



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

Civil Appli 71 of 2008 (UR 38/2008)

MARU PILING & GEOTECHNICAL CONTRACTORS LTD...APPLICANT

AND

BENSON RITHO MURIITHI RESPONDENT

(Application for injunction pending the filing, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Ang'awa J.) dated 10th April 2008

in

H.C.C.C. NO. 51 OF 2007)

RULING OF THE COURT

By its motion dated 25th April 2008, Maru Piling and Geotechnical Contractors Ltd, applies for an injunction restraining Benson Ritho Muriithi, the respondent, either by himself or servants or agents from levying distress or in anyway interfering with its possession of a portion of L.R. No.7107/2 situate at Embakasi, Nairobi, pending the filing, hearing and determination of an intended appeal against the decision of the superior court (Ang'awa J.) made on 10th April 2008.

The aforesaid decision of the superior court was made in High Court **Civil Case No. 51 of 2007**. The applicant had sought an injunction to restrain the respondent from levying distress for rent for alleged rent arrears for a portion of the aforesaid property. The applicant allegedly purchased 3 acres of the suit property at a price of Kshs.300,000/= from one Joseph Maingi Muriithi, the registered proprietor thereof, but who has since died. The applicant made part payment of Kshs.150,000 and the balance was to be paid upon registration of the transfer of the property to him. The applicant's case is that the vendor was to obtain necessary consents to enable the transfer of title while the applicant would pay City Council rates and government land rents for the portion it had purchased. No rent was payable to the proprietor.

The respondent is the administrator of the estate of Joseph Maingi Muriithi. The applicant contends that the respondent has shown reluctance in effecting transfer of title of the suit property to him and instead has demanded rent from the applicant amounting to Kshs.760,000/= allegedly for the use of the property. The applicant denies its occupation of the property is as a tenant. The aforesaid suit was

provoked when the respondent instructed a firm of Auctioneers, Keysian Auctioneers, to levy distress against the applicant to recover the aforesaid amount of money. Its application therein for an interlocutory injunction was dismissed on 10th April, 2008. The applicant intends to appeal against that decision and has filed a notice of appeal. That notice of appeal was filed on 22nd April 2008, which was within the time stipulated under **rule 74** of the Court of Appeal Rules. It then follows that this Court has jurisdiction under **rule 5(2)(b)** of the aforesaid rules, to grant the orders sought, provided that the applicant is able to satisfy the two principles which guide the Court in applications under **rule 5(2)(b)**, above.

The two principles aforesaid are well settled. For an applicant to succeed he must show, firstly, that his appeal or intended appeal is arguable, or differently put, that it is not frivolous. The second principle is that the applicant must in addition show that unless he is granted an injunction or order of stay then the success of his intended appeal would be rendered nugatory.

(see **David Morton Silverstein v. Atsango Chesoni**, Civil Application No. Nai. 189 of 2001 – (unreported).

There is evidence before us that on 21st April 1986, Joseph Maingi Muriithi as vendor, agreed to sell 3 acres out of L.R. NO. 7107/2 at Kshs.300,000/=. Paragraph 5 of the sale agreement fixed the completion date as 31st July 1986. There is no indication in the agreement, what the nature of the property the subject matter of the litigation, is, whether agricultural or otherwise. The applicant was given possession, but the sale was not concluded by the completion date. The applicant contends that the sale has not been completed because the respondent is in default for failing to obtain all the necessary consents to facilitate the transfer of the property. The respondent on the other hand, contends that because the transaction was not concluded within the period stipulated in the sale agreement, the sale became void and unenforceable, hence the subsequent agreement dated 26th August 2006, for the payment of rent not only by the applicant but by other parties as well. Those parties are described in that agreement as:

“The tenants are occupants of the said premises in varying portions and each of them paying rent for the occupation and use of the said premises to the said administrator.”

The applicant is one of the parties which signed that agreement. The question which the superior court had to consider is whether in view of the above agreement the applicant was a purchaser or tenant. The superior court (Ang’awa J.) ruled that the applicant is a tenant. It is that decision which is the subject matter of the applicant’s intended appeal.

Before us the applicant’s case was that the agreement dated 26th August 2006, was only confined to payment of land rents and rates. The wording of clause (B) of that agreement does raise serious doubts as to the correctness of that construction. There is also the issue that the sale agreement had a completion date. What would happen if that date passed before the sale transaction was concluded?

Mr. Khaminwa for the respondent submitted before us that after the expiry of the completion period, the agreement lapsed and the applicant continued in occupation of the suit property as a tenant. Mr. Kaluma for the applicant, on the other hand, submitted that the applicant had not paid any rent, but only the land rent and rates pursuant to the agreement of 26th August 2006.

Considering the facts and circumstances of this case we are not satisfied that the applicant has satisfied the first condition for the grant of an order under **rule 5(2)(b)** of this Court’s Rules.

Even assuming the applicant’s intended appeal is arguable we are of the considered view, that the applicant has not satisfied the second condition. Its case is that unless it is granted the order sought the respondent will have the leeway to demand rent. Kshs.660,000 is being demanded and a distraint for rent to recover that sum will render the intended appeal nugatory. But all that the applicant will be required to do is to pay rent which if it were eventually to succeed in its intended appeal would be recoverable may

be with interest. We do not see how the payment will render the success of the intended appeal nugatory.

We also observe that the applicant filed its suit in the High Court in or about 2007. Not much has been done to prosecute the suit for over two years down the line. There is some element of laches in prosecuting the suit.

In the result the application dated 25th April 2008 fails, and accordingly, it is dismissed with costs to the respondent.

Dated and delivered this 5th day of June 2009

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR