



COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION 213 OF 2009

PURBAI GOPAL RAMJI PATEL.....APPLICANT

AND

ASSET RECOVERY SERVICES LTD.....1ST RESPONDENT
JOSEPH MUNGAI GIKONYO T/A GARAM INVESTMENTS...2ND RESPONDENT

*(Application for an injunction from the Order and Ruling of the High Court of Kenya
at Nairobi, Milimani Commercial Courts (Kimaru, J) dated 1st July, 2009*

in

H. C. C. NO. 352 OF 2009)

RULING OF THE COURT

This is an application dated 15th July, 2009 brought under **rule 5 (2) (b)** of this Court's rules. It seeks an injunction against the ruling delivered on 1st July, 2009 by Kimaru, J in the Milimani High Court Civil Case No. 352 of 2009 pending the hearing and determination of the intended appeal.

The applicant relied on the grounds set out in the body of the application and a replying affidavit sworn on 13th July, 2009. In opposition the respondent has filed an affidavit sworn on 27th July, 2009 by Mr. Veena Jiwa, a director of the 1st respondent company.

During the hearing the learned counsel, Mr. Mugambi Imanyara represented the applicant and the respondent was represented by the learned counsel Mr. John Mbaluto.

The background facts are straight forward. The applicant (now deceased) is represented by his legal representative Mr. Purbai Gopal Patel. Part of the estate of the late Gopal Ramji Patel includes all that parcel of land known as L R 209/45/6 Nairobi which is charged to the City Finance Ltd. The charge on the property was registered on 31st March, 1998, and the registration was effected under the Registration of Titles Act Cap 281 of the Laws of Kenya. The deceased in his capacity as a guarantor, charged the property to secure certain advances to Kuza Farm and Allied Ltd, the principal debtor. By a deed of assignment dated 27th March, 2008, the chargee Messrs City Finance Ltd assigned book debts of the principal debtor to Asset Recovery Services Ltd the 1st respondent. Following the assignment the 1st respondent gave a statutory notice dated 18th December, 2008 to exercise the chargee's statutory power of sale on the charged property.

In order to restrain the exercise of power of sale the applicant filed suit in the superior court and sought a temporary injunction to restrain the 1st, 2nd, 3rd and 4th respondents, their agents, servants, nominees or surrogates from auctioning, selling by private treaty or in any other way interfere with the applicant's legal right and entitlement to the suit property pending determination and hearing of the suit. The applicant contended that the 1st respondent as assignee of an actionable claim could not exercise a chargee's statutory power of sale.

By a ruling dated 1st July, 2009 Kimaru, J dismissed the application for an injunction as described above. The applicant lodged a notice of appeal against the said ruling hence this application. It is the applicant's contention that his appeal might be rendered nugatory because firstly the 1st respondent has not shown that it has moneys equivalent to the value of the mortgaged property which is approximately Kshs.100 million and secondly because the chargee, Messrs City Finance is not a party to the suit and consequently the 1st respondent cannot rely on the presumed ability of the finance company either to reimburse the property value or repay damages arising from any wrongful sale.

The applicant's main contention is that an assignee of an actionable claim under a deed of assignment and in whose favour a charge has not been transferred by the registered chargee cannot exercise a chargee's statutory power of sale under section 69 of the Transfer of Property Act (TPA) because the charge which confers the power of sale is not vested in him by the deed of assignment whose only effect is to assign

actionable claim. This is the heart of the applicant's case as submitted by Mr. Mugambi Imanyara.

The 1st respondent put forward a brief submission, that by virtue of the assignment described above it is entitled to exercise chargee's statutory power of sale because the mortgagee's statutory power of sale may be exercised by any person who is for the time being entitled to receive and give a discharge of the mortgage as set out in section 69 D of the Transfer of Property Act. The learned counsel also submitted that the 1st respondent has deponed that should the intended appeal succeed it would be in a position to compensate the applicant in damages to the extent of the value of the property.

This being an application grounded on Rule 5 (2) (b) of this Court's Rules it is trite law that the applicant must firstly show that the intended appeal is not frivolous or in other words that he has an arguable appeal and secondly show that the appeal, if successful, would be rendered nugatory.

We have fully considered the rival arguments including the authorities cited by counsel. On the first requirement we think that whether or not an assignment can confer on an assignee, the chargee's statutory power of sale without the actual transfer of the charge pursuant to the provisions of the Registration of Titles Act is not a frivolous issue taking into account that the Court was informed that the charge was registered under the provisions of the Registration of Titles Act Cap 281 of the Laws of Kenya.

As regards the second requirement we are of the opinion that, the 1st respondent has not demonstrated in the affidavit in support of the application that it has sufficient means to repay Kshs.100 million being the estimated value of the suit property or any damages which might be awarded for any wrongful exercise of the power of sale by it and in addition the chargee M/s City Finance Ltd is not a party to the suit giving rise to the intended appeal. No notice of appeal was served on the chargee. We have also taken into account that the assignment between the City Finance Ltd and the 1st respondent does not provide for indemnity of the assignee in respect of the assignee's exercise of the power of sale. For the above reasons, we consider that the applicant's appeal might be rendered nugatory should the appeal ultimately succeed after the exercise of the power of sale by the 1st respondent.

In the result we grant an injunction in terms of prayer one (1) of the application dated 15th July, 2009. The costs of the motion shall be in the intended appeal. It is so ordered.

Dated at Nairobi this 18th day of December, 2009.

R. S. C. OMOLO

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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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