



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appli 141 of 2009 (UR 95/2009)

MWANIKI WA NDEGWA APPLICANT

AND

NATIONAL BANK OF KENYA LTD. 1ST RESPONDENT

MARY MBUKI MUGAMBI 2ND RESPONDENT

(Application for injunction and stay of execution of judgment/decree of the High Court of Kenya at Milimani Commercial Courts (Emukule, J) dated 4th April, 2008

In

H.C.C.C. No. 86 of 2000)

RULING OF THE COURT

On 21st May, 2009, Mwaniki Wa Ndegwa, the applicant herein, filed a notice of motion dated 14th May, 2009 asking for two basic orders, namely,

“1. -----

2. THAT pending the hearing and determination of Civil Appeal No. 124/08, the 1st Respondent be and is hereby restrained by itself or its agents from in any way (sic) advertising, realizing and/or in any manner disposing of the Appellant’s/Applicant’s property L.R. NO. 3734/198 – Lavington Nairobi being the Suit Property herein.

3. THAT there be a Stay of Execution of the Judgment and Decree of the High Court given on 04/04/08 in HCCC 86 of 2000 and all consequential Orders more specifically for recovery of costs by the 1st Respondent pending the hearing and determination of Civil Appeal No. 124/08

4. -----.”

That motion was brought against the National Bank of Kenya Limited, as the first respondent and Mary Mbuki Mugambi as the second respondent. At the time the motion was filed under a certificate of urgency, the first respondent had instructed M/s Spotlight Intercepts Kenya Ltd. to sell the applicant’s property known as L.R. 3734/98 by public auction and the sale was scheduled for 22nd May, 2009. The

matter first came up before the Court on 3rd June, 2009 when one member of the bench before which the hearing was listed disqualified himself. It also transpired on that date that the sale by public auction had actually taken place on 22nd May, 2009 and that the 1st respondent had in fact entered into a sale agreement with one Wamwa Trading Company Ltd. Another party Michael Thairu T/A Spur Hinterland Freight had attended the auction sale and was contending that he was the highest bidder at the auction and the property ought to have been sold to him. Michael Thairu, we were told, has filed another suit in the High Court challenging the validity of the sale agreement between the 1st respondent and Wamwa Trading Company Ltd.

Faced with this reality, the applicant, on 5th June, 2009 filed what is headed “AMENDED NOTICE OF MOTION under **Rules 5(2) (b)** and **42** Court of Appeal Rules.” The amendment he proposes to bring are the names of Wamwa Trading Company Ltd. and Michael Thairu T/A Spur Hinterland Freight as the 3rd and 4th respondents respectively.

Mr. K’Opere, learned counsel for the applicant, told us that these are parties who might be directly affected by any orders which the Court might eventually make either in the motion or in the pending appeal. Mr. Mburu, learned counsel for 1st respondent, appeared to think that an amendment cannot include joinder of parties and that in any case, as the proposed 4th respondent has filed suit in the superior court, his interests will be and can be taken care of in that suit. Mr. Gitonga, counsel for the 2nd respondent, agreed with Mr. Mburu while Mr. Owino, for the proposed 4th respondent, reluctantly agreed that the 4th respondent can be joined as a party to the motion.

For our part, we have no doubt that though the proposed 3rd and 4th respondents were not and could not have been parties to the proceedings in the superior court, because of what is alleged to have transpired on 22nd May, 2009, they have become

“ -----**persons directly affected by the appeal**”,

as provided in **rule 76 (1)** of the Court’s Rules. The motion asks the Court to restrain the 2nd respondent from disposing of the applicant’s property. If that order were to be granted, then it would mean that the 1st respondent would not be able to complete the sale agreement he has entered into with the proposed 3rd respondent. The proposed 3rd respondent would, therefore, be directly affected by such an order. Again the proposed 4th respondent is challenging the sale agreement between the 1st and 3rd respondents. We think the 4th respondent is also a party who ought to be heard before we make any orders.

That being our view of the matter, we allow the proposed amendments and order that the document headed “AMENDED NOTICE OF MOTION” lodged in the Court on 5th June, 2009 be deemed as having been properly lodged and served. If any of the respondents should wish to file any affidavits pursuant to those amendments, then such affidavits must be filed and served within seven days of the date hereof. The motion can thereafter be set down for hearing on priority basis as the same had been certified urgent. The costs occasioned by the amendments shall be in the motion. Those shall be our orders.

Dated and delivered at Nairobi this 12th day of June, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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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.