



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: O’KUBASU, GITHINJI, ONYANGO OTIENO JJ.A)

CIVIL APPLICATION NO. NAI. 73 OF 2011(UR 49/2011)

BETWEEN

MBAABU MBUI

FRIDAH MUCHINA.....APPLICANTS

AND

LANGATA GARDENS LIMITED.....RESPONDENT

(An application for injunction pending the hearing and determination of an intended appeal from the Ruling and Order of High Court of Kenya at Nairobi(Aggrey Muchelule J) delivered on 17th March 2011)

in

HCC NO. 581 OF 2010)

RULING OF THE COURT

The applicants seek an order of injunction under Rule 5 (2) (b) of the Court of Appeal Rules to restrain the respondent from disposing of, selling or transferring apartment No. B4 on Block 5 on LR No. 18591/9 pending the determination of the intended appeal.

On 4th May 2010 the respondent who was constructing apartments in a housing estate agreed to sell one of them, the suit property, to applicants at a price of Shs. 5,500,000. By the agreement the respondent acknowledged receipt of Shs. 910,000 and it was agreed that the balance of Shs. 4,590,000 should be paid 14 days after the registration of lease in favour of the applicants. Special condition A provides:-

“Completion documents

As soon as is possible after signing the Agreement for sale, and upon receipt of the purchaser’s advocates professional undertaking for payment of the balance of purchase price, and provided the purchaser has made payments of the fees and costs as per the schedule in the special conditions Q here

below the purchaser shall receive the sub-lease for apartment for execution.....”

By special clause B(a) if the purchaser default in payment of purchase price on completion and further defaults to pay within 21 days of the completion notice, the purchaser shall forfeit 10% of the purchase price as liquidated damages.

By a letter dated 9th April 2010, the respondent’s advocates asked the applicants’ advocates to forward their professional undertaking for the balance of the purchase price and to pay Shs. 348,674 being the stipulated costs. The applicants’ advocates apparently failed to give the professional undertaking. By a letter dated 16th July 2010, the respondent’s advocates gave 21 days notice requiring the applicants financiers to issue a professional undertaking to pay the balance of the purchase price and in default the sale agreement should stand rescinded. The notice was not apparently complied with and by a letter dated 18th August 2010, the respondent’s advocates gave notice of rescission of the agreement and forfeiture of Shs. 550,000 out of the deposit.

The applicants subsequently filed a suit against the respondent alleging breach of contract and seeking a declaration that the purported rescission was unlawful, void and specific performance of the contract. The applicants also filed an application for interlocutory injunction pending appeal. The respondent filed a defence denying breach of the agreement and a replying affidavit opposing the application for injunction.

The superior court (Muchelule J) dismissed the application on 17th March 2011 making a preliminary finding that the applicants were in breach of the agreement.

The applicants filed a notice of appeal and subsequently the present application. The application is supported by the affidavit of Mbaabu Mbui the first applicant. The applicants have also filed a draft memorandum of appeal containing six proposed grounds of appeal.

The application is opposed on the grounds contained in the replying affidavit of Winfred Nyawira Maina – a director of the respondent who deposes *inter alia*, that the suit property has been sold to a third party who has already paid a deposit and obtained financing from Housing Finance Company of Kenya (HFCK).

The applicants are required to demonstrate mainly that the intended appeal is arguable and that unless an order of injunction is granted, the appeal if it ultimately succeeds would be rendered nugatory.

It is clear from the pleadings, affidavits and documents filed in the superior court that each party accused the other of breach of the contract. Similarly in this Court, applicants claim that the respondent is in breach while the respondent claims that the applicants are the ones in breach. The suit is therefore dependent on the construction of the agreement of sale of the suit property. The first applicant deposes that in a similar application in **HCCC No. 580 of 2010, Pyramid Motors Ltd –Vs- Langata Gardens Ltd** which was based on the same facts and in which the two applications were heard together, Muchelule J granted an order of injunction. The Ruling in that case also delivered on 17th September 2010 has been annexed.

It is clear that in that case the applicant therein contended among other things that the notice of rescission was void because the respondent was not in a position to complete the transaction. The superior court agreed with that position. The present applicants raised the same issue in their application but it was rejected.

It is true that an agreement of sale between the respondent and Cecilia Wachuka Gathika was executed on 18th October 2010 whereby the respondent agreed to sell the suit property to Cecilia Wachuka Gathika for Shs. 7,000,000/=. It is also true that in the agreement the respondent acknowledges receipt of Shs. 3,000,000/=. That agreement was however entered into when the present application, which was filed on 25th March 2011, was still pending for hearing.

In the final analysis we are satisfied that the intended appeal is arguable.

The value of the suit property has shot up rapidly by about Shs. 2,000,000/=. The applicants have already forfeited Shs. 550,000/= as liquidated damages allegedly for breach of agreement of sale. It is apparent that if an order of injunction is not granted, the applicants are likely to suffer substantial loss. Furthermore, it is just and equitable that the suit property should be preserved pending appeal.

However, the court should also consider the impact that an order of injunction until the determination of the appeal is likely to have on the respondent. Indeed, in furtherance of the overriding objective of litigation the Court should ensure, *inter alia*, proportionate resolution of the appeal (**see S. 3A(1) of the Appellate Jurisdiction Act**). If an order of injunction is granted until the determination of the appeal the suit property is likely to be vacant for a considerable period thereby resulting in substantial loss to the respondent. It is just that the order of injunction should be limited to such a period as will enable the applicants to prosecute the pending suit. If the applicants are interested in the speedy prosecution of the suit they can approach the superior court for facilitation orders.

In the result we allow the application to the extent that an order of injunction is granted as prayed in the application for a period of nine (9) months from the date hereof. Costs of the application shall be in the intended appeal.

Dated at Nairobi this 28th day of October 2011

E. O. O’KUBASU
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JUDGE OF APPEAL

E. M. GITHINJI
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JUDGE OF APPEAL

J. W. ONYANGO OTIENO
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JUDGE OF APPEAL