



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

Civil Appli 124 of 2008

JOSEPH GITAU GACHAU 1ST APPLICANT
BEATRICE WANGECI GITAU 2ND APPLICANT

AND

PIONEER HOLDINGS (A) LIMITED 1ST RESPONDENT
PIONEER ASSURANCE CO. LTD. 2ND RESPONDENT
EVELYN WALEGHWA NG'ANG'A 3RD RESPONDENT
(Application for injunction pending the hearing and determination of Civil Appeal No. 67
of 2008 from the ruling and order of the High Court of Kenya
Nairobi (Ang'awa, J.) dated 9th May, 2007
in
Elc No. 1715 of 2007 (Formerly High Court Civil Suit No. 1402 of 2005)

RULING OF THE COURT

This is an application expressed to be brought under **Rule 5(2) (b)** of the Court of Appeal Rules for an order that:-

“Pending the hearing and determination of Nairobi Civil Appeal No. 67 of 2008 the Respondents whether by themselves, their agents and/or servants or otherwise howsoever be restrained by injunction from evicting the Applicants, taking possession, transferring, or in any other way interfering with the Applicants’ quiet possession of the premises known as L.R. No. 14970/49 Nairobi.”

The facts so far as relevant to the application before us may briefly be stated as follows. In or about the year 1996, the applicants, **Joseph Gitau Gachau** and **Beatrice Wangeci Gitahi**, husband and wife respectively, jointly purchased the suit property known as *Land Reference No. 14970/49, Evergreen Estate Off Kiambu Road, Nairobi*, (the suit property). The purchase was partly financed by a mortgage loan advanced by the 1st and 2nd respondents through a Housing Loan Scheme. It is common ground that the suit property was sold to the 3rd respondent, **Evelyn Waleghwa Ng’ang’a** at a public auction on *11th November, 2005*. It was the 1st and the 2nd respondents’ case that they had advanced the applicants a loan of *Shs.3,500,000/=* but they failed to service it by payments of monthly instalments as agreed under a Charge, prompting the said respondents to exercise their statutory power of sale.

However, the applicants contend that the 1st and the 2nd respondents in causing the property to be sold had failed to consider what they termed salient conditions that obtained when the loan was granted and particularly, the mode of repayment of the loan which had been agreed upon; and further, that the suit property was sold at a consideration far below its actual market value.

The applicants commenced suit by way of plaint dated *18th November, 2005*. In that suit, they sought permanent injunction; a declaration that the purported sale of the suit property was unlawful and fraudulent and was thereby *null and void*; and, an order that the 1st applicant’s commission through which, he was repaying the loan be reinstated. Together with that plaint, the applicants, also, filed chamber summons seeking temporary injunction and removal of the 3rd respondent from the suit property.

The application came up before the superior court (Ang’awa, J.) who after full hearing, dismissed it stating vide a ruling delivered on *9th May, 2007* as follows:

“ **FINDINGS**

11. There indeed has been a non disclosure of facts by the plaintiffs. There along (sic) has been a fall of the hammer which facts would be passed in the main suit.

12. In the case I do not think that injunction should issue. The plaintiffs’ remedy may be in damages which in effect part (sic) of the

main suit.

13. I hereby dismiss this application dated 18th November, 2005 on grounds of material non- disclosure. The plaintiff misled the court that he was being evicted from his house and would be rendered homeless where (sic) the house was only 45% complete.”

It is against that ruling that *Civil Appeal No. 67 of 2008* at Nairobi has been filed, and for now the applicants seeks an interim injunction.

In his submissions before us, Mr. Thuita, learned counsel for the applicants, argued essentially that the learned Judge erred in the exercise of her discretion by refusing to grant the injunction sought on the basis of the applicants’ non-disclosure of some material facts. Mr. Thuita also faulted the learned Judge for failing to appreciate that on the evidence before the court the applicants had established a prima facie case with a probability of success; and further, in failing to hold that the applicants would suffer irreparable harm for which damages would not be an adequate remedy, especially in that the suit property was a matrimonial home to which they were sentimentally attached. Thus, Mr. Thuita submitted that the appeal is arguable and that the same will be rendered nugatory unless we grant the order sought.

Both Mr. Savia and Mr. Kimani, learned Counsel for the 1st and 3rd respondents, respectively, have strenuously opposed the application on the ground that the appeal is frivolous.

On 4th April, 2008, a learned single Judge of this Court in an application for extension of time to lodge the appeal, held that the applicants’ intended appeal was arguable and not frivolous. On our part, after considering the rival submissions by the parties, the ruling of the learned Judge below together with pleadings we are satisfied that the appeal is indeed arguable. This, in essence, does not mean an appeal which must necessarily succeed, but of course, one which ought to be argued fully before the Court.

Having said that, it would not be appropriate to say more on that for doing so might cause embarrassment to the judges who will ultimately deal with the appeal itself. Suffice to say at this stage that we are prepared to assume that the appeal is arguable.

On the second point of whether the appeal will be rendered nugatory unless we grant the interim injunction sought, we are satisfied that the same will **not** be rendered nugatory. However, we recognize the argument put forward by the applicants that the suit property is a matrimonial home in which they occupy in their now sunset years. But we would like to point out that couples such as the one now before us must realise that when they charge their matrimonial property to secure a loan, they are in fact converting that property into a commodity for sale available for purchase by all and sundry, if they fail to pay the charge debts or the loans and that no sentimental value or attachment to the mortgaged property, however great, *per se*, would operate against the exercise of statutory power of sale by the mortgagee.

We are also of the view that damages would be an adequate remedy for the party that succeeds ultimately in the appeal. Having considered the interests of both the parties, we have come to the conclusion that the appeal herein, though arguable, will **not** be rendered nugatory should the order sought is not granted. In the circumstances, the twin aspects of the principle governing such an application as this having not been satisfied, the application must fail.

Accordingly, we dismiss this application with costs.

Dated and delivered at Nairobi this 3rd day of July, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR