



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 189 OF 2007 (120/07 UR)

M.M.KAPPLICANT

AND

K.W..... RESPONDENT

(Application for injunction and stay of execution pending the hearing and determination of an appeal from a ruling and order of the High Court of Kenya at Nyeri (Kasango, J) dated 11th May, 2007

in

H.C. C. Suit No. 13A of 2007)

RULING OF THE COURT

The applicant and the respondent in this notice of motion dated 24th July 2007 and filed on 26th July 2007, Margaret Mumbi Kagiri and Kagiri Wamairwe respectively, were married in or about the year 1956. The undisputed parts of the applicant’s affidavit in support of the aforesaid motion show that in the year 1963 they together purchased property known as land parcel Number Nyeri/Noromoru/613 measuring 127.8 acres and the entire family settled on it. The land was registered in the name of the respondent. Later, that land parcel was subdivided into two namely land parcel Nos. Nyeri/Noromoru/612 measuring 60 acres and Nyeri/Noromoru/613 measuring 67.8 acres. The latter remained for the family. It is not clear what happened to the former parcel of land but it is apparent, it was disposed of. Further, land parcel number Nyeri/Naromoru/613 was also subdivided into Nyeri/Naromoru/626 measuring 30 acres which was disposed of and Nyeri/Naromoru/627 measuring 37.8 acres which was retained for the family. That subdivision took place in the year 1981. The applicant got concerned when an attempt was made to sell land parcel Nyeri/Naromoru/627 to a third party. She registered a caution against the parcel of land on 20th April 1983 to stop the attempted sale. In February 1999, the applicant discovered, on visiting the District Land Registry, that the caution had been lifted and the land parcel number Nyeri/Naromoru/627 had been subdivided into land parcel numbers Nyeri/Naromoru/1769, Nyeri/Naromoru/1770 and Nyeri/Naromoru/ 1771 and a charge had been registered in favour of Agricultural Finance Corporation despite the caution earlier on registered against the land parcel number Nyeri/Naromoru/627. The applicant was not amused. By a plaint dated 16th February 2001, filed in the superior court at Nyeri, she instituted Civil Case No. 33 of 2001, against the respondent, the District Land Registrar, Nyeri, the Attorney General and Agricultural Finance Corporation seeking among others, the cancellation of title numbers Nyeri/Naromoru/1769, Nyeri/Naromoru/1770 and Nyeri/Naromoru/ 1771 and reinstatement of the original title number

Nyeri/Naromoru/ 627 and the caution and –

“A declaration that the title number Nyeri/Naromoru/627 is the joint property of the plaintiff and the first defendant and an order that the title number Nyeri/Naromoru/627 be transferred in the joint names of the plaintiff and the first defendant and in the event of a refusal by the first defendant to execute transfer documents, the Deputy Registrar of this Honourable Court be authorised to do so.”

The respondent, by an application dated 20th April 2001, made under **Order 6 rule 13(1) and (d)**, applied for that plaint to be struck out on the main grounds that the applicant, being at that time a wife to the respondent had no claim against the respondent known to law as her rights as a wife were inchoate and were not legally enforceable and thus that plaint disclosed no cause of action. That application went before Juma J. (as he then was) who, after full hearing, struck out the plaint for not disclosing a cause of action. The applicant appealed to this Court vide Civil Appeal No. 181 of 2002. This Court, in a judgment delivered on 9th February 2007, agreed with the conclusions of Juma J. and dismissed that appeal.

In the intervening period, the applicant filed a petition for divorce against the respondent. On 16th March 2007, the applicant went back to the superior court; this time she filed an originating summons dated 16th March 2007 against the respondent only, seeking whether land parcel number Nyeri/Naromoru/1771 could be declared to be a family asset and/or property; whether Nyeri/Naromoru/1771 could be shared equally between herself and the respondent or whether it could be distributed between the two of them in the best way possible bearing in mind the circumstances of the case and whether the respondent could be restrained by way of injunction from alienating, transferring, encumbering and/or in any way disposing/dealing with the family assets and/or property namely Nyeri/Naromoru/1771 without leave or further orders of the court. That originating summons was brought under **section 17** of Married Women Property Act 1882 and **sections 27 and 28** of Matrimonial Causes Act Chapter 150 Laws of Kenya. The originating summons was supported by an affidavit and was accompanied by chamber summons dated 16th March 2007 under a certificate of urgency. That chamber summons sought one main order and that was an order for temporary injunction to restrain the respondent from alienating, transferring, encumbering and/or in any other way disposing of or dealing in the land parcel known as Nyeri/Naromoru/1771 without leave or further orders of the court until the suit is heard and determined. Her main reason in support of that application was that she contributed towards the purchase of the original parcel No. Nyeri/Naromoru/613 from which the subject parcel 1771 was excised later, and as the respondent had disposed of the rest of the land leaving only that piece, which she was apprehensive that the respondent may sell and dispose of, the respondent should be restrained from doing so as the entire land was a matrimonial property which should benefit both spouses. That application for injunction was placed before Kasango J. for hearing, but before substantial hearing could proceed, a preliminary objection was raised that:

“The suit is *res judicata* vide Nyeri H.C.C.C Number 33 of 2001 and Court of Appeal Civil Appeal Number 181 of 2002.”

As would be expected, that preliminary objection was heard first. After hearing it, the learned Judge of the superior court, in a lengthy ruling in which both plaint in H.C.C.C No. 33 of 2001 and Originating Summons were compared side by side, upheld the objection stating in conclusion as follows:

“The finding of the court therefore is that the plaintiff’s suit in its entirety is caught by the doctrine of *res judicata* and therefore cannot stand and the same is hereby dismissed with costs to the defendant.”

The applicant felt aggrieved by that ruling. She filed a notice of appeal and, we were told from the bar, that she has now filed Civil Appeal No. 28 of 2008 against that ruling in this Court. In the meantime, she has brought this notice of motion in which she is seeking two substantial orders as follows:

“2. That this Honourable Court be pleased to grant an injunction to restrain the respondent by himself, his servants, and or agents from alienating, transferring, encumbering and or in any other way disposing and or dealing with the parcel of land known as Nyeri/Naromoru/1771 pending hearing and final determination of the intended appeal herein arising from Nyeri H.C.C.C No. 13A of 2007.

3. That this Honourable Court be pleased to stay execution of the decree on costs arising from ruling delivered on 11th May 2007 in Nyeri H.C.C.C No. 13A of 2007 pending hearing and final determination of the intended appeal.”

The notice of motion is premised upon seven grounds and a supporting affidavit sworn by the applicant in which she states that her intended appeal has been filed, raises several arguable points, the main one of which is that the originating summons was not caught by the doctrine of *res judicata*. There is a draft memorandum of appeal annexed to the application which we believe has since been properly filed in the appeal already filed. In that draft memorandum of appeal, the applicant alleges that the learned Judge erred in holding that the originating summons was *res judicata* as the first suit commenced by plaintiff i.e. H.C.C.C No. 33 of 2001 had not been heard on merits, having been struck out on grounds that it did not disclose a cause of action and that the causes of action or alleged causes of action in both cases were different.

Before us, Mr. Kahiga, the learned counsel for the applicant, amplified what is in the supporting affidavit. The respondent who appeared in person and did not file any affidavit in response to the allegations of the applicant in her affidavit, told us that he agreed with the decision of Kasango J. that the originating summons was *res judicata*. He asked for costs and asked us to lift the injunction granted earlier on against dealings with land parcel Nyeri/Naromoro/1771.

The notice of motion is brought pursuant to **rule 5 (2) (b)** of the Court of Appeal Rules (the Rules). The principles that guide this Court in deciding such an application are now well settled. An applicant seeking order under that rule has to demonstrate first, that the appeal or intended appeal is arguable and secondly, that if the court refuses to grant the order of stay or injunction as the case may be, the results of the appeal or intended appeal, were it to succeed would be rendered nugatory - see the case of **Reliance Bank Ltd (in Liquidation) vs. Norlake Investments Ltd** – Civil Application No. Nai. 93 of 2002.

In the notice of motion before us, we note that H.C.C.C No. 33 of 2001 which was decided by Juma J. was commenced by way of a plaint during the subsistence of the marriage between the applicant and the respondent. It was on a claim of title to a piece of land that was registered in the sole name of the applicant's husband whereas the latter case, heard and struck out by Kasango J., was commenced by way of originating summons after the applicant had petitioned for divorce. It was a claim filed pursuant to **section 17** of the Married Women Property Act of 1882 and under Matrimonial Causes Act Cap 150 Laws of Kenya. In our view, the question as to whether the doctrine of *res judicata* would apply to the latter suit commenced by way of originating summons and which was decided by Kasango J. is an arguable point.

That being our view, the next point we need to consider is whether, if the appeal were to succeed, the results of such success would be rendered nugatory by our refusal to grant the order sought in this notice of motion. The history of the entire matter before us, a gist of which has been narrated above and most of which appears in the unchallenged affidavit of the applicant, is that the respondent has penchant for disposing of the subject property which was originally 127.9 acres in 1963, but has since been subdivided from time to time and disposed of by the respondent. The applicant has categorically stated in the affidavit at paragraph 31 as follows:

“31. That the respondent has been sending prospective purchasers to the land and there is real danger that it could be sold at any moment thereby rendering the proposed appeal nugatory.”

That allegation has not been denied and is borne out by the history of the land transactions that have taken place since the subject land was purchased in 1963. We feel certain that in the circumstances of

this case, the outcome of the appeal, if it succeeds, will be rendered nugatory and an order protecting and preserving the suit land is called for.

In the result, prayer 2 of this notice of motion succeeds. The respondent, **Kagiri Wamairwe**, is hereby restrained by himself, his servants and or agents from alienating, transferring, encumbering and/or in any way disposing of and dealing with the land parcel Nyeri/Naromoru /1771 till Court of Appeal Civil Appeal No. 28 of 2008 is heard and determined. The costs of the application shall be in the appeal.

On prayer 3 of the notice of motion, we note that the parties in H.C.C.C No. 13A of 2007 were husband and wife. They still remain so as we were not told that the divorce petition has been finalised. In those circumstances, and in view of our decision above on prayer 2 of this notice of motion, we order that the execution of the decree of the superior court from the decision delivered on 11th May 2007 in H.C.C.C No. 13A of 2007 shall be and is hereby stayed till the appeal is heard and determined. The order made above on costs shall apply to prayer 2 as well.

Dated and delivered at Nyeri this 10th day of June, 2008.

S.E.O BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR