



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI. NO. 320 OF 2006

KANWAL SARJIT SINGH DHIMAN.....APPLICANT

AND

KESHAVJI JIVRAJ SHAH.....RESPONDENT

(Application for stay of execution and injunction pending the hearing and determination of an appeal from the ruling and orders of the High Court of Kenya at Milimani Commercial Court, Nairobi (Lady Justice Kasango) dated 18th December, 2006

in

H.C.C.C. NO. 205 OF 1999)

RULING OF THE COURT

This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules for two orders, firstly, an order of injunction to restrain the respondent, his agents or servants from evicting, alienating or interfering with the applicant's peaceful possession of L.R. No. 209/8192/8 Lavington pending the determination of the intended appeal and, secondly, an order that the order made by the superior court on 18th December, 2006 be stayed pending the determination of the intended appeal.

The applicant is aggrieved by the decision of the superior court (Kasango J) dated 18th December, 2006 whereby the superior court dismissed the application to set aside the judgment of the superior court dated 16th September, 1999 given in favour of the respondent herein against the applicant.

On 17th December, 1996, the respondent and the applicant entered into an agreement whereby the respondent agreed to lend Shs.13,000,000/= to the applicant in three instalments, thus:

(a) *Shs.2,500,000 on or before the execution of the Agreement.*

(b) *Shs.2,500,000 on 31st January, 1997.*

(c) *Shs.8,000,000 on 2nd April, 1997.*

The loan was repayable with interest at the rate of 36% p.a. on the sums advanced payable in arrears at the end of each quarter. The agreement provided, among other things, that the first two instalments were

to be secured by two promissory notes each for Shs.2,500,000/= payable on 31st March, 1997 and also by a memorandum of charge by Deposit of Documents of Title in favour of the lender on L.R. No. 209/8192/8; that the applicant had the option to take the third instalment of Shs.8,000,000 and a further option to repay the sums already advanced before taking the third instalment and that if the applicant exercised the option to take the third instalment, then the applicant was required to execute a first legal charge on L.R. No. 209/8192/8. It is apparent that the applicant only took Shs.6,000,000/= being the total in the 1st and 2nd instalments and Shs.1,000,000/= from the 3rd instalment – a total of Shs.7,000,000/=.

On 25th February, 1999, the respondent filed a suit in the superior court against the applicant. He averred in the plaint, among other things, that he lent a total of Shs.7,000,000/= to the applicant pursuant to the Agreement; that the respondent caused the Memorandum of the Charge by Deposit of Document of Title executed by the applicant pursuant to the Agreement to be registered against the title on 15th October, 1998; that the applicant failed to repay the loan and that the amount outstanding was Shs.13,813,132/25 inclusive of interest for which he sought judgment.

On 26th May, 1999 the respondent's advocates filed a request for judgment on the ground that the applicant had failed to enter appearance and the court duly entered interlocutory judgment. On 16th September, 1999 the superior court upon formal proof, entered judgment for the respondent for Shs.17,020,365/40 plus interest at 36% p.a. from 31st August, 1999.

Thereafter, the respondent attached the applicant's property L.R. 209/8192/8 in execution of the decree; advertised the applicant's property for sale by public auction and obtained leave of the court to bid at the auction. The respondent ultimately purchased the applicant's property at the auction for Shs.17,000,000/= and a Vesting Order was given to him on 13th June, 2006 which Vesting Order was registered against the title on 27th September, 2006. Thereafter, the respondent applied for and obtained an eviction order against the applicant on 11th August, 2006.

On 16th November, 2006, the applicant filed an application in the superior court under **Order IXA Rule 10** and **Order XLIV Rule 1 & 2** of the *Civil Procedure Rules* for an order that the ex parte judgment of 16th June, 1999 be reviewed and set aside and that he be given leave to defend the suit.

The application was supported by the affidavit of the applicant who deposed, among other things, that after the summons to enter appearance was served on him, negotiations for settlement commenced at the instance of the respondent which he innocently believed to be in good faith; that the ex part judgment was obtained without any notice to him; that he was not given notice of all the subsequent proceedings or served with any subsequent application; that the delay in bringing the application was partly occasioned by the respondent who deliberately took advantage of his ignorance of legal matters and deliberately engaged him in negotiations aimed at misleading him to waste time so that he could not challenge the judgment, and, partly by his former advocates who filed the wrong application in court; that the applicant subsequently paid Shs.3,000,000/= to the respondent who later declined the payment of the balance of Shs.4,000,000/=; that the property is a matrimonial property valued over Shs.30,000,000/= where he has lived with his family for over 30 years; and that he has a good defence to the respondent's claim.

The applicant annexed a draft defence and counter claim raising various defences to the respondent's claim. He avers, *inter alia*, that he entered into the Agreement through duress and coercion; that the respondent's interest was to illegally acquire the applicant's property; that the contract was illegal as the respondent was not authorized to operate as a money lender or to charge such high interest; that the rate of interest was unconscionable; that he had repaid Shs.3,000,000/=; and that the sale of the property was irregular. By the counter – claim he sought a declaration that the agreement was null and void and unenforceable in law; that he be allowed to pay the balance of the principal sum and that the registration of the transfer of the property be nullified.

The application to set aside ex parte judgment was dismissed by the superior court, (Kasango J) on 18th December, 2006. The superior court in its ruling held, among other things, that the applicant had not

proved that the agreement was illegal or that the entire proceedings of the court were irregular.

The principles upon which this Court exercises its unfettered jurisdiction under **Rule 5 (2) (b)** are firmly settled. The applicant is required to show that the intended appeal or appeal is arguable and that unless the court grants the order or orders sought (a stay of execution or an order of injunction or a stay of proceedings) the intended appeal or appeal would be rendered nugatory.

