



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 59 OF 2010

BETWEEN

DR. GEORGE GITAU WAINAINA .....APPLICANT

AND

1. KENYA COMMERCIAL BANK LTD

2. EPHRAIM WAMBU MIANO

3. A. M. MACHARIA.....RESPONDENTS

*(Application for stay of execution of the ruling and order of the High Court of Kenya at Machakos (Lenaola, J.) dated 5<sup>th</sup> February, 2010*

in

H.C.C.C. No. 113 of 2009)

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RULING OF COURT

This application made under **rule 5(2)(b)** of the Court of Appeal Rules and filed in Court on 25<sup>th</sup> March, 2010 seeks the following orders; namely:-

**1. THAT this Honourable Court be pleased to stay execution of the ruling and order of the High Court of Kenya (The Honourable Mr. Justice Isaac Lenaola) dated the 5<sup>th</sup> day of February 2010 at Machakos HCCC No. 113 of 2009) pending the hearing and determination of the applicant's intended appeal.**

**2. THAT this Honourable Court be pleased to issue a temporary injunction restraining the respondents by themselves, their servants and/or agents from selling, disposing, transferring advertising for sale and/or in any other way alienating land parcel number Kajiado/Kaputiei-North/4302.**

**3. THAT costs of and/or incidental to this application do abide the outcome of the intended appeal.**

The application is based on the grounds on the face thereof, namely:-

**“1. The applicant’s intended appeal is arguable and not frivolous as indicated and/or adduced from the memorandum of appeal.**

**2. The applicant’s intended appeal would be rendered nugatory if the stay of execution of the said ruling together with all consequential orders thereof is not granted.**

**3. The applicant’s intended appeal would also be rendered nugatory if a temporary injunction restraining the respondent either by themselves, their servants and or agents from selling, alienating, transferring, advertising for sale or in any other way alienating land parcel number Kajiado/Kaputiei-North/4302 pending the hearing and the determination of the intended appeal.**

**4. Substantial loss and hardship will be occasioned to the applicant if execution of the said ruling and all the consequential orders thereof are not stayed.**

**5. No undue prejudice will be occasioned to the respondents if stay of the said ruling and all consequential orders thereof is granted.**

**6. This application has been brought forthwith without undue delay.**

**7. The applicant is desirous of pursuing the appeal and has duly filed and served the Appeal.”**

The application is also supported by an affidavit deposed to by the applicant in which he refers to the ruling of the superior court (*Lenaola, J.*) delivered on 5<sup>th</sup> February, 2010. The applicant also refers to the notice of appeal filed in this Court and the draft memorandum of appeal which he says demonstrates an arguable appeal. The deponent states further that he stands to suffer irreparable loss if the orders sought in the application are not granted in view of the threat by the 1<sup>st</sup> respondent to exercise its statutory power of sale over land reference number *Kajiado/Kaputiei-North/4302* which the 2<sup>nd</sup> respondent had charged to the 1<sup>st</sup> respondent for a loan he obtained from the said 1<sup>st</sup> respondent. According to the deponent, in spite of an arrangement entered into between the 2<sup>nd</sup> respondent and himself to purchase the charged properties by private treaty and to offset the outstanding loan to the 1<sup>st</sup> respondent which he was made to believe stood at Kshs.1.4 million, the said 1<sup>st</sup> respondent refused to release registration documents for land L.R. *Kajiado/Kaputiei-North/4302* to the deponent alleging there was still an outstanding balance of Kshs3,100,000/=.

Arising out of this dispute, the applicant filed a suit against the respondents and prayed for various declarations and orders. At the same time he filed an application under **Order XXXIX Rules 1, 2, 3, and 9** of the Civil Procedure Rules and sought orders to restrain the respondents, their servants and/or agents from selling, advertising for sale, or disposing of by public auction or otherwise interfering with the applicant’s interest in title number *Kajiado/Kaputiei-North/4302* pending the hearing and determination of the suit. That was the application the subject of the ruling delivered by the learned Judge and dated on 5<sup>th</sup> February, 2010 wherein the same was dismissed. The applicant is aggrieved by the order of dismissal and intends to appeal against it as indicated in the application stated herein before.

The application was heard by this Court on 18<sup>th</sup> May, 2010 and **Mr. Muhoro**, learned counsel for the applicant and **Messrs Kemei, Wainaina & Macharia**, learned counsel for the respondents submitted on it. Mr. Muhoro raised concern over failure by the learned Judge to consider the contents of the applicant’s supplementary affidavit which would have enabled him to arrive at a different decision. According to him the 1<sup>st</sup> respondent had consented to the sale of the charged properties by private treaty for which the applicant paid the agreed purchase price in order to offset the loan indebtedness and that there was no reason why title documents for land L.R. No. *Kajiado/Kaputiei-North/4302* were not

released to him.

*Miss Kemei* for the 1<sup>st</sup> respondent submitted that the applicant had not met the conditions required to warrant an order of injunction being made in this application. In her view there is no arguable appeal because in the superior court the application for injunction was sought over a different plot, and in any case the 2<sup>nd</sup> respondent - loanee – had failed to repay the loan. She also stated that even if this application is refused and the appeal eventually succeeds the decision will not be rendered nugatory since damages would be an adequate remedy for the applicant.

*Mr. Wainaina* for the 2<sup>nd</sup> respondent submitted that since the agreement between the applicant and his client was subject to the land control board consent which was not obtained, the transaction was void; hence there was no arguable appeal against the said 2<sup>nd</sup> respondent. According to his submissions the conditions for the grant of a temporary injunction had not been satisfied in this application.

*Mr. Macharia* for the 3<sup>rd</sup> respondent did not wish to say anything on this application.

When counsel for the applicant submitted on the application, he abandoned the prayer for stay of execution. He must have realized that there are numerous decisions of this Court saying that when a suit or application is dismissed, there are no orders made by the Court which would call for enforcement, – see *Western College of Arts and Applied Sciences v Oranga & Others [1976] KLR 63* at page 66; see also *John Liboy v the Board of Governors St. John College - Civil Application No. Nai 138 of 2009 (UR 92/2009)*.

As regards the prayer for an injunction the applicant reveals that in his transaction with the 2<sup>nd</sup> respondent he paid Kshs.5 million which he was made to believe would cover the remaining balance of the loan with some money remaining for the said 2<sup>nd</sup> respondent. The submissions by counsel for the 2<sup>nd</sup> respondent do not specifically and sufficiently cover this area apart from saying the conditions for the grant of a temporary injunction have not been established. On the other hand the 1<sup>st</sup> respondent does not explain sufficiently why one of the properties charged for the loan was released to the applicant, to wit – *Kajiado/Kaputiei-North/4303* whilst the other, the subject of the intended appeal, *Kajiado/Kaputiei-North/4302*, was not. In view of the foregoing, we are convinced that the applicant has shown he has an arguable appeal. We are not saying such an arguable appeal is one which must succeed but that the intended appeal is not frivolous.

As to whether appeal will be rendered nugatory we are not satisfied that if this application for injunction is refused and the appeal eventually succeeds, the 2<sup>nd</sup> respondent in particular has adequate resources to avail to the applicant in the event of damages being ordered against him. In the circumstances the applicant has satisfied both limbs of the application to enable the Court to grant him an order for a temporary injunction.

We grant the order sought in prayer 2 of the application dated 22<sup>nd</sup> March, 2010 and direct that the status quo as at the time of the superior court order be maintained until the hearing and determination of the intended appeal, or until further orders of the Court. Costs of the application shall be in the intended appeal.

***Dated and delivered at Nairobi this 11<sup>th</sup> day of June, 2010.***

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**E. O. O’KUBASU**

.....

**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**