



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 356 OF 2009

BETWEEN

SAMSON OKUN ORINDA.....APPLICANT

AND

- 1. AYUB MUTHEE M'IGWETA.....1ST RESPONDENT**
- 2. FREDRICK MWITI M'IGWETA.....2ND RESPONDENT**
- 3. JAPHET MURITHI M' IGWETA.....3RD RESPONDENT**

(An application for stay of execution of the judgment of the High Court of Kenya at Meru (Lady Justice Kasango) dated 30th October 2009

in

H.C.C.C. NO. 72 OF 1995)

RULING OF THE COURT

This is an application under **rule 5 (2) (b)** of the Rules of this Court for a temporary injunction to restrain the respondents whether by themselves or agents and servants from selling or moving into or interfering with parcel **No NTIMA/IGOKI/4218** situate in Meru within the Republic of Kenya pending the hearing and determination of an intended appeal against the judgment and order of the Superior Court (Lady Justice Mary Kasango) delivered on 30th October 2009.

We were urged in arguments that the appeal has overwhelming chances of success which if successful will be rendered nugatory unless the respondents are restrained from interfering with the suit property. It is also submitted that it is in the interest of justice that the application be allowed since important points of law are raised in the intended appeal and that the applicant has made substantial development and improvements on the suit property.

Briefly stated the facts giving rise to this dispute are that the applicant, Samson Okun Orinda, entered into

an agreement with Ayub Muthee M'Igweta, Fredrick M'Igweta and Japheth Muriithi M'Igwita, respectively the 1st, 2nd and 3rd respondents in November 1990, for the purchase of the suit premises Ntima/Igoki/4218 measuring 0.6228 hectares for Kshs. 350,000/= which the respondents declined to transfer soon after the agreement was concluded. The applicant had beforehand moved into the suit property and effected substantial developments thereon. The applicant and his family resided in the suit property since 1995.

The applicant brought a suit against the respondents for orders that the respondents sign transfer forms to facilitate his registration and in the alternative he prayed that the respondents be ordered to refund the purchase price and the value of developments being and erected on the suit premises. However, though judgment of the learned Judge was partly in the applicant's favour in the sum of Kshs. 261,000/-, the applicant was also ordered to vacate the premises within 90 days of the judgment and without any award being made with regard to substantial developments the applicant undertook on the suit property and which he says amounts to Kshs. 1.5 million. The learned Judge rendered her judgment in respect of this aspect of the claim in these terms:-

“The plaintiff’s prayer therefore for orders of specific performance of the contract cannot be entertained because of frustration of the contract. The defendants even if they were ordered to would not be able to transfer the land that they contracted to sell to the plaintiff. The plaintiff did however make a prayer for refund of the money paid as an alternative prayer. That prayer can be entertained. The plaintiff’s prayer however for compensation for the development he has carried out cannot be entertained. This is because the plaintiff even by his own evidence entered the suit property without the consent of the defendants. The agreement between them provided that that he would obtain possession once the property was officially transferred to him. Having found that he occupied the suit property without the defendants’ authority, he cannot then have his claim for compensation entertained. He in any case did not prove before court the value of that development. It follows that he built the house without the defendants’ authority. The agreement they entered into did not allow him to construct a house. The plaintiff cannot be heard to seek compensation for what he did without the authority of the defendants.”

We think the learned Judge’s pronouncements in this respect must be viewed in the background of what the respondents are contending in their affidavit filed in opposition to the application for injunction. We do this in an effort to crystallize what would appear to us to be arguable points in the intended appeal. The respondents have in their replying affidavit deposed that:-

“14. That in the event that the Court is inclined to grant a stay, then it should be granted on the condition the portion where the applicant house is built, be excised from the main parcel and the respondents herein be allowed to take possession and occupation of the undeveloped portion. Also the respondents will not be required to pay the Kshs. 261,000/= as ordered by the court until the appeal is heard and finally determined.”

The respondents, on their part, seem in this affidavit, to be seeking variation of the contract the learned Judge said was frustrated. The respondents, unlike the learned Judge are ready to embrace the fact of the applicant’s development. At the same time they appear to yearn for the same stay or injunction in relation to the order against them to pay back the purchase price in the sum of Kshs. 261,000/=.

The applicant has, in a proposed memorandum of appeal contended that the learned Judge erred in holding that the contract was frustrated and erred in limiting her award to the sum of Kshs 261,000/- only and in refusing to make an award in respect of the extensive development he undertook on the suit premises. The learned Judge is also said to have erred in deciding the case against the weight of the evidence.

The respondents on their part oppose the application urging that there is no basis on which this Court may grant an injunction in that the applicant sought and was granted what he prayed for before the superior Court. What is more the applicant seeks to reap the fruits of a forceful takeover of the suit property after he failed to honour his part of the 1990 agreement for the sale of the suit property.

It is submitted that the applicant is appealing to the sympathy of the Court in waving about the so called extensive developments on the suit property. The application and the intended appeal, it is submitted, would not avail the applicant since he developed the premises fully knowing that he never acquired any title to it. It is also contended that the application does not disclose an arguable appeal which would be rendered nugatory if no injunction is granted.

However, the respondents appear to concede that in the event that the Court is disposed to granting the injunction sought, then the same ought to be confined to the portion where the applicant has built which portion should also be excised in order that the respondents are free to take possession of the balance of undeveloped part of the suit premises. In which event the respondents contend that they will not be required to pay the sum of Kshs. 261.000/= which they were ordered to pay the applicant.

This Court in the case of **Silverstein vs Chesoni [2002] 1 EA 296** held that:-

“An applicant seeking a stay under rule 5 (2) (b) of the Court’s Rules has to satisfy the Court that his intended appeal was arguable, that is, that the intended appeal was not frivolous, and that unless the order of stay were granted, the intended appeal if successful, would be rendered nugatory. Both requirements have to be proved before an injunction or order of stay could be obtained.”

We are of the view that the applicant in the instant application has demonstrated that the intended appeal is arguable and therefore not frivolous. In order that it may be appreciated what this entails, we advert to the treatment by the learned Judge of the claim for compensation for development which the applicant had undertaken on the suit property. This aspect, when viewed in the background of what the respondents urged in opposition shall alone constitute an arguable point which would be rendered nugatory if no injunction is granted to restrain the respondents from evicting the applicant from the suit property.

What is more, the respondents admit having not complied with the judgment which required them to refund the applicant the Kshs. 261,000/= being part of the purchase price of the suit property. We believe that, an eviction of the applicant from the property prior to payment to him, not only of that sum but without ventilation of the issue whether compensation is payable for his development, would put the property out of his reach and at risk of disposal by the respondents thereby rendering the applicant’s appeal nugatory.

We accordingly grant the applicant a temporary injunction to restrain the respondents or agents from selling or moving into or interfering with the interest comprised in the suit premises No NTIMA/IGOKI/4218 situated in Meru pending the hearing and determination of an intended appeal and we further order that the costs of this application be in the intended appeal.

Made and dated at Nairobi this 16th day of July 2010

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

M. OLE KEIWUA

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR