



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

CORAM: GITHINJI, ONYANGO OTIENO & KOOME, J.J.A.

CIVIL APPLICATION NO. NAI 125 OF 2012 (UR 94/2012)

BETWEEN

CHARLES NDIRITU WANJOHI

JOSEPH MARO KARIUKI

STEPHEN WAWERU KIBERI

JOHN KIRIGU MWAURA

PATRICK MBUGUA MWAURA.....APPLICANTS

AND

LAWRENCE MAINA MWANGI

MILLING CORPORATION OF KENYA 2009 LTD.....RESPONDENTS

(An application seeking injunction in an intended appeal from the ruling & order of the High Court of Kenya

at Nakuru (Wendoh, J) dated 27th March, 2012

in

HCCC NO. 250 OF 2011)

RULING OF THE COURT

1. On various dates between January 2005 and March 2006, the applicants entered into different agreements for sale of plots of land with the 1st respondent. According to the terms of the agreement, the respondent was supposed to sub divide the plots and transfer them to the applicants. However, the applicants contend that the 1st respondent failed to observe the terms of the agreement and in the month of August 2011, the 1st respondent purported to sell the same plots to the 2nd respondent who moved to take possession of the plots that were originally to be sold to the applicants.

2. The 1st respondent also purported to refund the purchase price terming it as “*liquidated damages for breach of contract*”. The applicants filed a suit – **Nakuru HCCC No. 250 of 2011**, and also an application seeking temporary orders of injunction to restrain the respondents from transferring, selling or occupying **Plot Numbers 2, 3, 7, 10, 11, 14, 8, 9, 12 and 13** all comprising **Nakuru Municipality Block 8/44** pending the hearing and determination of the suit.

The application for injunction was heard by Wendoh, J and by a ruling delivered on 28th March, 2012; the applicant’s application was dismissed for failure to meet the “*threshold for granting an interlocutory injunction*”.

3. Being aggrieved by that order the applicants have filed the notice of motion under **Rule 5 (2) (b) of the Court of Appeal Rules**, principally seeking similar orders as follows:

“That there be an order of injunction restraining the respondents by themselves or agents or servants or employees from further acts of transfer of title, alienation, sale, leasing, engaging, mortgaging and/or in any other way howsoever dealing with plots identified as Nos. 2, 3, 7, 10, 11, 14, 8, 9, 12 and 13 comprised in Nakuru Municipality Block 8/44, the suit property in Nakuru HCCC No. 250 of 2011, Charles Nderitu Wanjohi & 4 Others v s Lawrence Maina Mwangi & Another, until the substantive hearing of the intended appeal.”

4. Mr Kimani Mburu, learned counsel for the applicants relied on the applicants’ supporting affidavit and the grounds stated on the body thereto. He argued that the intended appeal was arguable as demonstrated by the draft memorandum of appeal. The applicants had obtained interlocutory judgment against the respondents that had not been set aside. That is an indication that there would be an arguable appeal. Moreover, the two respondents were permitted by the learned judge to respond to the application despite the fact that they had not filed any replying affidavit or grounds of opposition and that unless the orders sought are granted, the intended appeal would be rendered nugatory as the applicants’ suit primarily sought for an order of specific performance. Although the title has been transferred to the 2nd respondent, Mr. Kimani was of the view that the court can still restrain the 2nd respondent from any further transfer of the suit plots.

5. On the part of the 1st respondent, Mr Karanja, learned counsel opposed the application. He relied on the documents exhibited by the applicants to show that transfer had been effected as the documents were lodged and the requisite stamp duty was paid by the time the applicants came to court. Immediately the order of injunction was discharged, the title was issued. Mr Karanja, also pointed out that the suit premises, the applicants were seeking orders against was a different plot from the one occupied by the 2nd respondent; that the applicants acknowledged through the photographs that they exhibited, that the 2nd respondent was in possession of the suit land.

6. We have considered this application against the established practice of this Court as articulated in a long line of authorities among them the case of; **ERICK MAKOKHA & 4 OTHERS VS LAWRENCE SAYANI & 2 OTHERS [1994] ECLR**, where this court in an application under **Rule 5 (2) (b)** stated:

*“An application for injunction under Rule 5 (2) (b) is an invocation of the equitable jurisdiction of the court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, “**equity, like nature, will do nothing in vain**”. On the basis of the maxim, courts have held again and again that it cannot satisfy itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the court will decline to grant it.”*

6. Mr Mwangi for the applicants supplied us with a copy of a certificate of official search dated 7th June, 2012. It confirms that title No. Nakuru Municipality Block 8/44 was transferred to the 2nd respondent on 4th October, 2011. He further urged the court to take into consideration the fact that failure to grant an order of injunction as prayed, the appeal which is arguable will be rendered

nugatory. Apparently, even as at the time the matter was before the High Court, the transfer of the suit plots had already been effected to the 2nd respondent.

7. The 2nd respondent was not a party to the sale agreement that the 1st respondent is accused of breaching. The learned trial judge brought out that aspect in her ruling when she made the following observations which were borne out of the sale agreements that the applicants relied on;

“In paragraph 8 of the agreement, it was agreed that in the event of breach the party in breach of the agreement would pay the other party 10% of the purchase price, as general damages. The applicants have told the court that the defendant has given them cheques as refund. The court has not been told whether the applicants ever took possession of the plots since 2006 because it seems the 2nd defendant found the place unoccupied and has taken possession. Because of clause 8 of the agreement, the plaintiffs have not demonstrated that they will suffer irreparably if an order of injunction is not granted.”

8. The transfer of the suit premises was effected and thus an order of injunction is overtaken by events because it cannot be issued in vain. Although we were urged to extend the order against the 2nd respondent, we are not inclined to make an order against the 2nd respondent who was not party to the agreements for sale that the 1st respondent is accused of contravening.

For the foregoing reasons, we find no merit in this application which we dismiss with costs to the 1st respondent.

Dated and delivered at Nakuru this 9th day of August, 2012.

E. M. GITHINJI

.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

M. K. KOOME

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR