



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI  
CIVIL APPLI. 80 OF 2009 (UR 49/2009)

AMOS KINUTHIA ..... APPLICANT

AND

PLANFARM INVESTMENT COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT

PURMA HOLDINGS LIMITED ..... 2<sup>ND</sup> RESPONDENT

*(Application for injunction pending the lodging, hearing and determination of an*

*intended appeal from the Ruling and Order of the High Court of Kenya at*

*Milimani Commercial Courts (Kimaru, J.) dated 5<sup>th</sup> day of March, 2009*

*in*

*H.C.C.SUIT. NO. 610 OF 2008)*

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**RULING OF THE COURT**

This application is related to *Civil Application No. NAI.79 of 2009*. In the present application, the applicant, **AMOS KINUTHIA**, comes to this Court pursuant to **rule 5(2)(b)** of the Court of Appeal Rules seeking the following orders:-

***“1. THAT this Honourable Court be pleased to grant an injunction restraining the respondents and each of them whether by themselves, their appointed agents, servants and/or employees from transferring, leasing, disposing off, charging, alienating and/or otherwise whatsoever and howsoever dealing or interfering with ALL THAT PROPERTY known as L.R. Number 209/5135, South C, Nairobi from pending (sic) the lodging, hearing and determination of an intended appeal from the Ruling and Order of Honourable Justice L. Kimaru delivered in the High Court on the 5<sup>th</sup> March, 2009.***

***2. THAT this Honourable Court be pleased to grant a stay of further proceedings pending the lodging, hearing and determination of an intended appeal from the Ruling and Order of Honourable Justice L. Kimaru delivered in the High Court on the 5<sup>th</sup> March, 2009.***

**3. THAT costs of this application be provided.”**

The application is brought on the following grounds:-

- “1. THAT the applicant is aggrieved by the Ruling and Order of Honourable Justice L. Kimaru delivered in the High Court in the 5<sup>th</sup> day of March, 2009 in the superior court and intends to appeal against the said decision to the Court of Appeal.**
- 2. THAT the intended appeal raises arguable points of law and has high prospects of success.**
- 3. THAT unless this Honourable Court grants an injunction as prayed, the intended appeal, if successful, would be rendered nugatory.**
- 4. THAT it is in the interests of justice that this application be allowed as prayed.”**

This application has its origin in a plaint filed in the superior court on 21<sup>st</sup> October, 2008. In that plaint the applicant herein sued the two respondents seeking judgment against them jointly and severally for:-

**“(a) A permanent injunction restraining the Defendants and each of them whether by themselves, their appointed agents, servants and/or employees from transferring, leasing, disposing off, charging, alienating and/or otherwise whatsoever and howsoever interfering with ALL THAT PROPERTY known as L.R. Number 2/28, Nairobi.**

**(b) A declaration that the purported sale of ALL THAT PROPERTY known as L.R. Number 2/28, Nairobi on 9<sup>th</sup> September 2008 or such other date was and/or is illegal, null and void and of no effect in law and be set aside, cancelled and/or nullified.**

**(c) An inquiry as to the circumstances leading to the loss of the Title document in respect of ALL THAT PROPERTY known as L.R. Number 2/28, Nairobi.**

**(d) An order that the plaintiff is entitled to and be allowed to redeem ALL THAT PROPERTY known as L.R. Number 2/28, Nairobi upon delivery of the Title documents herein and the title document in L.R. Number 2/268 which properties secured the balance of liabilities to the 1<sup>st</sup> Defendant which debt has been agreed upon at K.shs.33,000,000.00.**

**(e) General Damages.**

**(f) Costs of this suit together with interest thereon at court rates from the date of judgment until payment in full.**

**(g) Such further or other orders as this Honourable Court may deem fit to grant.”**

On the same day the applicant filed his plaint, he took out a notice of motion pursuant to the provisions of **Order XI Rule 1, Order XXXIX Rules 1, 2, 2A and 3** of the Civil Procedure Rules, **Sections 3 and 63 (e)** of the Civil Procedure Act and **Sections 53 and 60** of the Transfer of Property Act seeking orders of injunction to restrain the defendants (*respondents herein*) by themselves or their agents from completing the sale in respect of the parcel of land known as L.R. No. 2/28 (*the correct reference was actually L.R. No. 2/268*) by lodging any completion documents, transferring, leasing, charging, alienating, registering any further interest over the suit property or otherwise interfering with the applicant’s ownership of the suit property pending the hearing and determination of the suit. The applicant further prayed for an order of the superior court compelling the 1<sup>st</sup> respondent or its agents to attend court to explain the circumstances under which the title in respect of the suit property was lost or misplaced. The applicant specifically sought an order to restrain the 2<sup>nd</sup> respondent from taking vacant possession, occupying, collecting, or demanding rent or other benefit whatsoever or from demolishing, evicting or otherwise interfering with the plaintiff’s right of peaceful occupation and possession of the suit property.

That is the application that was placed before the High Court of Kenya (Milimani Commercial and Tax Division) (Kimaru, J.) for determination. The parties, through their advocates, appeared before the learned Judge and it would appear that it was agreed by consent of the parties to file written submissions in support of their respective positions. The learned Judge considered both written and oral submissions and came to the conclusion that the application before him lacked merits and proceeded to dismiss the same. In concluding his ruling delivered on 5<sup>th</sup> March, 2009, the learned Judge said:-

***“In the present application, it is clear that the plaintiff cannot impeach or challenge the sale of the suit property to the 2<sup>nd</sup> defendant by relying on alleged irregularity in the manner which the sale was conducted. The 1<sup>st</sup> defendant issued the requisite statutory notice. It issued the redemption notice. It advertised the suit property for sale. The property was sold to the 2<sup>nd</sup> defendant in the said sale. The legal ownership of the property has passed to the 2<sup>nd</sup> defendant. The plaintiff no longer has any proprietary right over the suit property. Under Section 69B of the Transfer of Property Act, the only remedy available to the plaintiff, if he is aggrieved with the manner in which the suit property was sold, is to seek damages. The plaintiff cannot therefore be said to have a prima facie case capable of being upheld by this court.*”**

***It is therefore clear from the foregoing that the plaintiff’s application dated the 17<sup>th</sup> October, 2008 cannot be allowed. It is hereby dismissed with costs to the defendants.”***

Being aggrieved by the foregoing ruling, the applicant herein filed a notice of appeal on 13<sup>th</sup> March, 2009 followed by this application for injunction as set out at the commencement of this ruling. That is the application that came up for hearing before us on 30<sup>th</sup> April, 2009 when Mr. David Majanja appeared for the applicant, while Mr. P.M. Gachoka appeared for the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent was represented by Mr. M. Havi.

In a brief submission, Mr. Majanja stated that he wished to adopt the submission he had made in *Civil Application No. 79 of 2009*, he concluded by saying that this application was in respect of Kilimani property.

On his part Mr. Gachoka emulated his learned colleague by telling us that he too wished to adopt his submissions in *Civil Application No. 79 of 2009*, save the issue of the title. He further submitted that the property was different and that there was no question of a title but a conveyance in which case if the conveyance got lost a party had the right to apply for a copy of a certified search. Finally, Mr. Gachoka submitted that the applicant had no arguable appeal and that if there was to be any remedy, then that would be in damages, which the 1<sup>st</sup> respondent was capable of paying.

In opposing the application on behalf of his client, the 2<sup>nd</sup> respondent, Mr. Havi submitted that as the transfer had been effected in favour of the 2<sup>nd</sup> respondent and his client is already in occupation, there can be no arguable appeal. He associated himself with the submission of Mr. Gachoka to the effect that even if this application is dismissed the applicant’s intended appeal would not be rendered nugatory as damages would be an adequate remedy.

As regards stay of proceedings, Mr. Havi submitted that there were no grounds to warrant the granting of that prayer.

It is now well established that for an application under **Rule 5(2)(b)** of this Court’s Rules to succeed the applicant must satisfy the Court that:-

***(i) The appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal.***

***(ii) Unless the order of stay of execution is granted, the intended appeal or appeal, if it eventually succeeds, will be rendered nugatory.***

There is a long line of authorities repeating these twin principles right from **GITHUNGURI V. JIMBA CREDIT CORPORATION** (No. 2) [1988] KLR 838 to **BOB MORGAN SYSTEMS LTD. & ANOTHER V. JONES** [2004] 1 KAR 194, and subsequent decisions of this Court.

What are the arguable issues to be raised in the intended appeal? This may be deciphered from the supporting affidavit of **AMOS KINUTHIA** in which he alludes to the fact that there was clogging of the right of redemption and that there was no valid notice issued before the suit property was sold at the public auction. It will be the applicant's contention that these were sufficient reasons, to persuade us to grant this application.

As already stated at the commencement of this ruling, this application is related to *Civil Application No. 79 of 2009*. The learned Judge found that there was no dispute that the applicant as a director of limited liability Company known as **St. Anne's Limited** (the applicant in Civil Application No. 79 of 2009) guaranteed a loan that was advanced to that company. The applicant offered the suit property as security to guarantee a sum of K.Shs.18 million. It is common ground that the applicant defaulted in repaying the said sum together with agreed interest. Statutory notices were issued which culminated into the suit property being sold by public auction when the 2<sup>nd</sup> respondent was declared the purchaser at the fall of the hammer.

We have considered what was urged before the superior court and the submissions before this Court. While we are slow at this stage in declaring an intended appeal unmeritorious, we think that the facts which remain mainly unchallenged are that the applicant defaulted in his repayment of the loan and as a result the property which had secured the loan was sold by public auction. That being the case, we express serious doubt on the arguability of the intended appeal. But even assuming for a moment that the intended appeal is arguable would that appeal be rendered nugatory if we refused to grant a stay of execution? We do not think so. The dispute relates to a property which was put forth as security. This property can be easily valued. Indeed, in his plaint in the superior court the applicant sought among other reliefs, general damages as already indicated elsewhere in this ruling. The applicant's claim as earlier pointed out is capable of being compensated, by way of damages.

Just as we observed in a related application (***Civil Application No. 79 of 2009***) the applicant herein appears to have abandoned the prayer in respect of stay of proceedings. Only Mr. Havi made reference to this prayer, and, in his view, there were no grounds to warrant such prayer being granted by this Court. The applicant's counsel and the 1<sup>st</sup> respondent's counsel confined their submissions to the issue of stay of execution and totally ignored the fact that there was a prayer for a stay of further proceedings in the superior court. Just as we said in the earlier application we found no reason to order a stay of further proceedings in the superior court.

The upshot of the foregoing is that the notice of motion dated 24<sup>th</sup> March, 2009 is hereby dismissed with costs.

***Dated and delivered at NAIROBI this 12<sup>th</sup> day of June, 2009.***

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**