



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 52 OF 2008

CHARLES NZAU NDETO THE ADMINISTRATOR OF

THE ESTATE OF THE LATE REUBEN MUTUA APPLICANT

AND

EURO BANK LIMITED (IN LIQUIDATION) RESPONDENT

(Application for an injunction pending the hearing and determination of an intended appeal from a ruling and order of the High Court of Kenya at Milimani Commercial Courts (Azangalala, J) dated 23rd November, 2007

in

H.C.C.C No. 508 of 2007)

RULING OF THE COURT

The genesis of this notice of motion before us dated 31st March 2008 and filed in the Court on 3rd April 2008 is traced from the affidavit in support of the application, and from the record as read together with the replying affidavit filed by the respondent on 6th May 2008. Briefly, these are that the late Reuben Mutua who passed on on 17th July 2000, and whose estate is being administered by **Charles Nzau Ndeto**, the applicant herein, was together with one Mary Syombua Ndeto, the registered owners of property registered as L.R No. NAIROBI BLOCK 209/10482/75 (subject property) situated in Nairobi in the Republic of Kenya. By a legal charge dated 20th May 1998, they offered the subject property as security for an overdraft facility in the sum of Ksh.3.4 million which was advanced to Matex Commercial Supplies Limited by the respondent, **Euro Bank Ltd.**, which was later placed under liquidation. The instruments for the same were dully executed by the late Reuben Mutua and Mary Syombua Ndeto. There are indications in the documents before us that that financial accommodation was to last for a period of one month but that is no longer important as will be observed hereafter. Reuben Mutua died before that overdraft facility was allegedly made good although the applicant denies this. The respondent moved to sell the property after Mutua's demise as it alleged that the debt remained unpaid. It served Mary Syombua Ndeto with a mandatory ninety days notice of sale. This was before the applicant in this notice of motion obtained letters of administration. Matex Commercial Supplies Limited and Mary Syombua Ndeto moved to court by way of a plaint dated 28th February 2006 and filed on 1st March 2006. The respondent stated in his replying affidavit, and it was not controverted, that together with that plaint, Matex Commercial Supplies Limited and Mary S. Ndeto also filed chamber summons in which

they sought injunction orders. That application was dismissed by Warsame J. on 15th March 2007. Six months later, on 18th September 2007, the applicant herein, obtained letters of administration *ad litem*. On 28th September 2007, he filed a plaint in the superior court against the respondent bank in liquidation, in his capacity as the administrator of the estate of Reuben Mutua. In that plaint, the applicant sought judgment against the respondent for a declaration that the charge dated 20th May 1998 created over the subject property is void and unenforceable for want of consideration; that the respondent has no statutory power of sale over the suit property be made; and for orders that a permanent injunction be issued against the respondent restraining it, its agents, servants and employees from selling or offering the subject property for sale and that the respondent be compelled to discharge the charge over the suit property and that the property be released to the applicant. Together with that plaint, the applicant also filed chamber summons dated 28th September 2007 in which the main prayer was:

“That, a temporary injunction do issue restraining the defendant whether by itself, its agents, servants and/or employees from selling or offering for sale whether by public auction or private treaty, transferring, charging, leasing pledging or in any other way alienating or disposing of the property L.R. No. 209/10482/75 pending the hearing and determination of this suit.”

The reasons that were advanced by the applicant in support of that application in the superior court were that the respondent had not served the estate of the deceased with the mandatory statutory notice under the Transfer of Property Act, since the deceased passed away on 17th July 2000; that no notification of sale had been served upon the same estate; that the charge was not valid as the money secured under it was not disbursed to the chargor as the deceased was not a guarantor or surety to Matex Commercial Supplies Limited to which the monies were disbursed; that the charge was not valid as it lacked the mandatory advocate’s certificate required under **section 69(4)** of the Transfer of Property Act; that some of the monies in dispute were advanced to Matex Commercial Supplies Limited after the demise of Reuben Mutua and that the respondent had never complied with **section 66** of the Law of Succession Act or **sections 52 & 53** of the Transfer of Property Act. That application was placed before the superior court (Azangalala J.) who, after full hearing, dismissed it in a ruling delivered on 23rd November 2007. One of the points that was raised before the learned Judge by the learned counsel for the parties was whether the estate of the late Reuben Mutua had any interest in the suit property. The respondent’s counsel argued before that court that as Mutua and Mary Syombua Ndeto were registered as joint owners of the suit property, upon the death of Mutua, Mary Syombua Ndeto, being the surviving owner, became the sole and exclusive owner of the subject property by operation of the law and so the suit filed by the administrator of the estate of Reuben Mutua was a non starter as the same estate has no *locus standi* on the matter. The applicant’s counsel argued that the position in this case was different as the Registration of Titles Act under which the suit title is registered does not permit that interpretation. The learned Judge, having considered the rival arguments before him and the authorities to which he was referred accepted the argument that the estate of Reuben Mutua had no *locus standi* on the matter and upon that one main point, he dismissed the application for injunction addressing himself thus:

“I must therefore reject the plaintiff’s argument that joint tenancy means something else. In my view, the non survivorship of interest in a joint tenancy on the demise of one of them is the most distinctive feature of joint tenancy. The late Reuben Mutua died on 17.7.2000. As the tenancy was joint, his interest was extinguished on his death. The suit property was not and is not an asset of the estate of the late Reuben Mutua and is not available for distribution to the surviving heirs.

Having taken that view of the matter, I find that the plaintiff has not shown a *prima facie* case with a probability of success at the trial. I need not therefore consider the other conditions of an interlocutory injunction.”

However, before he concluded that ruling, the learned Judge found, in what we do think was an *orbiter dictum*, that as Mary Syombua Ndeto, the surviving owner of the subject property and Matex Commercial Supplies Limited had, in another application, sought injunction which was refused by Warsame J. on grounds that financial facilities had indeed been sought from and granted by the respondent but they had failed to honour the same debt which was outstanding, that application could not

stand. The learned Judge was of the view, arising from that scenario, that even if Mutua was alive and was joined together with Mary Syombua Ndeto in that suit, still there would have been no basis of granting the injunction sought.

The applicant felt aggrieved by that decision and hence he filed a notice of appeal and subsequently this notice of motion which is brought under **rule 5(2) (b)** of this Court's Rules seeking injunctive orders as follows:

“That an injunction do issue restraining the respondent whether by itself, its agents, servants and/or employees from selling or offering for sale whether by public auction or private treaty, transferring, charging, leasing, pledging or in any other way alienating or disposing of the property LR No. 209/10482/75 pending the hearing and determination of the intended appeal.”

We need to say here that the notice of motion was filed after an application for injunction had been filed in the superior court immediately after Azangalala J. had dismissed the main application. That other application was to take care of the period before the intended appeal to this Court is filed and determined. That application was also dismissed by Kimaru J. who, however, remarked:

“There is no doubt that the plaintiff has an arguable point which he will argue on appeal.”

But on other salient aspects, he dismissed that application.

The main ground in support of this application as appears in the record and argued by Mr. Mutua, the learned counsel for the applicant, is that the intended appeal from the decision of Azangalala J. is arguable. The respondent opposes the application, contending that the intended appeal is not arguable but Mr. Opundo, the learned counsel for the respondent, concedes that the only matter that was raised and upon which the injunction was refused by the superior court was as to whether the interests of the late Reuben Mutua were extinguished upon his death or not.

The law as to the principles upon which this Court will decide a matter brought under **rule 5(2) (b)** of the Court's Rules is now well settled. The applicant is enjoined to demonstrate to the court, first, that the appeal or the intended appeal as is the case here, is arguable, that is to say the intended appeal is not frivolous and, secondly, the applicant must show that if the application for injunction is dismissed and the intended appeal eventually succeeds, the results of such a success would be rendered nugatory - see the case of **Reliance Bank Ltd. (in Liquidation) vs. Norlake Investments Ltd. – Civil Application No. Nai. 93 of 2002** (unreported).

In this motion, from what is stated above, we have no hesitation whatsoever, that the issue as to whether upon the death of Reuben Mutua, the joint registered owner of the subject property together with Mary Syombua Ndeto, the interests of Reuben Mutua are extinguished and so his estate has no *locus standi* in the entire case, which point is at the very root of this entire case, and the point as to whether in an application for injunction such as was before the superior court, such an issue should have been decided with finality, or apparent finality, are arguable points much as they are both points of law and this Court will need to ventilate them when the appeal is filed and eventually comes up for determination.

That leaves the next point for us to decide. That is whether if we dismiss this application and the intended appeal eventually succeeds, the results of the success would be rendered nugatory. If we dismiss this application, the property will most likely be sold. The amount demanded by the respondent as at the time this suit was filed was well over Ksh.13,214,391.35. The property was charged to secure a payment of Ksh.3.4 million. The subject property is the same property the subject of Civil Suit No. 82 of 2006. As the learned Judge of the superior court (Azangalala J.) stated in his ruling in that case, another Judge (Warsame J.) found in an application for injunction before him that the overdraft was not made good. Before us, Mr. Issa, for the applicant, did not dispute that finding but contended that that money was not paid to the estate of the deceased. We also note that the respondent bank is in liquidation and the applicant may not find it easy to recover the entire amount claimed should execution proceed and the applicant thereafter succeeds in his intended appeal. Under all these circumstances and considering the

entire history of the matter and doing our best in the matter, what commends itself to us is to grant conditional injunctive orders in the matter. We order that upon the applicant depositing **Ksh.3.5 million** (three million five hundred thousand) into an interest earning account with a reputable bank in the names of both advocates for the respondent and for the applicant within **thirty (30) days** of the date hereof, the respondent, whether by itself, its agents, servants and/or employees is restrained from selling, or offering for sale whether by public auction or private treaty, transferring, charging, leasing, pledging or in any other way alienating or disposing of the property L.R 209/10482/75 pending the hearing and determination of the intended appeal. Costs to be in the intended appeal. We further order that if these conditions are not complied with, the notice of motion shall stand dismissed. Order accordingly.

Dated and delivered at Nairobi this 6th day of June, 2008.

P.K. TUNOI

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR