



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, AGANYANYA & NYAMU, JJ.A.)

CIVIL APPLICATION NO. NAI 237 OF 2009 (UR 166/2009)

BETWEEN

CAPTAIN MOSES KARIUKI WACHIRA.....APPLICANT

AND

JOSEPH MURIITHI KANYITA.....1ST RESPONDENT

MONICA JAMES.....2ND RESPONDENT

JOHN MBURU.....3RD RESPONDENT

INVESTMENT & MORTGAGE BANK LIMITED.....4TH RESPONDENT

(Being an application for stay of execution and an injunction under paragraphs 5(2)(b) of the Court of Appeal Rules pending the hearing and determination of an appeal from the ruling and order of the High Court of Kenya at Nairobi, (Kimaru, J.) dated 24th July, 2009

in

H.C.C.C.NO.423 OF 2009)

RULING OF THE COURT

The application before us is grounded on **rule 5(2)(b)** of this Court’s rules and seeks the substantive order in these terms:

“That the execution of the ruling and order by the Nairobi High Court in Milimani HCCC 423 of 2009 dated 24th July 2009 be stayed and an injunction do issue pending the lodging, hearing and final determination of the intended appeal against the ruling and order of the honourable learned Mr Justice Kimaru dismissing with costs the applicant’s chamber summons application dated 30th May 2009.”

The background to the application is that the applicant claims to be the beneficial and true owner of the

property known as Land Reference Nairobi/Block/94/170 Nyari, having purchased the same from **Mikah Njeri Gitaru** and **Joseph Muriuki Gitau** being the legal administrators of the estate of the late **Samson Mwaura Gitau**. The applicant's beneficial interest is based on a sale agreement dated 21st September, 2004 which provided, inter-alia, that the purchase price would be 3.8 million Kenya shillings and a deposit of kshs.380,000 and that the vendor would if so requested by the purchaser transfer the property to the nominees nominated by the purchaser. The applicant claims that pursuant to the provisions of the sale agreement, he duly purchased the suit property by paying the entire purchase price from his own resources and at the same time directed that the suit property be transferred to the 2nd respondent **Monica James** as his nominee and that Monica was the mother of his 2 children. Sometime in March 2008 the plaintiff requested the 1st respondent to donate a general power of attorney to the applicant's advocate for the purposes of charging the property to obtain credit of kshs.5 million or to sell the land if need be. Thereafter the 2nd respondent did execute the general power of attorney as requested but plans on the suit property changed when the applicant decided to use his own resources to construct a house on the land. Thereafter the applicant received an offer to buy the property from a third party but the sale could not proceed because at that point the applicant's then advocates received a letter from a firm of advocates that the power of attorney had allegedly been revoked. The events which followed thereafter explain the involvement of the other respondents in the suit and in this application. The second respondent had allegedly donated a Power of Attorney to one **Michael Mwangi Ngugi** vide a Power of Attorney dated 5th March 2007. Michael Mwangi Ngugi on the strength of the said Power of Attorney had allegedly entered into a sale agreement dated 23rd March 2007 with the respondent **Joseph Muriithi Kanyita** for the sum of kshs.3.8 million. On his part the 1st respondent thereafter allegedly transferred the suit property to the 3rd respondent **John Mburu** vide a transfer dated 13th September, 2007. Prior to the transfer in favour of the 3rd respondent, the 2nd respondent had been granted by the 4th respondent a financial facility on the security of the suit property to the tune of kshs.8.8 million and the bank had in turn registered a charge in its favour over the suit property.

It is the applicant's case that the Power of Attorney and the transfer described above were fraudulently obtained and went on to draw the Court's attention that there were criminal cases pending in the relevant courts touching on the said Power of Attorney and the transfer. In this connection an advocate of the High Court of Kenya, **Mrs Kaguchia** who is said to have been instrumental in facilitating the alleged transfer had vide an affidavit filed in the Court on 9th December 2009 denied having been aware of the transfer and that the parties to the transaction were unknown to her.

In the application before us the applicant claims that unless an injunction order is granted the four respondents are likely to proceed with the transactions described to the detriment of the applicant. In particular there is a pending transfer in favour of the 3rd respondent and a charge in favour of the 4th respondent which are awaiting registration in the Lands Office and which could be registered thereby putting the suit premises beyond the reach of the applicant for good. In the superior court the applicant had sought an injunction to restrain all the four respondents but the superior court in a ruling given on 24th July 2009 by the learned Judge (Kimaru, J.) dismissed the applicant's injunction application hence the intended appeal. The application before this Court is based on the following grounds:-

1. ***“THAT the applicant intends to appeal against the whole of the decision of the superior court dismissing with costs his chamber summons application dated 30th May 2009.***
2. ***THAT the applicant has an arguable appeal with high probability of success for the reasons inter alia:-***
 - a) ***THAT the learned Judge erred in law and in fact by misdirecting himself as to the legality of the sale transaction over L.R.94/170, Nyari (herein referred to as the suit property) as between the 2nd respondent and the 1st respondent and in the further absence of any mention of the forgery of the Power of Attorney dated 5th March 2007, it is manifest that the (sic) failed to address his mind to the same.***

- b) **THAT the learned Judge erred in law and in fact by failing to appreciate the entire fraud involved in the alleged transaction between the 2nd respondent and the 1st respondent.**
- c) **THAT the learned Judge failed to appreciate that in failing to allow the application the court was sanctioning the perpetuation of a fraud.**
- d) **THAT the learned Judge erred in fact and in law, in making a finding that the suit property had been given as a gift to the 2nd respondent by the appellant.**
- e) **THAT the learned Judge failed to appreciate that 2nd respondent had at all times held the suit property in trust for the appellant.**
- f) **THAT the learned Judge further erred in fact by making a finding that there was no evidence on record to suggest that it was what the appellant's intention when he transferred the suit property to the 2nd respondent, that she holds the suit property in trust for him.**
- g) **THAT the learned Judge erred in law in ruling that the 1st respondent had the legal right and power to deal with the suit property in any manner she deemed fit.**

3. **THAT the applicant's appeal would be rendered nugatory if this application is not granted for the reasons inter alia that:-**

I. **The respondents would be at liberty to deal with the suit property to the applicant's detriment and the appeal would have been rendered nugatory and overtaken by events.**

II. **The 1st respondent who has entered into a sale agreement with the 3rd respondent will zealously seek to have the suit property transferred to the said 3rd respondent.**

III. **If the transfer to the 3rd respondent (which transfer has been lodged) is not restrained, the said documents risk being registered at any time to the applicant's prejudice.**

IV. **The 1st respondent had prior to, entering into a sale agreement with the 3rd respondent, charged the suit property in favour of the 4th respondent, who may in light of the circumstances and for fear of loss, proceed to exercise its statutory right of sale to the applicant's detriment unless restrained.**

V. **Without prejudice to the above, though the court erroneously found that damages would be adequate, yet there is reasonable apprehension that the respondents are unlikely to be capable of compensating the applicant.**

4. **THAT the balance of convenience clearly weighs in favour of the applicant owing to the substantial amount of money involved.**

5. **THAT it is only just and equitable that this application be granted."**

During the hearing of the application the applicant was represented by learned counsel **Mr Stephen K. Kibunja** whereas the first, second, third and fourth respondents were represented by learned counsel, **N.A. Havi, Henia** and **Martin Munyu** respectively.

Mr Kibunja, in his submissions stated that the transactions giving rise to the suit are tainted with forgery and fraud; that the superior court did give what appears to be final orders as regards the determination of the parties rights although the application before the court was interlocutory; that the draft memorandum of appeal disclose grounds of appeal which are not frivolous and that unless an injunction order is granted the first two respondents did not have the means to compensate him should the appeal succeed and that the intended registration of a further transfer and a charge in favour of the third and fourth respondents would prejudice the applicant's chances in the intended appeal by placing the suit property in the hands of third parties.

Mr Havi on his part submitted that the application was incompetent and that this Court did not have jurisdiction to stay a negative order which only dismissed the applicant's injunction application. In this connection learned counsel cited four previous decisions of this Court declining to grant any stay orders in similar circumstances. Finally, counsel submitted that the applicant did not have any arguable appeal in that there was no such trust registered pursuant to **section 39** of the Registered Land Act.

In his submissions **Mr Henia** adopted Mr Havi's submissions but was quick to add that the further transfer and the charge had not been registered but were lying in the Lands Office.

Mr Munyu submitted that the application was incompetent as argued by Mr Havi; that there was a valid sale agreement between the 1st respondent and the 3rd respondent and that in order to complete the sale the 3rd respondent had applied for kshs.10,000,000 facility from the 4th respondent and that the agreed purchase price had been paid to the 1st respondent in full and part of the purchase price (kshs.10 million) was advanced to the third respondent by the 4th respondent. He further submitted that no trust existed between the applicant and the 2nd respondent and therefore the intended appeal was not arguable and that the 4th respondent had a valid legal interest in the suit property by virtue of the charges created by the 1st and 3rd respondents in favour of the 4th respondent and that the said charges could not be impeached by an unproven trust; that the appeal could not possibly be rendered nugatory because firstly, the suit property having been offered as a loan facility it had an ascertainable commercial value supported by professional valuation report and secondly, in the circumstances, damages would be an adequate remedy.

We have considered the averments made by the parties in the affidavits, submissions by counsel together with the cases cited in the filed lists of authorities.

It is our view that the grounds set out in the draft memorandum of appeal are not frivolous. For the purpose of the application we consider that the ground concerning the alleged finality of the orders issued by the superior court in an interlocutory application does constitute an arguable ground.

Turning to the second requirement on whether the intended appeal could be rendered nugatory should we decline to grant the order sought, it is clear to us that since the means of the 1st and 2nd respondents have not been established and the transfer and the charge instrument in favour of the 3rd and 4th respondents have not been registered, there is still a possibility they could be registered any time. In the circumstances the order which commends itself is the preservation of the status quo pending the hearing of the appeal on merit. The reason for this is that failure to restrain further transactions might place the property beyond the applicant's reach for example, if a third purchaser for value were to formally come into the picture. In this regard, contrary to the respondents' counsel's contention that there was nothing to restrain by way of injunction, we note from the contents of the order sought that the applicant had sought both a stay of execution and an injunction. For the purpose of clarity we wish to reproduce the provisions of the relevant part of **rule 5 (2)** of this Court's rules, upon which this application is based. It reads:-

“subject to sub rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution but the Court may –

a)

b) In any civil proceedings where a notice of appeal has been lodged in accordance with rule 75 order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

It is therefore clear that we have the jurisdiction to grant an injunction which is the second remedy as per the rule.

We accordingly grant an injunction in terms of prayer one (1) of the application dated 3rd August 2009. Costs of the application to abide the outcome of the intended appeal.

It is so ordered.

DATED and delivered at Nairobi this 25th Day of March 2011.

E.M. GITHINJI

.....

JUDGE OF APPEAL

D.K.S. AGANYANYA

.....

JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR