



REPUBLIC OF KENYA
COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 95 OF 2009

JOHN MURITU KIGWEAPPLICANT

AND

EABS BANK LIMITED 1ST RESPONDENT

CANPAN INVESTMENT LIMITED2ND RESPONDENT

JUJA FORTY NINE LIMITED 3RD RESPONDENT

(An application for injunction from the ruling and orders of the High Court of Kenya

at Nairobi, Milimani Court (Kimaru, J.) dated 11th March, 2009

in

H.C.C.C. NO. 665 OF 2008)

RULING OF THE COURT

The dispute giving rise to this application which is expressed to be brought under **rule 5(2)** of the Rules of this Court arose, briefly, in this way. **John Muritu Kigwe**, the applicant herein, in or about August, 2002 offered his property **L.R. No. 10823/54** (hereinafter referred to as “the suit property”), measuring approximately 103 acres or thereabouts situate in Juja Township of Thika District as security for advances and other financial facilities to be made by the **EABS Bank Limited**, the 1st respondent herein, to **Kelly Petroleum Limited** and he did execute a charge in favour of the 1st respondent. It is common ground that soon thereafter a disagreement arose between the parties which disagreement resulted in the applicant filing several suits seeking a variety of orders.

By a plaint dated 11th November, 2008 the applicant averred that sometime in the latter part of 2007 he did come to learn that the 1st respondent had sold the suit property to the 2nd respondent **Canpan Investment Limited** in alleged exercise of its statutory power of sale which had not in fact arisen. The applicant maintained that he was not served with the requisite initial demand under the instrument of charge. Further, he maintained that the suit property was sold and transferred fraudulently and at an inordinate undervalue to the 3rd respondent and that this was done against the provisions of and without due compliance with the mandatory requirement of the Land Control Act. He therefore sought, *inter alia*, the following orders: -

- i) *A declaration that the purported sale of the suit property by the 1st respondent to the 2nd respondent and the subsequent assignment thereof in favour of the 3rd respondent are irregular, illegal, null and void, and of no effect, and the same be set-aside.*
- ii) *An order that the registration of the transfer by the 1st respondent to the 3rd respondent be set-aside, cancelled and reversed, and the requisite Land Register be amended and/or rectified accordingly.*
- iii) *A declaration that the purported Land Control Board consent obtained by the 1st and 3rd respondents is a nullity in law, and/or null and void for all purposes.*
- iv) *A permanent order of injunction restraining the respondents, whether acting jointly or severally, or through their successors, assignees, servants, or agents from interfering with the applicants' right, title and interest in the suit-property and his possession of the same; and/or restraining them from trespassing upon the suit property."*

It is the 1st respondent's case as pleaded in its defence to the suit that the applicant was guarantor and chargor for financial accommodation granted to Kelly Petroleum Ltd which subsequently defaulted on repayment as a result of which all requisite statutory and demand notices were issued to the 1st respondent. As the demand was ignored the suit property was sold to the 2nd respondent pursuant to the agreement dated, 2005.

Simultaneously with the lodging of the suit, the applicant filed a Chamber Summons under **Order 39 rules 1 and 3** of the Civil Procedure Rules, **section 3A** of the Civil Procedure Act and **sections 69** of the **Indian Transfer of Property Act (1882)** of India, among other statutes, seeking interim reliefs, mainly to restrain the respondents from interfering with the applicant's possession and occupation of the suit property and from transferring it to any other party pending the hearing and determination of the suit.

On 11th March, 2009 Kimaru, J dismissed the application for interim reliefs holding first, that the applicant had not established a prima facie case so as to entitle him to the reliefs he was seeking, second; that damages would be an adequate remedy for whatever alleged breaches of the law, and finally; that the balance of convenience tilted in favour of the 3rd respondent who is now the registered proprietor of the suit property.

Dr. Kuria learned counsel for the applicant has submitted before us in this motion that all the thirteen or so grounds of appeal contained in the draft memorandum of appeal which is annexed to the application are arguable. The main ground of the intended appeal is that the learned Judge erred in disregarding the applicant's contention that he was never served with either the demand contemplated by the charge in order to crystallise the debt, or the three month's Statutory Notice stipulated by **section 69** of the **Transfer of Property Act of India (1882)** as amended and applied to Kenya. However, Mr. Gichuki learned counsel for the 3rd respondent, contended that the intended appeal is not arguable at all. He averred that the 3rd respondent acquired the suit property legally and that there was nothing irregular in the transaction between the 1st and the 2nd respondents. He submitted that the Court should not restrain the mortgagee which was exercising its power of sale merely because the amount due was in dispute, or because the mortgagor has begun a redemption action or because he objects to the manner in which the sale was arranged. He referred us to the decision of this Court in **Joseph Okoth Waudi vs. National Bank of Kenya [2006] e KLR (Civil Appeal No. 77 of 2004)**.

For our part, after considering the issues raised by the applicant in the draft memorandum of appeal, we would think that they do not lack substance. Thus, we accept the applicant's submission that the intended appeal is indeed arguable. As to whether the intended appeal if it ultimately succeeds would be rendered nugatory unless the orders sought are granted, we would agree in that if the suit property is further alienated the intended appeal in its present character would be of no useful purpose to the applicant. We think, therefore, that the *status quo* as of today shall be observed by all the parties. In the circumstances we allow the application to the extent that we order that the 3rd respondent shall not transfer, sell, dispose

of the suit property or evict the applicant therefrom until the intended appeal is determined. These are the orders we make in this application. Costs herein shall be in the intended appeal.

Dated and delivered at Nairobi this 25th day of September, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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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