



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: O'KUBASU, WAKI & AGANYANYA, J.J.A.)**

**CIVIL APPLICATION NO. NAI 46 OF 2011**

**BETWEEN**

**1. ALTON HOMES LIMITED**

**2. JOHN KANGOGO.....APPLICANTS**

**AND**

**1. DAVIS NATHAN CHELOGOI**

**2. JOHN NDUATI NJUGUNA**

**3. SAMUEL KUGEKA NDEGWA.....RESPONDENTS**

***(Being an application for injunction pending the determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Okwengu, J. ) dated 25<sup>th</sup> February, 2011***

**in**

**H.C.C.Suit No. 193 of 2010)**

**\*\*\*\*\***

**RULING OF THE COURT**

This application is made under **rules 1(2) and 5(2)(b)** of the Court of Appeal Rules. It seeks the following prayers pending the lodging, hearing and determination of the intended appeal; namely:

***“(a) The 1<sup>st</sup> and 2<sup>nd</sup> respondents be restrained whether by themselves or by their agents, servants or otherwise howsoever from advertising, offering for sale, leasing, mortgaging, charging transferring (other than to the 1<sup>st</sup> applicant) or assigning and/or otherwise dealing with property Nairobi Block 26/113***

***(b) The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents be restrained whether by themselves or by their agents, servants or otherwise howsoever from entering upon property number Nairobi Block 26/113, levying distress upon attaching the 1<sup>st</sup> and 2<sup>nd</sup> applicants furniture and chattels evicting the 1<sup>st</sup> and 2<sup>nd</sup> applicants from and/or in a manner whatsoever, interfering with the 1<sup>st</sup> and 2<sup>nd</sup> applicants occupation of property Nairobi Block 26/113.***

***(c) The 2<sup>nd</sup> and 3<sup>rd</sup> respondents by themselves or their agents, servants or otherwise howsoever be restrained from advertising, offering for sale, leasing, mortgaging charging, transferring or assigning and/or otherwise dealing with the 1<sup>st</sup> and 2<sup>nd</sup> applicants furniture and chattels distressed (sic) from the premises on Nairobi Block 26/113.***

***(d) The 2<sup>nd</sup> and 3<sup>rd</sup> respondents by themselves or by their agents, servants or otherwise howsoever be directed by an order of mandatory injunction to return to the 1<sup>st</sup> and 2<sup>nd</sup> applicants and at the said 2<sup>nd</sup> and 3<sup>rd</sup> respondents costs, all the furniture and chattels distressed (sic) from the premises on property Nairobi Block 26/113.”***

There was also a prayer that the costs of the application to abide the result of the appeal.

The grounds on which the application is based are set out on the body thereof and also in the affidavit in support. The grounds are similar to those set out in the memorandum of appeal dated 28<sup>th</sup> February, 2011. The brief facts of the supporting affidavit were that on 27<sup>th</sup> February, 2007 the 1<sup>st</sup> applicant entered into an agreement, herein referred to as the first agreement, wherein the said 1<sup>st</sup> applicant was to purchase the property known as **Nairobi Block 26/113** from the 1<sup>st</sup> respondent at Kshs.7,500,000/=, and a deposit of Kshs3,200,000/= was paid to the 1<sup>st</sup> respondent on execution of the same; receipt whereof the said 1<sup>st</sup> respondent acknowledged. The balance of the purchase price was to be paid within 90 days from the date of execution of the 1<sup>st</sup> agreement and would be utilized by the said 1<sup>st</sup> respondent to settle the sums due to the Government of Kenya which had allocated the said property to the 1<sup>st</sup> respondent under tenant-purchase agreement on 27<sup>th</sup> February, 2007. Completion date was set for 27<sup>th</sup> May, 2007. The 1<sup>st</sup> applicant alleges that though he paid the balance of the purchase price as agreed and was given vacant possession of the property in May, 2007, the 1<sup>st</sup> respondent did not perform his part of the obligation by delivering to the former an executed instrument of transfer or complete the necessary consents and forms to facilitate the registration of the property in the name of the 1<sup>st</sup> applicant. This necessitated extension of time and the 1<sup>st</sup> agreement was varied by an addendum in writing dated 3<sup>rd</sup> May, 2009 between the 1<sup>st</sup> applicant and the 1<sup>st</sup> respondent. The terms of the addendum included an additional Kshs.2,000,000/= respectively to be paid by the 1<sup>st</sup> applicant in two equal instalments and a further Kshs.1,400,000/= to the Government of Kenya for and on behalf of the 1<sup>st</sup> respondent under the tenant purchase agreement. In spite of the 1<sup>st</sup> applicant complying with the terms of the addendum, the 1<sup>st</sup> respondent was still unable to comply with his part of the bargain; to wit, to process and ensure the registration of the transfer of the property in the name of the 1<sup>st</sup> applicant. Instead, a second agreement was entered into by the parties on 4<sup>th</sup> August, 2009 wherein the purchase price was increased by a further Kshs.5,000,000/= and terms of payment of the further amount were spelt out therein. Completion date was given another 90 days. Though the 1<sup>st</sup> applicant complied with his part of the bargain by paying the requisite amounts and issuing two post-dated cheques for Kshs.2,000,000/= the 1<sup>st</sup> respondent did not complete the sale transaction in time or at all and was guilty of the unreasonable delay and that the property was not transferred to the 1<sup>st</sup> applicant as required.

On 15<sup>th</sup> December, 2009 the 1<sup>st</sup> respondent, in further breach of the agreement of 4<sup>th</sup> August, 2009 demanded that the 1<sup>st</sup> applicant pays a further Kshs.13,958,355/= before 20<sup>th</sup> December, 2009 failing which the 1<sup>st</sup> respondent would terminate the sale transaction. And on 14<sup>th</sup> January, 2010 the 1<sup>st</sup> respondent sold and transferred the property to the 2<sup>nd</sup> respondent at a consideration of Kshs.12,000,000/=. But by then the 1<sup>st</sup> applicant had already taken possession of the same since May, 2007 and renovated and redeveloped it at a cost of Kshs.7,644,528/= apart from paying water and electricity bills on it.

On 17<sup>th</sup> April, 2010 the 2<sup>nd</sup> respondent sent his servants and/or agents (*3<sup>rd</sup> respondent*) to break and enter the 1<sup>st</sup> applicant's house and they seized and took possession of his furniture, goods and chattels and wrongly removed and converted the same to their own use and have threatened to auction the same;

though the 1<sup>st</sup> applicant is not a tenant of the 2<sup>nd</sup> respondent and does not owe him any money in form of rent, and/or that the said 2<sup>nd</sup> respondent had no authority to levy distress upon the said 1<sup>st</sup> applicant.

The respondents disputed the facts deposed to in the supporting affidavit. In particular the 1<sup>st</sup> respondent filed a replying affidavit to state that it was the 1<sup>st</sup> applicant who breached the terms of the 1<sup>st</sup> agreement and this led to the addendum and the 2<sup>nd</sup> agreement, both of which he too breached. This forced the 1<sup>st</sup> respondent, to sell the property to the 2<sup>nd</sup> respondent. In the meantime the 1<sup>st</sup> applicant remained in the property as a paying tenant.

The 2<sup>nd</sup> respondent also filed a replying affidavit and stated that he was the new registered proprietor of the property who had taken possession of it and he is not indebted to the 1<sup>st</sup> applicant for anything.

It appears in view of these differences, the applicants filed a suit in respect of this dispute and an application by Notice of Motion dated 27<sup>th</sup> April, 2010 in the superior court - (**H.C.C.C. No. 193 of 2010**) seeking injunctive orders which were granted on an ex parte basis the same date but apparently when the matter was heard inter-partes, the superior court (*Okwengu, J.*) dismissed it on 25<sup>th</sup> February, 2011 hence the intended appeal which is the subject of this application.

The considerations necessary for an application under **rule 5(2)(b)** are well settled, namely that there is an arguable appeal or intended appeal which is not frivolous. It is not necessary that the arguable appeal must succeed. Secondly it must be shown that if the application is not granted and the appeal or intended appeal succeeds, its result will be rendered nugatory.

In this application there are competing interests. The 1<sup>st</sup> applicant alleges he has paid a total sum of Kshs.11,000,000/= to the 1<sup>st</sup> respondent in exchange of property known as Nairobi Block 26/113. The 1<sup>st</sup> respondent does not deny having received some money from the 1<sup>st</sup> applicant but states that the 1<sup>st</sup> applicant breached the agreement by not paying the balance of the purchase price in the sum of Kshs.4.3 million within the stipulated time. The learned Judge appears to have considered the merits of the main case and made findings of fact at an interlocutory stage, thus prejudicing the applicant's application for injunction. Moreover, the basis of the addendum and the 2<sup>nd</sup> agreement between the parties is not clear from the record. These, in our view, are arguable points.

On the nugatory aspect the 1<sup>st</sup> respondent does not give an undertaking over the purchase price which the 1<sup>st</sup> applicant paid to him – which in any case is in excess of Kshs.6 million. In any case the ruling of the superior court does not give the basis of dismissing the applicant's application for injunction – or whether the learned Judge exercised her discretion properly in refusing to grant the injunction sought, in the circumstances of the case. In the result we grant prayers C and D of the application dated 28<sup>th</sup> February, 2011. Costs of the application shall be in the intended appeal.

***Dated and delivered at Nairobi this 15<sup>th</sup> day of July, 2011***

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**