



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL APPLICATION 4 OF 2012

JOHN KAYELI OLAKA..... APPLICANT

AND

LAWRENCE M. OLAKA..... 1ST RESPONDENT

NATIONAL BANK OF KENYA LTD. 2ND RESPONDENT

GIRMANT AUCTIONEERS 3RD RESPONDENT

(Being an application for stay of execution and sale of the suit property from the judgment and decree of the High Court of Kenya at Kakamega (Tanui, J) dated 15th March, 2001

In

H.C. C. C. No. 604 of 1993)

RULING OF THE COURT

This is an application under **rule 5 (2) (b)** of the Court of Appeal Rules. The applicant is John Kayeli Olaka, with Lawrence M. Olaka (1st respondent), National Bank of Kenya Ltd. (2nd respondent), and Girmant Auctioneers (3rd respondent), as respondents.

The applicant intends to appeal against the decision of the High Court (Tanui, J), given on 15th March, 2001 at Kakamega. We do not have a copy of the notice of appeal on record but we presume one was filed. The jurisdiction of this Court under **rule 5 (2) (b)** of the Court's rules is invoked by the filing of a notice of appeal in the High Court. On the assumption that it was filed, we will proceed to consider the applicant's motion on the merits. We have adopted that course because the applicant is an old man and he was unrepresented.

The dispute giving rise to the application before us concerns several parcels of land one of which is plot No. Bukhayo/Mundika/3050. That property along with several others were given as security to secure a loan to Lawrence M. Olaka (the 1st respondent), by the 2nd respondent bank. There was default in repayment of due instalments. The 2nd respondent took steps to realize the security. It would appear that the 1st respondent by way of alleged fraud, caused the register of the land to be altered by changing the

name of the registered owner who was the applicant herein, to that of the 1st respondent. The applicant unsuccessfully moved the High Court for a declaration that the 1st respondent was holding the land in trust for him. His intended appeal is against that decision, given at Kakamega, in High Court Civil case No. 604 of 1993.

In a replying affidavit opposing the motion before us, the second and third respondents, have intimated that this application is *res judicata*. The applicant filed Civil Application No. 74 of 2003 before this Court, which application was heard by a different bench of this Court and on 7th April, 2003, the Court gave a ruling dismissing that application. The Court after hearing submissions made before it, came to the conclusion that the applicant did not raise any arguable point and in the end the Court dismissed that application.

This application replicates that application and in effect the applicant seeks similar orders. He wants the 2nd and 3rd respondents to abstain from selling the aforesaid property which the applicant contends is slated for auction any time now. The applicant informed us that the sale was due on the day this motion came up before us for hearing. The applicant passionately urged us to order a stay pending the hearing of his appeal. The appeal, to wit Civil Appeal No. 341 of 2001, has not been heard and he pleaded that he be allowed to prosecute it before the aforesaid property could be sold. He submitted before us that he does not have anywhere to move to if the land is sold.

It was common ground that the subject property is not in the name of the applicant. It is registered in the name of the 1st respondent who is a son of the applicant. The applicant's case is that the 1st respondent fraudulently caused the land to be registered in his name. The land was originally registered in the name of the applicant.

For an applicant to succeed in an application under *rule 5 (2) (b)* above, he must show, firstly that his appeal, or intended appeal is arguable, and secondly, and in addition, that unless he is granted an injunction or stay as the case might be, the success of that appeal or intended appeal shall be rendered nugatory. In view of this Court's decision in Civil Application No. 74 of 2003, we are not in a position to help the applicant. The applicant's plea that the 1st respondent was registered as trustee was rejected by the Court. The circumstances have not changed. That being the case, we hold that this application is *res judicata* (see *section 7* of the Civil Procedure Act, **Cap 21** Laws of Kenya).

Accordingly we dismiss the application dated 3rd January, 2012. We make no order as to costs.

Dated and Delivered at Kisumu this 26th day of April, 2012.

S.E.O. BOSIRE

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

H. M. OKWENGU

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR