



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 351 OF 2009

1. WARDPA HOLDINGS LIMITED

2. PATRICK KANG’ETHE NJUGUNA

3. EDWARD KANG’ETHE NJUGUNA

4. GEORGE KANG’ETHE NJUGUNA.....APPLICANTS

AND

1. EMMANUEL WAWERU LIMA MATHAI

2. HOUSING FINANCE COMPANY OF KENYA LIMITEDRESPONDENTS

(Being an application for stay pending the determination of an intended appeal from the entire ruling and order of the High Court of Kenya at Milimani Commercial Courts Nairobi (Kimaru, J.) dated 11th December, 2009

in

H.C.C.Suit No. 634 of 2008)

RULING OF THE COURT

The application dated 14th December, 2009 has been brought under **rule 5(2)(b)** of this Court’s Rules. It seeks the following substantive orders:-

1. *The order made on 11th December, 2009 in High Court Milimani Civil Suit No. 634 of 2008, Emmanuel Waweru Lima Mathai –vs- Housing Finance Company of Kenya Limited and 4 others, convicting the 2nd, 3rd and 4th applicants of contempt of court and requiring their attendance in court on 21st January, 2010 to show cause why they should not be punished together with all consequential orders in respect of the conviction, be stayed pending the lodging, hearing and determination of the appellants’ intended appeal.*

2. *The proceedings in High Court Milimani Civil Suit No.634 of 2008, Emmanuel Waweru Lima Mathai –vs- Housing Finance Company of Kenya Limited and 4 others be stayed pending the lodging, hearing and determination of the applicants’ intended appeal.*

The material background facts are that, by a ruling made on 11th December, 2009 the superior court held that the 2nd, 3rd and 4th applicants were in contempt of the order made on 28th October, 2008 and further ordered that the four applicants appear before the Court on 21st January, 2010 to show of e why they should not be punished for contempt.

The order of 28th October, 2008 restrained the 1st, 2nd, 3rd, 4th and 5th defendants from the process of registration of the transfer, and/or any further dealings with L.R. 209/2489/22 Ngara, Nairobi which was the subject matter of the suit in the superior court until the hearing the suit inter-parties. It further restrained the defendants from forcefully removing the tenants, demolishing, damaging, leasing, renting, subletting, collecting rent or interfering in any way with L.R. 209/2489/22 Ngara and the tenants had been sold and staying therein pending inter-parties hearing. It was further ordered that pending the hearing of the suit the property should not be sold, transferred or dealt with by the defendants. The defendants were further restrained from effecting any sale or transfer by private treaty. The order had a penal notice endorsed on its body. Contrary to the contents of the order the property the subject matter of the suit and the application before the Court was on 3rd September, 2008 sold and transferred to the 2nd defendant by the 1st defendant in exercise of the 1st defendant's statutory power of sale.

When the matter came before us for hearing on 14th January, 2010 Mr. Havi, advocate appeared for the applicants and Mr. Otieno, advocate appeared for 1st respondent. The 2nd respondent was not represented because its presence had been dispensed with by the superior court.

Mr. Havi in his submission relied on the affidavit in support of the application sworn by the 2nd applicant on 14th December, 2009. He highlighted the following submissions:

1. ***That the order of 24th October, 2008 was never served and that the 2nd applicant did not destroy the property.***
2. ***That the 1st respondent was not in possession of the suit property when the applicant took possession.***
3. ***That exparte order had lapsed and was in any event illegal and void ab inito.***
4. ***That the 1st respondent's notice of motion, the statement and affidavit in support of the application for leave were never served on the applicants and the Attorney General and therefore the application before the superior court was incompetent***
5. ***That the court disregarded the authorities cited before it concerning the law of contempt.***
6. ***That the appeal would be rendered nugatory if stay of injunction were not granted because the 2nd, 3rd and 4th respondents have been convicted of contempt they are likely to be committed to civil jail thereby losing their liberty which could not be restored (sic) ever after the hearing of the intended appeal and further that as the disobeyed order was illegal ab initio the applicants would have suffered in vain. He concluded that the above grounds including those set out in the filed memorandum of appeal were arguable and that the loss of liberty were wholly to render the intended appeal nugatory.***

On his part Mr. Otieno relied on the replying affidavit and submitted that they had produced a return of service in respect of the challenged order but the court did not rely on it since the relevant court proceedings had disappeared from the Court file. In addition the applicant had failed to challenge the application for contempt by filing a reply and were apparently content to file only a written preliminary objection devoid of facts. Turning to the grounds of appeal as set out in the memorandum of appeal annexed to the application, the learned counsel contended that the grounds were frivolous and that any pending issues between the parties could be canvassed in the suit pending in the superior court. He contended that the appeal was not arguable. He concluded his submissions by stating that as the applicants had been summoned to show cause on 21st January, 2010 why they were not guilty of

contempt, the application before the Court was speculative and premature since they are seeking orders in this application in anticipation of the findings of the court before the hearing of the notice.. In the result, he went on, the second requirement for the grant of orders under **rule 5(2)(b)** had not been met since there was still no order threatening the applicants' liberty. He submitted that it was possible for the court to make different orders from that of committal upon the applicants showing cause. Concerning the cited list of authorities he submitted that the authorities did not deal with the law of contempt and were clearly distinguishable from subject matter herein.

We have considered rival submissions including the affidavits filed by the parties. Concerning the twin requirements under **rule 5(2)(b)** we have perused the memorandum of appeal and also considered the grounds as set out above and although we cannot at this stage pronounce on the merit of any ground we are of the view that the grounds as set out are not frivolous.

On the second requirement under **rule 5(2)(b)** it is the view of the Court that the applicants cannot presently demonstrate that they are likely to lose their liberty or that there is an immediate threat to lose their liberty as no order for their committal has been made yet, and the application had been set down on 21st January, 2010 for them to show cause why they were not guilty of contempt. This ruling should ideally have been delivered before that date but it was not possible as the application came for hearing only a week before that date. We have stayed the order requiring the applicants to appear before the superior court on 21st January 2010 until 5th February 2010 the day that this ruling is scheduled to be delivered. It is for example possible for superior court to make an order for the payment of a fine or lift the challenged order, when applicant appears next before it in which events the applicants' liberty would not be risk at all.

The upshot is that as regards the second requirement on whether the appeal if successful could be rendered nugatory, the application before us is premature and speculative.

In the result the application is dismissed with costs to abide the intended appeal.

It is so ordered.

Dated and delivered at Nairobi this 5th day of February 2010.

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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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