



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPLI. 79 OF 2009 (UR 48/2009)

ST. ANN'S LIMITED APPLICANT

AND

PLANFARM LIMITED 1ST RESPONDENT

HUSSEIN MOHAMMED 2ND 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 5th day of March, 2009

in

H.C.C.C. NO. 565 OF 2008)

RULING OF THE COURT

The applicant herein, **ST. ANN'S LIMITED**, took out a notice of motion under **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 5th 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 5th March, 2009.

3. THAT costs of this application be provided.”

The application which is supported by the affidavit of **AMOS KINUTHIA**, a director of the applicant was 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 on the 5th 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 fairness and justice that this application be allowed as prayed.”

The primary facts giving rise to this application are briefly as follows: The applicant charged the suit property to secure the sum of **K.Shs.27 million** which was due and owing to **PLANFARM INVESTMENT COMPANY LIMITED** (1st Defendant in the superior court). The instrument of charge is dated 1st September, 1999 and registered at the Lands Registry on 7th October, 1999. The directors of the applicant signed a certificate confirming that they understood the effect of **Sections 69(1) and 100A (1)** of the Transfer of Property Act. It would appear that there was no dispute that the applicant defaulted in repaying the sum owing together with the accrued interest. The 1st defendant made several attempts to realize the security charged to it, but was severally persuaded at the last moment by the applicant to postpone the sale of the suit property. For example, the 1st defendant attempted to realize the security in *October, 2003* but demurred when the applicant promised to settle the debt. Another attempt to sell the suit property was made in *January, 2007* and on that occasion, the applicant again was able to persuade the 1st defendant not to exercise its statutory power of sale. The same was the position in *March, 2008*. On this last instance, the applicant was able to persuade the 1st defendant from realizing the security when it made representation that Prime Bank was willing to advance to the applicant the sum of **K.Shs.33 million** to liquidate the debt. The applicant pegged its case on that offer by Prime Bank. But what was the nature of that offer? In a letter dated 19th March, 2008 written to the directors of the applicant by the Chief Manager – Credit of Prime Bank it was stated as follows:-

“We are pleased to inform you that we are agreeable “in principle” to sanction you a Loan facility of Kshs.33,000,000/= (Kenya Shillings Thirty Three Million Only) to be secured, inter alia, by first charge on L.R. No. 2/268 Kilimani, Nairobi registered in the name of Mr. Amos Kinuthia and L.R. No. 209/5135 Sungura Road, South ‘C’, registered in the name of St. Anne’s Limited.

Please note that this is a non-binding “in principle” letter. We will forward to you the Bank’s standard letter offer incorporating various terms and conditions upon completion of all the Bank’s formalities.”

It would appear that the applicant took no substantive action to pursue the loan from Prime Bank. It is as a result of the foregoing that the 1st defendant decided to exercise its statutory power of sale and upon the fall of the hammer in the public auction held on 9th September, 2008 the property to the suit passed to **HUSSEIN MOHAMMED**, (2nd defendant in the superior court). It was that sale of the suit by public auction that triggered the suit that the applicant filed in the superior court against the two defendants (**PLANFARM INVESTMENT COMPANY LIMITED** and **HUSSEIN MOHAMMED**). In that plaint, the applicant (*as the plaintiff*) raised various issues among them illegality, breach of duty of care, breach of contract and statutory obligations against the 1st defendant. The applicant therefore sought judgment against the defendants 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 209/5235, South C, Nairobi.**

(b) A declaration that the purported sale of **ALL THAT PROPERTY** known as L.R. Number 209/5135, South C, Nairobi on 9th 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 order that the plaintiff is entitled to and be allowed to redeem **ALL THAT PROPERTY** known as L.R. Number 209/5135, South C, 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 1st Defendant which debt has been agreed upon at **K.shs.33,000,000.00**.

(d) General Damages.

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

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

As is usual in disputes of this nature, the applicant did not wish to wait for the hearing of the suit and as a temporary measure, took out a notice of motion under “**Order XXXIX Rule 1, 2, 2A and 3** of the Civil Procedure Rules and **section 3, 63(e)** of the **Civil Procedure Rules** and **Section 53** of the **Transfer of Property Act** seeking an order of injunction to restrain the 1st defendant by itself or its agent from completing the sale of all that property known as **L.R. No. 209/5153** by way of lodging of any completion documents, transferring, leasing, charging, alienating, registering any further or any other interest over the suit property or in any way interfering with the applicant’s ownership of the suit property by paying or receiving any monies pursuant to any purported agreement for sale pending the hearing and determination of the suit. The applicant further sought orders to restrain the 2nd defendant by itself or its servants from taking possession of the suit property, occupying, collecting or otherwise demanding rent or other benefit of whatsoever nature or from evicting or otherwise interfering with the applicant’s right to peaceful possession of the suit property pending the hearing and determination of the suit. The applicant further sought an order of mandatory injunction to compel the 1st defendant whether by itself or its agents to deliver and deposit with the Deputy Registrar of the consent the title in respect of the suit property within such time as the court may direct.

That was the application that was placed before the superior court for determination. After taking into account the rival submissions, the learned Judge of the superior court (*Kimaru, J.*) came to the conclusion that the injunction orders sought lacked merits and were for dismissal. In concluding his ruling, the learned Judge said:-

“It is clear from the foregoing that the 1st defendant’s right to exercise its statutory power of sale had accrued at the time the suit property was sold to the 2nd defendant. Upon the fall of the hammer in the public auction held on 9th September, 2008, the plaintiff’s equity of redemption was extinguished. The plaintiff no longer had ownership of the suit property capable of being enforced by this court. It is apparent that in filing the present application, the plaintiff was seeking to enforce its alleged ownership of the suit property. Under Section 69B of the Transfer of Property Act, this court lacks jurisdiction to set aside a sale made pursuant to a mortgagee’s statutory power of sale where it is established that the conditions precedent were fulfilled prior to the said sale. Any irregularities in the conduct of the said sale cannot invalidate the sale. The only remedy available to an aggrieved mortgagor is to sue the mortgagee for damages.

Taking into consideration the facts of this case and the applicable law, it is clear that the plaintiff failed to establish a prima facie case. The plaintiff is no longer the legal owner of the suit property. The property in the suit property has passed to the 2nd defendant. The plaintiff’s claim, if at all, is capable of being compensated by an award of damages. The balance of convenience tilts in favour of the 2nd defendant who has already paid valuable consideration for the purchase of the suit property. The plaintiff’s application dated 25th September, 2008 therefore lacks merit and is hereby dismissed

with costs.”

Being aggrieved by the foregoing ruling the applicant filed a notice of appeal indicating its intention to challenge that ruling of the superior court. But before the appeal is heard and determined the applicant comes to this Court seeking the orders set out at the commencement of this ruling.

In urging us to allow the application before us, Mr. David Majanja, the learned counsel for the applicant submitted that the arguable point in the intended appeal would be that the loss of the title of the suit property in the hands of the 1st Respondent was a clog on the equity of redemption. Mr. Majanja further submitted that if injunction was not granted then the intended appeal would be rendered nugatory as the property would have been transferred to a third party.

In opposing the application Mr. Gachoka, the learned counsel for the 1st respondent, took issue with the names of the parties before this Court. He pointed out that while in the superior court the suit was between **St. Ann’s Limited** (as the plaintiff) and **Planfarm Investment Company Ltd.** (1st Defendant) and **Hussein Mohamed** (2nd Defendant) in this application, the 1st respondent is Planfarm Limited. It was Mr. Gachoka’s submission that, 1st Defendant in the superior court is different from 1st respondent in this application. In that case the 1st respondent herein was not a party in the superior court and no orders can be granted against it.

On the merits of the application, Mr. Gachoka was of the view that the intended appeal had no chances of success as the application relates to *L.R. NO. 209/5135* which was different from the property *L.R. 2/268*. He pointed out that the title to the property (South C property) was not lost. It was further submitted that proper notices were issued followed by a properly conducted auction. Mr. Gachoka emphasized the fact that the applicant filed the suit three weeks after the auction had taken place. Finally, Mr. Gachoka submitted that even if the appeal were to succeed it would not be rendered nugatory as damages would be adequate remedy.

On his part, Mr. Owino, the learned counsel for the 2nd respondent, associated himself with the submission of Mr. Gachoka to the effect that the parties before this court are not the same as those before the superior court. Mr. Owino then submitted that the applicant’s remedy was in damages as its right of redemption was extinguished upon the fall of the hammer at the auction.

We have set out in some detail the background to this dispute and the submissions by counsel appearing. As already stated, this application was brought under **rule 5(2) (b)** of this Court’s Rules. The jurisdiction exercisable by this Court under that rule is now settled. It is original and discretionary. For an applicant to succeed, he/it must satisfy the two guiding principles. First, that the intended appeal is arguable, that it is not frivolous and second, that unless a stay or injunction is not granted the appeal or intended appeal if it eventually succeeds, will be rendered nugatory – see **GITHUNGURI V. JIMBA CREDIT CORPORATION** (No. 2) [1988] KLR 838, **J.K. INDUSTRIES LTD. V. KENYA COMMERCIAL BANK LTD.** (1982-88) 1 KAR 1688 and **RELIANCE BANK LIMITED (IN LIQUIDATION) V. NORLAKE INVESTMENTS LIMITED** – *Civil App. No. Nai. 98 of 2002 (unreported)*.

As already stated elsewhere in this ruling, the applicant sued Planfarm Investment Company Ltd. (1st Defendant) and Hussein Mohamed (2nd Defendant) in the superior court seeking certain specific reliefs. In the present application Planfarm Limited is named as the 1st respondent. This Planfarm Limited is not a party in the superior court. It is a stranger to these proceedings. In that case any order would be an order against a wrong party. It is for this reason that we accept the submissions by Mr. Gachoka and Mr. Owino that this application should, on that ground alone, be dismissed. We would however consider the merits of the application as submitted by Mr. Majanja. In this application, it is common ground that the applicant defaulted in repaying the loan granted to it and that as a result notices were issued which culminated into the property being sold by public auction where the 2nd 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, in declaring an intended appeal

unmeritorious, we think that the facts which remain unchallenged are that the applicant defaulted in its 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 doubts on the arguability of the intended appeal. But even assuming that the intended appeal is arguable would that appeal be rendered nugatory? We do not think so. The dispute relates to a property which was put forth as security. This property can be valued very easily. Indeed, in its plaint in the superior court the applicant sought among other reliefs general damages. The applicant's claim as earlier pointed out is capable of being compensated by way of damages.

Before we conclude this ruling it is to be noted that the issue of stay of proceedings was not argued by the applicant nor referred to by the respondents. We take it that it was abandoned. But even if it had been taken up we see no good reason to order a stay of proceedings in the superior court.

Having come to that conclusion we need say no more than that the notice of motion dated 24th March, 2009 is hereby dismissed with costs.

Dated and delivered at NAIROBI this 12th 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