REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, O'KUBASU & NYAMU JJ.A)

CIVIL APPLICATION NO. NAI. 245 OF 2010 (UR 175/2010)

BETWEEN

ACRES AND HOMES LTD.....APPLICANT

AND

INSURANCE COMPANY OF EAST AFRICA LTD.....RESPONDENT

(An application for injunction pending the hearing and determination of an intended appeal from the ruling and order of the

High Court of Kenya at Nairobi (Okwengu J.) dated 13th October 2010

in
H.C.C.C.NO. 22 OF 2010
****

RULING OF THE COURT

Before us is an application under **rule 5 (2)(b)** of the Court of Appeal Rules for an order of injunction brought by **Acres And Homes Limited,** the *applicant.* It has named **Insurance Company of East Africa Limited**, as the *respondent*. The application was filed following a refusal by the superior court to grant an injunction application by the applicant, in which the latter had sought an order restraining the respondent from advertising for sale, leasing, mortgaging or in any other manner dealing with property known as L.R. No. 7788/7 I.R. 12137 Rosslyn Green Estate, Nairobi pending the hearing and final determination of Nairobi **Civil Case No. EL.C. 22 of 2010.**

In the aforesaid suit the applicant had, among other things, prayed for specific performance of an agreement dated 31st day of October, 2008, in which the respondent had agreed to sell to and the applicant had agreed to purchase from it the aforesaid property at an agreed price of Kshs.175,000,000. The respondent had allegedly refused to continue with the sale and hence the suit. Filed with the suit was an application for injunction in which, as stated earlier, the applicant was seeking an order, in effect, to restrain the respondent from selling the property to a third party or parties.

The application for injunction was heard by Okwengu J. She did not think the applicant persuaded her that it had made out a ***prima facie*** case with the probability of success upon trial because, in her view, it was the applicant itself which was in breach of the sale agreement and not the respondent. She did not

also think that the balance of convenience favoured the grant of injunction.

The principles which guide the court in an application under rule **5(2)(b)** are now well settled. For an applicant to succeed he must show that his appeal or intended appeal is not only arguable, but also that unless he is granted an injunction or stay as the case may be, and he were eventually to be successful in that appeal, that success would be rendered nugatory (**see Reliance Bank Ltd (In liquidation) vs. Norlake Investments Ltd .** Civil App. No. Nai. 98 of 2002. Satisfying one condition without the other is not enough.

The agreement for sale of the aforesaid property was dated 31st December, 2008, and the completion date was mutually agreed to be *"Ninety (90) days from the date of execution of this Agreement or such other date as shall be agreed by the parties in writing."*

By clause H (a) of the agreement if the purchaser would be in default in the payment of the balance of the purchase price or any part thereof or default in the performance or observance of any obligation the vendor was entitled to serve upon it a notice requiring it to make good the default within twenty one days failing which the vendor would be entitled at its sole discretion to rescind the sale agreement.

After an exchange of several letters the parties mutually agreed that the execution date would be 19th February 2009. That date was later varied and the completion date was changed from 19th May 2009 to 19th August 2009. That date came and passed, and by its letter dated 18th September, 2009, addressed to the respondent's advocates on record the applicant's advocates requested for the execution of a supplementary agreement to vary the payment of the balance of the purchase price by specified instalments. A deed of variation and a supplementary agreement were drawn by the applicant's advocates on terms which the respondent apparently, initially accepted. On reading its letter dated 20th November, 2009, addressed to the applicants, it appears that it changed its mind and rejected the proposed variations in the sale agreement. As material the respondent's advocates penned as follows:"

"… Due to your client's failure to honour any of the proposed variations as encaptured in the deed our client have (sic) reverted to its letters of 2nd September 2009 in which it rescinded Sale Agreement dated 31st December, 2008.

In accordance with special condition H(a) as invoked in our letter of 2nd September 2009, the 21 days Notice period has lapsed, and your client has forfeited the 10% deposit paid herein."

The letter of 2nd September, 2009 referred to above was explicit. As material is stated thus:

"We further refer to special condition H(a) of the Sale Agreement and hereby give you Notice that if your client fails to rectify its default on completion within 21 days hereof our client will rescind this Agreement. Your client will consequently forfeit the 10% balance."

In the proposed variation the applicant was to pay to the respondent by certain proposed instalments the balance of the purchase price. Kshs. 60,000,000 was to be paid upon the execution of the supplementary agreement. Kshs.30,000,000 would be paid on or before 12th October 2009, and Kshs.67,500,000 on or before the 15th November, 2009. It is apparent that by 20th November, 2009, when the respondent changed its mind about entering into a supplementary and variation agreement, the applicant had not honoured some if not all the terms of the proposed variation. That would perhaps explain why the respondent changed its mind.

The applicant contends that the respondent having agreed to enter into the variation agreement the completion notice carried in the respondent's letter of 2nd September, 2009, aforesaid, was withdrawn by operation of the law and by the respondent's own conduct. It is however, apparent that apart from the 10% of the purchase price the applicant has to date not paid any other money to the respondent. It was hoping to get financial accommodation from a financial company, which as at the date of the suit had not been given. That notwithstanding the applicant through its director, Esther Njeri Gitau, deposed, in the affidavit in support of its application before the superior court and another in support of the motion before us, that it is and has all along been ready and willing to perform all its obligations under the Sale

Agreement.

Mr. Anzala for the applicant submitted before us that the applicant's intended appeal is arguable, contending that the question whether or not the original sale agreement had been varied is a matter the applicant intends to urge at the hearing of its intended appeal. Mr. Anzala was particularly relying on the respondent's advocates' letter dated 24th September 2009, in which those advocates as material, penned as under:

"Our client proposes that Kshs.37.5 million be released to them on the execution of the Supplementary Agreement. This amount will comprise Kshs.17.5 million plus accrued interest being the 10% deposit currently held, together with Kshs.20 million removed from Kshs.60 million paid by your client. Our client will refund the Kshs.l20 million less interest to your client should it fail to complete. However, the Kshs.17.5 million plus accrued interest will be forfeited by your client, the purchaser."

The balance of the monies as set out in your said letters can be held by the Advocates in a joint interest earning account pending completion.

Kindly confirm to enable us prepare the Supplementary Agreement."

The applicant accepted the terms contained in the above letter and by its advocates' letter dated 6th October, 2009, to the respondent's advocates proposed that the 2nd and 3rd payments be made on 30th October, 2009 and 30th November, 2009. No payment was however made as promised, and by its letter to its advocates dated 1st December, 2009, the applicant wanted more time to make payments stating that they had problems with their financing bank.

It was on the basis of the foregoing background that, as stated earlier, Okwengu J. held that she was not persuaded that the applicant had established a prima facie case with the probability of success upon trial. What is apparent is that the applicant was not able to complete within the mutually agreed time nor could it do so with the mutually extended completion period. That being our view of the matter we find no basis for holding that the applicant's intended appeal is arguable.

In the event it is immaterial that the success of the applicant's intended appeal may be rendered nugatory as the applicant has not met the threshold for the grant of an order of injunction under **rule 5(2)(b)** of the Rules of this Court.

In the result, the application dated 21st October, 2010 fails and it is accordingly dismissed with costs.

Dated and delivered at NAIROBI this 13TH day of APRIL 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR