



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 296 OF 2008 (UR 197/2008)

THUGI RIVER ESTATES LIMITED 1ST APPLICANT

PAUL KIBUGI MUIITE 2ND APPLICANT

AND

NATIONAL BANK OF KENYA LIMITED 1ST RESPONDENT

UNIKEN MARKETING SERVICES LIMITED 2ND RESPONDENT

WA-GATHAGU LIMITED 3RD RESPONDENT

(An application for injunction pending appeal from the ruling and orders of the High Court of Kenya at Nairobi (Kimaru, J.) dated 27th October, 2008

in

H.C.C.C. NO. 633 OF 2004)

RULING OF THE COURT

Paul Kibugi Muite, the 2nd applicant, is a Director and Chairman of Thugi River Estates Ltd, the 1st applicant. The two applicants come before us under rule 5 (2) (b) of the rules of this Court seeking two orders:

*“1. **THAT** this honourable Court be pleased to issue an interim injunction restraining and prohibiting the 1st and 2nd Respondents from accessing, taking possession, transferring, charging or in any other manner whatsoever dealing with the parcel of land known as L.R. No. 12882/35 Karen pending the hearing and determination of the intended appeal and further orders.*

*2. **THAT** this Honourable court be pleased to issue an interim injunction restraining and prohibiting the 1st and 3rd Respondents from accessing, taking possession, transferring, charging or in any other manner whatsoever dealing with the parcel of land known as L.R. No. 8747,Thika pending the hearing and determination of the intended appeal and further orders.”*

Those orders will issue if the applicant satisfies the usual twin requirements, namely; that the intended appeal is not frivolous or that it is arguable even on a solitary ground, and secondly, that if the order for

injunction is not granted, the intended appeal, if successful, would be rendered nugatory. See **Githunguri v Jimba Credit Corporation Ltd (No. 2) [1988] KLR 838**. As also stated in **Butt v Rent Restriction Tribunal [1982] KLR 417**:

“1. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.”

Those principles are equally applicable to an application for injunction.

The factual background to the application is not seriously contested and may be briefly related:-

The two applicants have, for a long time, been customers of the National Bank of Kenya Ltd (“*the Bank*”). In 1996 the Bank extended to the applicants, at their request, a generous financial accommodation which was secured by two properties: an agricultural farm known as **LR No. 8747** in Thika registered in the name of the 1st applicant, and **LR No. 12882/35**, a residential property in Karen in the name of the 2nd applicant. The terms of the borrowing were stated in various instruments which were executed between the parties. For several years thereafter the two applicants made no payment towards the loan account and the Bank expressed serious concern at the situation. Eventually in December 2001, accounts were taken and agreed between the parties and the applicants undertook to pay off the indebtedness by the end of January 2002. In default of payment, they gave the Bank irrevocable authority to sell the charged properties either by public auction or by private treaty. Four years down the line, the debt had not been paid and indeed, the applicants began to raise issues relating to the interest, penalties, and other charges made on the loan account. On 22nd November, 2004, the applicants filed suit against the Bank asserting that “*all interest rates, penalties and Bank charges (sic) otherwise than strictly in accordance with section 44 and 45 of the Banking Act were illegal and unlawful*”. They sought an order for a declaration to that effect.

Four more years down the line, the suit was still pending, the loan was not repaid, and the Bank had not realised the securities. In April, 2008 the Bank finally decided to dispose of the two securities for the best offer they could get through private treaty. The Karen property was sold to **M/S. Uniken Marketing Services Ltd**, the 2nd respondent, for Shs.35 million and the transfer was registered in their favour on 22nd May, 2008. The Thika farm was sold to **M/S. Wa-Gathagu Limited** for Shs.82 million, and the transfer in their favour is said to be pending registration.

On being notified in June 2008 that the properties had been sold, the applicants rushed to the superior court and filed an application to amend the original plaint. The chamber summons filed on 25th June, 2008 sought, not only orders to enjoin the two purchasers, in the suit, but also proposed major amendments to the pleading. The proposed amendments included, *inter alia*, averments that the charge documents were tainted with illegality and were therefore null and void and unenforceable; that the sale conducted between the Bank and the two purchasers was fraudulent; that the applicants were in possession of the properties which were secretly sold; and that the applicants would suffer irreparable damage if the transactions were not reversed. They prayed for cancellation of the transfers, if any have been registered, and for declaratory, injunctory and prohibitory reliefs. That is the application which the superior court, Kimaru J., determined on 22nd October, 2008 and declined to enjoin the 2nd and 3rd respondents in the suit, but granted conditional leave for the amendments sought. Injunctory relief was also rejected. The learned Judge stated: -

“I therefore find no merit with the plaintiffs’ application dated 25th June 2008. The application seeking to enjoin the proposed 2nd and 3rd defendants into this suit is hereby dismissed. As purchasers of the suit properties, the proposed 2nd and 3rd defendants’ titles cannot be impeached under section 69B of the Transfer of Property Act. They are not necessary parties to these

proceedings. The plaintiffs are granted leave to amend their plaint in terms of the proposed amended plaint provided that any reference to the proposed 2nd and 3rd defendants (as the defendants in the suit) is deleted. The said amended plaint shall be filed and served within fourteen (14) days of today's date. The defendant shall be at liberty to file a response thereto within fourteen (14) days of service.

The application for injunction, lacking in merit, and for the reasons stated above is hereby dismissed.”

Aggrieved by the ruling, the applicants intend to appeal and have filed and served a notice of appeal.

Learned counsel for the applicants Mr. Nowrojee sought to persuade us that the applicants had serious questions of law for submission before the appellate court. These will include the issue of fraud which was pleaded in the proposed plaint and which the superior court granted leave to plead. It would be rendered vacuous if the purchasers were not enjoined in the suit. It would be necessary at the trial, he submitted, to interrogate the purported sale agreements signed and any consents relied on to transfer the properties. The two purchasers would therefore be necessary parties to the suit. Another weighty legal issue would be the application of **section 69B** of the **Transfer of Property Act** which the learned Judge found was applicable but which Mr. Nowrojee submits does not apply where fraud is pleaded. According to Mr. Nowrojee there is a common law meaning of “*fraud*” but also a statutory meaning under **section 3** of the **Registration of Titles Act**, under which the properties the subject matter of the suit are registered. **Sections 52 and 53** of the **Transfer of Property Act** will also need to be interpreted by the appellate court as they were dismissed as inapplicable by the superior court. Finally, Mr. Nowrojee submitted that the serious issue as to whether the mortgagee had discharged his duty to the mortgagor was not frivolous, considering that the 2nd applicants matrimonial home was sold by private treaty under questionable circumstances.

As for the nugatory aspect, Mr. Nowrojee submitted that there was imminent danger of the purchasers seeking possession of the properties. If they succeed, the properties may be alienated or mortgaged even further thus rendering the success of the intended appeal meaningless.

Opposition to the application came fast and furious. The Bank, for one, found nothing but mischief in the manner the two applicants have conducted themselves since the loans were advanced in 1996. Learned counsel for the Bank Mr. Ojiambo submitted that the Bank has bent backwards, to accommodate the 2nd applicant who for a considerable period has been an honourable Member of Parliament in this country and variously sought the indulgence of the bank to avoid embarrassment which would ensue by publicly auctioning the mortgaged properties. The authority to sell by private treaty was expressly given by the 2nd applicant in writing and he cannot be heard to allege fraud in the realization of the securities. Mr. Ojiambo further submitted that the interest charged on the loan was agreed in the mortgage instruments; that the issues of fraud or improper sale and transfer of the two properties were not before the superior court since the applicants did not amend the plaint as conditionally ordered; that there were no irregularities in the sale and transfer of the mortgaged property, and if any consents were necessary they could still be obtained. Finally Mr. Ojiambo, urged us to dismiss the application because the only dispute was on accounts and interest thereon which issues, on authority, do not normally support injunctory relief. If any temporary injunction is granted, he pleaded, then it ought to be conditional.

In those arguments Mr. Ojiambo was supported by the purchasers' counsel M/S. Havi and Mburu. In their view, there is no arguable appeal since the purchasers were fully protected under **section 69B** of the **Transfer of Property Act**. The applicants' remedy is statutory and it can only be against the Bank for damages. The two were innocent purchasers of the properties for value without notice of any pending suit and there was no notice of any suit filed against the titles prior to the sale. It was clear to both counsel that the applicants' intention was simply to keep the land and also enjoy the benefits accruing from it, thus enjoying the best of both worlds. That is why the applicants had said nothing about other suits filed by the purchasers seeking vacant possession of the properties they lawfully bought.

We have considered the application in the light of the principles stated at the beginning of this ruling.

It seems to us on careful consideration that the issues relating to the efficacy of **sections 69B** and **52** of the Transfer of Property Act as they affect the amended suit, if the appeal succeeds, and also issues of fraud, are not frivolous issues and we find that the first limb of the requirements is satisfied. Not so however, the second limb.

We are mindful as submitted by the respondents and as the record clearly shows, that the applicants have for many years acknowledged the debt owed to the Bank and have received considerable indulgence to allow them to resolve the issue themselves without success. There are several undertakings and commitments made by the applicants that they would either settle the matter or let the Bank proceed with the sale of the properties. They were ready to part with possession of the properties and the arguments now advanced about the sentimental attachment to the Karen matrimonial property did not arise. No argument has been advanced that the Bank is incapable of paying any damages that may accrue on the sale of the properties if ultimately the court decides against them. We are in no doubt that the 2nd and 3rd respondents are anxious to take possession of the properties they have purchased as they have paid for them and must expect a return on their investment. Indeed there are existing suits seeking possession and eviction. A simple restraining order would certainly be unjust to them although we are persuaded that it is necessary to preserve the subject matter of the suit pending the hearing of the appeal.

In all the circumstances it is with considerable reluctance that we grant the relief sought but only on the following terms: -

- a) An order for a temporary injunction shall issue in terms of prayers 1 and 2 of the notice of motion but is limited to a period of six months or such shorter period as it will take for the disposal of the intended appeal.
- b) The applicants shall jointly and severally deposit the sum of Shs.1.5 million to cover the following:
 - i) Mesne profits accruing from LR. 12882/35, the Karen property at the rate of shs.150,000 per month for six months.
 - ii) Mesne profits accruing from LR. 8747, the Thika farm at the rate of Shs.100,000 per month for six months.
- c) The said deposit shall be made within fourteen (14) days of the date of this ruling in an interest-earning account with a reputable Bank in the joint names of counsel for the applicants and counsel for the 2nd and 3rd respondents.
- d) In default of compliance with (b) and (c) above, the notice of motion dated 5th November, 2008 shall stand dismissed with costs to the respondents, without further application.
- e) The costs of the application will otherwise abide the result of the intended appeal.

Those shall be our orders.

Dated and delivered at Nairobi this 19th day of December, 2008.

E.O. O’KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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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