In this case, the applicant lodged *Civil Appeal No. 33 of 2007* in this Court on or about 2nd March, 2008. The memorandum of appeal contains four grounds of appeal. The grounds of appeal are similar to the grounds that the applicant relied on in the superior court to support the application for setting aside the ex parte judgment. Mr. Nduati, learned counsel for the applicant, submitted briefly on the merits of the appeal. It seems that in addition to the grounds relied on in the superior court to show that the Agreement was illegal and unenforceable the applicant will also be contending that the Agreement is illegal because it was not registered and stamped in contravention of the Stamp Duty Act.

Mr. Sharma, learned counsel for the respondent, submitted in effect, *inter alia*, that the contract was not illegal; that the trial was conducted regularly; that the judgment was regular and that the Vesting Order was properly issued.

Although the applicant has over-emphasized the merits of its defence to the respondent's claim, we nevertheless recognize that the appeal is not against the judgment of the superior court on the merits given on 10th September, 1999. Rather, the appeal is against the dismissal of the application to set aside the ex parte judgment thereby denying the applicant a chance to defend the suit. That the applicant has good grounds of defence to the respondent's claim and that the entire proceedings were grossly irregular are some of the relevant grounds in exercising the court's discretion. In the appeal, the applicant is in effect complaining that the superior court did not exercise its discretion properly as it failed to take into account that the applicant had strong grounds of defence to the respondent's claim and the fact that the proceedings to obtain the judgment and the execution of the judgment were irregular.

We have considered the grounds of appeal in that light and we are satisfied that the appeal which is already filed is not frivolous. Indeed, the applicant has shown that there are serious issues of both substantive law and procedural law to be determined in the appeal.

Regarding the application for injunction, the heart of the dispute between the parties is the acquisition of applicant's valuable property L.R. No. 209/8192/8 by the respondent through execution proceedings. In the event that the appeal succeeds, the effect will be to set aside the judgment of the superior court given on 16th September, 1999 and all consequential orders including the attachment and sale of the applicant's property to the respondent. If the property is alienated before the appeal is heard and determined, the appeal, if successful would no doubt be rendered nugatory. The application for injunction seeks an order to restrain the respondent from **evicting, alienating** and/or **interfering** with the applicant's peaceful stay in the suit premises L.R. No. 209/8192/8. This Court cannot lawfully restrain the respondent from **evicting** or **interfering** with applicant's lawful stay in the premises because in seeking to evict the applicant from the premises, the respondent is executing an Eviction Order issued by a Court of competent jurisdiction. However, the Court has jurisdiction to grant an injunction restraining the respondent from **alienating** the property which would have the effect of preserving the property pending the hearing and determination of the appeal.

The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see ***Western College of Arts & Applied Sciences vs. Oranga & Others*** [1976] KLR 63 at page 66 paragraph C).

However, it is clear from the certificate of urgency and from the supporting affidavit, particularly

paragraphs 14, 15, 22, that the main purpose of the application is to get a stay of the Eviction Order given on 11th August, 2006 and which is annexed to the application. The Eviction Order was not the main relief given in the suit or the main order given in the execution proceedings. The main orders given in the execution proceedings were the attachment of the applicant's property, the permission to the respondent to bid at the auction and the vesting of the property in the name of the respondent. The Eviction Order was merely a consequential order which terminated the execution process. Moreover, the Eviction order is not specifically the subject matter of the appeal and no notice of appeal has been given in respect of the Eviction Order. In the circumstances, we are of the view that the Court has no basis for staying the execution of the Eviction Order under **Rule 5 (2) (b)**.

It seems to us that there are no specific provisions in the Rules by which the operation of the Eviction Order can be stopped. Where like here, there is no specific rule giving an applicant a remedy this Court can invoke its inherent jurisdiction under **Rule 1 (3)** to make such orders as may be necessary for the ends of justice (see Hastings Irrigation (K) Ltd. v. Standard Chartered Bank Ltd. & 2 Others [1987] KLR 532, Ruithibo vs. Nyingi [1984] KLR 505).

The applicant claims that the house in issue is a matrimonial property where he has lived for 30 years. On the other hand, the respondent maintains that he lawfully bought the property and that he is entitled to possession. We had during the pendency of this application ordered on 28th December, 2006 that that status quo, in respect of the property be maintained on condition that the applicant deposited Shs.500,000/=, being estimated part of mesne profits, in a joint interest – earning bank account. We are informed from the bar that the applicant complied with the order. In the circumstances of this case, we are of the view that it is just that the applicant should be allowed to remain in possession of the house pending the determination of the appeal on condition that he pays further sums into the joint account.

In the result, we allow the application to that extent and we order that:

- 1. An order for injunction do issue restraining the respondent, his agents or servants from alienating the suit premises L.R. No. 209/8192/8 Lavington, Nairobi pending the hearing and determination of Civil Appeal No. 33 of 2007.**
- 2. In the exercise of the court's inherent jurisdiction under Rule 1 (3) the applicant do remain in possession of the suit premises L.R. 209/8192/8 Lavington until the hearing and determination of Civil Appeal No. 33 of 2007 on condition that the applicant deposits a further sum of Shs.500,000/= as further estimated mesne profits into the bank account already opened within 21 days from the date hereof.**
- 3. In default of compliance with (2) above, the eviction order shall be executed.**

The costs of this application shall be costs in the appeal.

Dated and delivered at Nairobi this 4th day of July, 2008.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J.ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR