



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OMOLO, ONYANGO OTIENO & VISRAM, JJ.A)**

**CIVIL APPLICATION NO. NAI. 24 OF 2011 (UR. 17/2011)**

**BETWEEN**

**DUNCAN**

**NDURACHA .....APPLICANT**

**AND**

**FUAD M. MOHAMMED .....1<sup>ST</sup>  
RESPONDENT**

**MARIAM MOHAMED.....2<sup>ND</sup>  
RESPONDENT**

**SENIOR RESIDENT MAGISTRATE’S COURT MOMBASA .....3<sup>RD</sup>  
RESPONDENT**

***(Being an application for stay of execution of the judgment and order of the High Court of Kenya at Mombasa (Ibrahim, J.)***

***dated 31<sup>st</sup> January, 2011***

**in**

**H.C. MISC. APP. 1 OF 2011)**

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**RULING OF THE COURT**

The history of the dispute giving rise to the application before us is long and we will not set it all out in this ruling. Suffice it to say that the first respondent in this notice of motion dated 7<sup>th</sup> February 2011 and filed on 10<sup>th</sup> February 2011, **Fuad Mohammed**, claims to have bought the suit property L.R. No. MN/1/3966 situate in Mainland Mombasa North in June 1997 from one David Bett Langat. The property had however been, prior to the agreement between the respondent and Bett, charged to National Bank of Kenya Limited by one Ezekiel Kiplelei Barngetuny. In the event, the ownership of the property could not be transferred to the first respondent immediately as the first respondent alleges that National Bank of Kenya Limited frustrated his effort to have loan cleared and to release the title documents to facilitate transfer of title to him. In the meantime, the first respondent took possession of the suit property. The

National Bank of Kenya advertised the property for sale by public auction to recover its money advanced to a third party. On 6<sup>th</sup> October 2003, the first respondent alleges that he obtained injunction orders stopping that public auction of the suit property. However, notwithstanding that, it would appear that National Bank of Kenya Limited sold the property to one James Kamore Njomo and Peter Kamore. The first respondent filed a suit in the High Court of Kenya at Mombasa – Civil Suit No. 243 of 2003 challenging that sale and seeking that it be declared illegal, unlawful, null and void. Injunctive orders were also sought in the accompanying injunction application. The injunctive orders were issued pending the hearing and determination of that suit. That order, the respondent says, is still in force. Later, vide HCCC No. 186 of 2005 at Mombasa, James Kamore Njomo filed suit against the first respondent seeking orders for the eviction of the first respondent from the suit property. That suit was consolidated with HCCC No. 243 of 2003 and are as yet not finalized in the superior court. Yet again, vide CMCC No. 2127 of 2010 at Mombasa Chief Magistrate’s Court, James Kamore Njomo filed a suit against the first respondent seeking eviction order. That suit was transferred to the High Court vide H.C. Misc. Application No. 447 of 2010 and was also consolidated with HCCC No. 243 of 2003. As the records show and as we have stated, that suit has not been heard and finalized. James Kamore Njomo then sold the property to the applicant Duncan Nduracha who alleges that James Kamore Njomo did not inform him and he did not know that there were disputes between Kamore and the respondent over the suit property. In short he alleges that he was a bona fide purchaser without notice. The record shows that transfer of the property to him was executed on 5<sup>th</sup> November 2010. Armed with documents of title, the applicant filed notice of motion in the Senior Resident Magistrate’s Court at Mombasa seeking eviction of one Mariam Mohamed, who we were told by the respondent, was not living in the suit premises, but who, the applicant insisted was the person in occupation of the suit premises. The issue as to the existence of Mariam Mohamed, will be ventilated later in another platform. For our part, what is important is that Senior Resident Magistrate (M.O. Kizito) granted the orders and the applicant proceeded to execute it. The first respondent and his family, being the ones who were the actual people in the suit premises at the relevant time, were evicted and the applicant took over the property.

The first respondent was not amused. He proceeded to the High Court by way of Chamber Summons dated 10<sup>th</sup> January 2011 for leave to be granted to him to apply for prerogative orders of certiorari, prohibition and mandamus pursuant to **Order 53 (1)** of the Civil Procedure Rules. Apparently, leave was granted and notice of motion dated the same day was heard by the superior court (M.K. Ibrahim) who, in a lengthy judgment dated and delivered on 31<sup>st</sup> January 2011, allowed the application in so far as it sought orders of certiorari but declined to grant mandamus and prohibition orders. The learned Judge went ahead and also considered whether or not to evict the applicant, in case he was in the suit premises and concluded:-

***“I therefore do hereby grant an order of eviction as against the 1<sup>st</sup> respondent from the suit premises L.R. No. MN/1/3966, compelling the 1<sup>st</sup> respondent, by himself, servants, agents, legal representatives, licencees, tenants or otherwise to forthwith vacate and move out of the suit property.***

***The order of eviction shall be issued forthwith and enforced immediately and with immediate effect ..... Upon the said enforcement, the applicant shall be reinstated into possession and occupation in the premises forthwith.”***

That notice of motion was filed against the first respondent, Mariam Mohamed and the Senior Resident Magistrate. That is the order that prompted this application before us. The applicant intends to appeal against it and has filed notice of appeal dated 31<sup>st</sup> January 2011. Before that appeal is filed, heard and finalized, he is by this notice of motion seeking three orders which are in a summary, an order to stay the execution of the order of the superior court we have partly reproduced hereinabove pending the hearing and determination of the intended appeal; in the alternative an order of injunction to restrain the first respondent from taking possession or being in occupation of the suit premises and lastly, further alternative prayer for what we may call mandatory injunction, for it seeks an order to evict the first respondent from the suit premises, in case the first respondent had complied with the superior court’s orders and had taken possession and occupation of the suit premises. The application is brought on grounds that the intended appeal is arguable, that is that it is not frivolous and secondly, that were the

intended appeal to succeed, that success would be rendered nugatory. Several grounds in support of the arguability of the intended appeal were spelt out in the application and were ably highlighted by the learned counsel for the applicant, Mr. Nyang'au. Two grounds suffice. These were that the judgment shows that the learned Judge discussed the matter with one of the parties in chambers without any indication as to whether the other parties were present and if so their input at that discussion. Secondly the learned Judge erred in failing to ensure that all the necessary parties and interested parties were before him before proceeding to conclude the hearing. As to the issue of whether the result of the intended appeal would be rendered nugatory were the appeal to succeed, Mr. Nyang'au's submission was that the applicant is losing the rent income from the suit premises which he assesses at Ksh.100,000/- per month.

The application is opposed and the respondent, represented by Mr. Kyalo filed a lengthy affidavit which was also ably highlighted by Mr. Kyalo and which maintains that the learned Judge acted properly in the circumstances of the case as he was faced with fraudulent transaction by the applicant, who had no right to the suit property and who fraudulently sought to sue and eventually evict a person who was not in occupation of the property but who was set up for purposes of evicting the first respondent from the suit premises. On the nugatory aspects, Mr. Kyalo stated that in the event that the applicant eventually succeeds in his intended appeal, the respondent will pay mesne profits lost by the applicant.

The law as regards the principles to be applied when considering an application brought under **rule 5 (2) (b)** is now settled. The court in deciding such an application exercises unfettered discretionary powers which cannot be exercised capriciously nor upon the whims of the court. The applicant has to demonstrate that the intended appeal or the appeal, where one has been filed, is arguable, that is that it is not frivolous. Secondly, he has to demonstrate also that were the appeal or the intended appeal, as the case may be, to succeed, such success would be rendered nugatory by our refusal to grant the application. See ***UAP Provisional Insurance Co. Ltd vs. Michael John Beckett, Civil Application No. NAI 204 of 2004*** and ***Githunguri vs. Jimba Credit Corporation Ltd (No.2) [1988] 838***. In this notice of motion, confining ourselves mainly to the matters that were before the superior court, the submissions, record and the judgment delivered by the same court, we are of the view that the intended appeal is not frivolous. It is arguable. In coming to that view we have considered matters such as that the learned Judge appears to have discussed matters before him with some parties without clear evidence as to whether this was in the presence of the other parties and the effect of that discussion. Of course, at this stage, we cannot go into the details of what could have happened as that is not our duty at this stage and as doing so may prejudice the full hearing of the appeal, but on the face of it we think that is an arguable point. Only one arguable point is required. We need to make it clear that an arguable point need not be a point that will succeed. It is a point that will require ventilation before the court whether it eventually succeeds or not.

The next aspect we need to consider is whether the eventual success of the intended appeal, were it to succeed, would be rendered nugatory. Mr. Nyang'au says the applicant will have lost rent at the rate of about Ksh.100,000/- per month and that will be a colossal loss. Mr. Kyalo says the respondent will be able to pay that in the form of mesne profits. We will consider that but first we need to revert to the prayers before us. The first prayer is for stay of the orders granted by the superior court. The order granted by that court was for eviction of the applicant from the suit premises and reinstatement of the first respondent into the premises. Both counsel inform us that those orders have been executed and the first respondent is now in constructive occupation of the premises. In that scenario, the prayer for stay of execution is overtaken by events and we cannot grant it. Equally second prayer for injunction also cannot be granted as what was to be injuncted has taken place already. As to prayer for eviction of the first respondent from the premises, that is an order that is the same as mandatory injunction. It can only be granted in very exceptional cases and in our view this is not one of them. That takes us back to the question as to whether our refusal to grant the orders sought altogether would render the success of the intended appeal, were it to succeed nugatory. We think, we need to do a balancing act. There is some sense in the argument that if no order is given by this Court to contain the situation, by the time the appeal is heard, and finalized, the applicant, who is currently out of the premises as a result of the order appealed from if he succeeds, will have lost considerably by way of mesne profits. In the circumstances, and considering the possibility of either party succeeding, we think the fairest order to make is to order the respondent to pay mesne profits which we assess at Ksh.60,000/- per month into an interest earning account in a reputable bank in the names of both advocates firms till the appeal is heard and finalized.

Subject to the first respondent paying Ksh.60,000/- as mesne profits into an interest earning account in a reputable bank in the names of the firms of both advocates for the parties, with effect from 1<sup>st</sup> day of June 2011, the first respondent will continue in occupation till the intended appeal is heard and determined. The costs of this application to be in the intended appeal.

*Dated and delivered at Nairobi this 6<sup>th</sup> day of May, 2011.*

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**