



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 20 & 11 OF 2010

1. MARY MUTORO SIRENGO

2. JOEL BOB SIRENGO APPLICANTS

AND

MARCELLUS LAZIMA CHEGE RESPONDENT

(Application for an order of injunction and/or stay of execution of the orders of the High Court of Kenya at Kitale (Ombija, J.) dated 2nd July, 2009 and all consequential order pending the hearing and determination of the Civil application No. Nai. 348 of 2009 at Court of Appeal Eldoret dated 12th November, 2009 and intended appeal to be lodged in the Court of Appeal

in

H.C.C.APP. NO. NAI. 348 OF 2009)

RULING OF THE COURT

This application is mainly brought under **Rules 1 (2) and 5 (2) (b)** of the Court of Appeal Rules for the main order that the respondents be restrained by an order of injunction from advertising for sale land parcel No. Trans- Nzoia/Sinyerere/301 (suit land) pending the hearing and determination of the intended appeal.

The application was filed on 11th February, 2010 under certificate of urgency certifying that unless the application was heard urgently, the respondent who had served a notification for sale of the suit land dated 29th January, 2010 would proceed with sale by public auction on 18th February, 2010. The application was supported by the affidavit of Mary Mutoro Sirengo the registered proprietor of the suit land deposing, among other things, that the intended public auction of the suit land was scheduled for 18th February, 2010.

The background to the application is briefly as follows.

On 16th July, 2004 the respondent instituted a suit *H.C.C.C. No. 777 of 2004* against the two applicants. The 1st applicant is the wife of the 2nd applicant. The respondent averred in the plaint, among

other things, that by an agreement dated 7th March, 2003 the 1st applicant agreed to sell 18 acres to the respondent to be excised from the suit land (which comprises of 22.5 acres); that the sale price was agreed at Shs.100,000/= per acre; that the 1st applicant acknowledged receipt of Shs.1,065,000/=; that the balance of the purchase price of Shs.735,000/= was to be paid on completion; that the 1st applicant subsequently breached the agreement by failing to sub-divide and transfer the land; that the respondent had suffered loss as a result of the breach. The relief claimed was Shs.1,783,800/= apparently comprising of Shs.1,065,000/= being part of purchase price acknowledged as paid and Shs.718,800/= as special damages and in addition the respondent sought an order for specific performance of the agreement of sale.

The applicants filed a joint defence denying the existence of an agreement of sale, breach of the alleged agreement and disputing liability for the alleged breach.

It seems that on 24th February, 2005 a consent judgment was entered for the 1st respondent against the applicants jointly and severally for the sum of Shs.1,700,000/= all inclusive and a decree to that effect issued on 8th April, 2005.

The applicants subsequently by an application dated 12th August, 2008 applied for an order setting aside the consent judgment, mainly on the ground that the applicants had not given their advocate, Walter Wanyonyi instructions to record a consent judgment and that their advocate colluded with the respondent's advocates. The application was however dismissed by the superior court (Ombija, J.) on 2nd July, 2009, whereupon the applicant lodged a notice of appeal within the prescribed time. This application was filed seven months after the dismissal of the application to set aside the consent judgment and although the application was brought under certificate of urgency, it was not so certified.

On 23rd September, 2010 Mr. Arum, learned counsel for the applicants prosecuted the application at the sitting of this Court in Eldoret. Thereafter, Mr. Ndambiri, learned counsel for the respondent who had not filed a replying affidavit submitted on points of law. He stated in the course of his submissions that the suit land had already been sold and that the respondent had already recovered the decretal sum. The Court thereupon adjourned the application for hearing in Nairobi and gave leave to the respondent to file a replying affidavit relating to the said sale. When the hearing of the application resumed in Nairobi on 14th October, 2010 Mr. Ndambiri referred to his replying affidavit and the annexed documents. Mr. Ndambiri deposes, among other things, that the suit property was sold by public auction on 18th February, 2010 outside Kitale General Post office; that a certificate of sale was issued by the Deputy Registrar Kitale to the purchaser Paul Andrew Okwaro on 26th March, 2010 and that Shs.1,809,935/= being part of the proceeds of sale has been released to the respondent in settlement of the decree. The 1st respondent has filed a further affidavit desposing, *inter alia*, that the purported sale is illegal, unprecedural and unlawful and that this Court has jurisdiction to nullify the alleged sale.

In the event, Mr. Arum on his part made an informal application for stay of registration of the transfer and leave to join the purchaser as a party to the application.

The replying affidavit of Mr. Ndambiri shows that the suit property was sold on 18th February, 2010. He has annexed a copy of the advertisement of the sale in the Daily Nation of 8th February, 2010, and a certificate of sale dated 4th March from an auctioneer confirming that the suit property was sold to Paul Andrew Okwaro for Shs.2,500,000/= through a public auction. Further a certificate of sale dated 26th March, 2010 issued by the Deputy Registrar of the High Court at Kitale certifies that the suit property was sold in satisfaction of the decree to Paul Andrew Okwaro at a public auction held on 18th February, 2010.

It is true that the applicants assert that the purported sale is illegal and unlawful. However, this is not the appropriate forum for resolving the dispute relating to the alleged sale of the suit land. The jurisdiction lies with the court of first instance and that is why it would be wrong to order the joinder of

the purchaser in this application. Furthermore, the application has been fully heard as between the parties to the application. If the joinder of the purchaser is ordered the effect would be to re-open the hearing of the application. That would not only be grossly unprocedural but it would also offend the overriding objective of civil litigation as stipulated in **Sections 3A** and **3B** of the Appellate Jurisdiction Act.

Although the appeal has now been filed – being *Civil Appeal No. 6 of 2010*, nevertheless, the application has been rendered futile as the suit property which the application sought to preserve has prima facie been sold to one Paul Andrew Okwaro and decretal sum paid to the respondent.

In the result, the application is dismissed with costs.

Dated and delivered at Nairobi this 19th day of November, 2010.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR