



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 9 OF 2010

ALICE KERUBO NYAMBATI APPLICANT

AND

OCHOKI

MOGAKA

DAVID OMWOYO

T/A

OMWOYO AUCTIONEERS RESPONDENTS

(An application for temporary injunction pending the hearing and determination of an intended appeal from the Order of the High Court of Kenya at Kisii (Muchelule, J.) dated 25th January, 2010

in

H. C. C. C. No. 263 of 2009)

RULING OF THE COURT

This is an application under **rule 5 (2) (b)** of the Court of Appeal Rules (“the Rules”) for an injunction to restrain the respondents from selling or disposing off the property known as Kisii Municipality/Block 111/141 (“the suit property”).

The facts giving rise to this application are as follows: Achoki Mogaka, the 1st respondent herein, is the decree holder in Kitale H. C. C. C. No. 49 of 1997 pursuant to a Judgment delivered on 29th October, 2002. The 1st respondent instructed the 2nd respondent to execute the decree against the applicant’s suit property located in Kisii. The applicant filed a suit in the superior court in Kisii, being H. C. C. No. 263 of 2009 to forestall the execution, and sought an interim injunction to restrain the disposition of the suit property. The superior court (Musinga, J) granted an ex-parte interim injunction on 7th December, 2009, and directed that the matter be heard inter-partes on 16th December, 2009. On that day, the court was unable to hear the application and adjourned the same to 25th January, 2010. When the matter came up for inter-partes hearing before Muchelule, J the applicant’s counsel, who had continued to enjoy ex-parte orders until then, applied for an adjournment on the ground that he was unwell, and needed

medication. The application for adjournment was strongly opposed by counsel representing the two respondents, one of whom had travelled from Kitale for the hearing. The superior court granted the adjournment but on an application by counsel for the 1st respondent, supported by counsel for the 2nd respondent, the superior court vacated the interim orders.

It is against that decision that the applicant intends to appeal, and in the meantime filed this application dated 28th January, 2010 seeking the following orders:

“2. THAT pending the hearing of this application interpartes the 2nd respondent be restrained from putting up for sale, selling and/or disposing off the property registered as Kisii Municipality/Block 111/141 through public auction or private treaty or at all.

3. THAT pending the hearing and determination of the intended appeal the 2nd respondent be restrained from putting up for sale, selling and/or disposing off the property registered as Kisii Municipality Block 111/141 through Public Auction or Private Treaty or at all.

4. THAT the costs of and incidental to this application do abide the outcome of the intended appeal.”

In his submissions before us, Mr. C. O. Minda, learned counsel for the applicant, argued that the superior court had acted without jurisdiction in purporting to vacate the interim orders; and that the intended appeal would be rendered nugatory unless the suit property was preserved pending the hearing and determination of the intended appeal.

Mr. J. O. Samba, learned counsel for the 1st respondent, submitted that the intended appeal was not arguable as the learned judge was within his jurisdiction under **section 3A** of the Civil Procedure Act to vacate the interim orders. In any event, the submitted, the intended execution against the suit property was in respect of a valid court decree, against which no appeal had been preferred.

Mr. J. M. Oguttu, learned counsel for the 2nd respondent also argued that the intended appeal was neither arguable nor would it be rendered nugatory if the orders sought were not granted.

The principles applicable to the determination of applications under **rule 5 (2) (b)** of the Rules are well settled, as was observed by this Court in **Civil Application No. Nai. 157 of 2006** in **Ishmael Kagunyi Thande vs Housing Finance of Kenya Ltd** (unreported) in these terms:

“The Jurisdiction of the Court under rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.” {See Githunguri vs Jimba Credit Corporation Ltd, No 2 (1988) KLR 838, J. K. Industries Ltd vs Kenya Commercial Bank Ltd (1982-88)}.”

We have considered the application, the affidavit in support thereof, the submissions of counsel and the authority cited to us. We would observe here that the execution sought before the superior court was in respect of a valid decree of the same court, against which no appeal had been preferred. The learned Judge clearly had the discretion to extend, or vacate the interim order that had been made ex-parte. At this time, it would not be appropriate for us to comment on whether the learned Judge exercised his discretion correctly. Suffice it to say, that on our part we are skeptical about the arguability of the applicant’s intended appeal. It is, of course, the applicant’s right to pursue the intended appeal and upon the appellate court to pronounce itself finally on that appeal.

Having found that the intended appeal is not arguable, we do not find it necessary to go into the second limb of the principles set out for determining this application, namely, that the appeal will be rendered nugatory in the event an injunction is not granted.

In the result, we dismiss the motion dated 28th January, 2010 with costs to the respondents.

Dated and delivered at Nairobi this 23rd day of April, 2010.

E. O. O’KUBASU

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR