st respondent obtained a temporary order of interlocutory injunction restraining the applicants and the 2nd respondent from forcefully evicting the 1st respondent, or demolishing, or damaging, or leasing the suit property, until the *inter partes* hearing of the 1st respondent's application for injunction.

3. The application was due for hearing on 5th November 2008 but the same was not listed for hearing. The 1st applicant believing that the interim orders had expired caused the 1st respondent to be evicted from the suit property. The 1st applicant thereafter demolished the building that stood on the suit property and commenced construction of a new modern structure. By an application dated 5th December 2008, the 1st respondent applied for the 2nd to 4th applicants to be cited for contempt of the order of temporary injunction issued on 27th October, 2008. This application was heard and the 2nd, 3rd and 4th applicants convicted, following which the court issued the orders of 9th February 2010 now subject of this application.

4. Being aggrieved by the orders of 9th February 2010, the applicants filed a notice of appeal on 12th February 2010, and applied for certified copies of the ruling and proceedings subject of the appeal. These have now been availed. In support of the present application, the applicants have annexed a draft memorandum of appeal to demonstrate that they have an arguable appeal. The applicants have each paid a fine of Kshs. 1 million. However, the applicants argue that if the proceedings in the superior court are not stayed, they will be forced to participate in an irregular process which will expose them to paying hefty sums of money in damages.

5. The applicants are apprehensive that if the damages are assessed and paid, they will suffer irreparable loss. This is because the 1st respondent may not be able to refund the amount paid to him as damages if required to do so, and this would render the applicant's appeal nugatory. The applicants contend that the 1st respondent is a man of straw, as he was unable to repay his loan, hence the exercise of the 2nd respondent's statutory power of sale.

6. Counsel for the applicant has pointed out that the 1st respondent did not claim any damages in his suit, and therefore the court could not award him any damages without his claim having been amended. Further that under the law of contempt of court, there is no provision for award of damages. These are arguable issues which the applicants intend to raise in their appeal.

7. The application is opposed by the 1st respondent, who has filed a replying affidavit dated 31st January, 2012. The 1st respondent swears that the applicants blatantly disobeyed the court order of 27th October 2008, and caused the building which was on the suit property to be demolished at night. Counsel for the 1st respondent has submitted that the applicants have no arguable appeal as the 2nd, 3rd and 4th applicants have admitted that they were in contempt of the court order, claiming to have been misadvised by their advocate. Counsel argued that the applicants have never shown respect for the court orders, as they have persisted in their disobedience of the order by continuing in occupation of the suit property. Further, the

applicants have put up a building on the suit property which they have rented out to tenants and continue to collect rents contrary to the court order. Counsel sought to distinguish an application for contempt of court under the Judicature Act, with one under **Order 39** of the Civil Procedure Rules, arguing that the superior court rightly proceeded under **Order 39** of the **Civil Procedure Rules** which does not require the invocation of the provisions of the Judicature Act. Counsel urged the court to dismiss the application contending that an order of stay of proceedings would only delay the finalization of the suit.

8. In **Republic vs. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31**, this court restated the principles for applying **Rule 5(2) (b)** of the Court of Appeal Rules as follows:

“The law as regards the principles that guide the Court in such an application brought pursuant to Rule 5(2)(b) of the Rules are now well settled. The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the results or the success could be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb. (See this court’s decisions in the cases of Reliance Bank Ltd vs. Norlake investments Ltd [2002] IEA 227 and Githunguri vs. Jimba Credit Corporation Ltd & Others (No 2) [1988] KLR 838)”

9. We have considered this application with the above principles in mind. We note that the applicants have raised a pertinent issue as to whether the superior court was right in making orders concerning damages in an application for contempt of court, where the substantive suit does not include a claim for damages. The intended appeal cannot, therefore, be said to be frivolous.

10. As regards the issue whether the appeal would be rendered nugatory if an order of stay is not granted, the case of **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited [1999] 1 EA 236**, is instructive. In that case, this court held that in dealing with the issue whether or not success in the intended appeal will be rendered nugatory if stay is not granted, the court ought to weigh the claims of both sides. In **Silverstein vs. Chesoni [2002] 1 KLR, 867** this court reiterated that in deciding whether or not an appeal would be rendered nugatory, each case has to be decided on its own facts.

11. In this case, if this court does not issue the order of stay of execution and stay of proceedings, the order issued on 9th February 2010, will take effect. This means that in accordance with that order, the 1st respondent shall quantify the losses that he has suffered as a result of the applicants’ disobedience of the order of the court, for appropriate assessment of damages by the court. There is a danger that the court will proceed to assess damages and the applicants condemned to pay the same.

12. The applicants have raised an issue regarding the 1st respondent’s financial status. It is on record that the 1st applicant purported to exercise its statutory power of sale following the 1st respondent’s inability to meet his financial obligations under the charge. The applicants’ apprehension regarding the 1st respondent’s financial status is therefore not without justification.

13. Further, the peculiar circumstances of this case means, that if an order for stay of proceedings is not issued, the proceedings undertaken in regard to assessment of damages by the superior court will be an exercise in futility, and a total waste of judicial time if the appeal is later successful. We have taken note of the observation of this court in **Silverstein vs. Chesoni (Supra)** wherein the court considering a similar application stated:

“The appeal may be heard and if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless.”

14. We find the circumstances of the present case different, firstly because there is the possibility of the

appeal being rendered nugatory if successful as a result of the 1st respondent's financial status. Secondly, there is now in force **section 3B** of the Appellate Jurisdiction Act, which obligates this Court to further the overriding objective of that Act, which is, facilitating the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act by *inter alia* ensuring the efficient use of the available judicial and administrative resources. We believe that we would be failing in this obligation if we allow a process which may end up being a total waste of the scarce judicial time.

15. For the aforesaid reasons, we are satisfied that the application meets the conditions of **Rule 5(2) (b)** of the Court of Appeal Rules. Accordingly, we allow the application, only to the extent of issuing orders for stay of proceedings in **High Court Milimani Civil Suit No. 634 of 2008, Emanuel Waweru Mathai vs. Housing Finance Co. Limited and 4 Others**, as per prayer (ii) of the notice of motion, pending the hearing and determination of the applicants intended appeal.

Dated and delivered at NAIROBI on this 2nd day of March 2012.

R. S. C. OMOLO

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR