



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPLI 83 OF 2007 (UR 55/2007)

KENLINE AGENCIES LTD. APPLICANT

AND

HOUSING FINANCE COMPANY OF KENYA

JOHN GITHUA NJOGU RESPONDENTS

(Application for injunction and stay of execution pending the hearing of the intended appeal from the ruling and order of the High Court of Kenya at Milimani Commercial Court, Nairobi (Lady Justice Okwengu) dated 23rd March, 2007

in

H.C.C.C. NO. 668 OF 2006)

RULING OF THE COURT

The applicant *KENLINE AGENCIES* (company) seeks orders under *Rules 5 (2) (b); 1 (2) and 42* of the Court of Appeal Rules and *Section 64* of the Registration of Titles Act:

“(1) That an urgent injunction do issue forthwith restraining the respondents, their servants, agents or employees from entering into or remaining into or in any way dealing with or interfering with the plaintiff’s possession of all that parcel of land known as L.R. No. 209/11475 and all buildings or improvements erected thereon pending the hearing and determination of the applicant’s intended appeal.

(2) That there be a stay of execution of the orders given by the High Court on 23rd March 2007.

(3) That a prohibitory order further do issue restraining the respondents or any of them from registering any other or further documents against the certificate of title register at Nairobi Land Registry as L.R. 17003 till further orders of the court”.

The applicant intends to appeal against the ruling and order of the superior court (Okwengu J) dated 23rd March, 2007 dismissing an amended chamber summons dated 21st December, 2006 for the following interlocutory orders:

“(1) to restrain by injunction the 1st defendant, its servants/ or agents from conveying or transferring to the 2nd defendant or his nominee L.R. No. 209/11475 or in any manner interfering with the said land till this suit is heard and finalized.

(2) A prohibitory order do issue restraining the defendants or any of them from registering any other or further documents against certificate of title registered as L.R. 17003 until further orders”.

By a charge instrument dated 13th March, 1997 the company charged L.R. No. 209/11475 to the HFCK to secure a loan of Shs.5,000,000/- which was repayable by monthly instalments of Shs.128,125/- at annual interest rate of 29% p.a. The managing director of the company Wilson Njugu Kigo died on 24th March, 2002 before the loan was fully repaid. It seems that his widow Jacinta Wanjiru Kigo was also a director of the company. By a statutory notice dated 18th January, 2005, HFCK demanded the repayment of the outstanding loan together with interest due in the sum of Shs.9,643,814/47 within three months and notified the company that upon expiry of the notice it would exercise its statutory power of sale under **Section 69** of the Transfer of Property Act, 1882 of India (TPA). Nothing seems to have happened after the statutory notice was issued until 1st December, 2006 when HFCK and John Githua Njogu, the 2nd respondent entered into a sale agreement, whereby, HFCK agreed to sell the charged property to John Githua Njogu, by private treaty for Shs.11,000,000/-. Subsequently, on 6th December, 2006, the company filed a suit, *High Court Civil Case No. 668 of 2006* against HFCK seeking a declaration that the chargee's statutory power of sale had not arisen and a permanent injunction to restrain the sale. The plaint was accompanied by an application for interlocutory injunction to restrain the sale of the suit land. On 14th December, 2006 Janet Mwaluma, Assistant Manager Legal Services of HFCK filed a replying affidavit to the application disclosing that the suit property had been sold by private treaty and annexed the agreement of sale dated 1st December, 2006. As a consequence, the company filed an Amended Plaint on 19th December, 2006 and an Amended chamber summons dated 21st December, 2006 joining the purchaser John Githua Njogu as a party to the suit and to the application. In the amended plaint, the company asked for an alternative relief that the HFCK be ordered to compensate the company for the full market value of the charge property.

The amended chamber summons was scheduled for hearing in the superior court on 10th January, 2007 but the court acceded to the application for adjournment made by counsel for HFCK and the purchaser and adjourned the application to 17th January, 2007. However, the superior court made an interim order, thus:

“Until 17th January, 2007, the status quo prevailing shall be maintained. In other words, if the transfer has not been registered, the process of registration is to be held in abeyance”.

On 17th January, 2007, the application was again adjourned to 1st February, 2007 and the interim order extended to that date. Meanwhile, on 25th January, 2007, a transfer executed in favour of the purchaser by HFCK on 5th December, 2006, was registered by the Registrar of Titles on 13th February, 2007. The purchaser filed a supplementary affidavit annexing a copy of the certificate of title. Despite that registration, the superior court on 15th February, 2007 ordered the company to remain in possession of the suit premises till the determination of the application, which application was ultimately determined on 23rd March, 2007.

The basis of the suit and the application in the superior court was that the statutory power of sale had not arisen as, *inter alia*, the company had fully repaid the loan, *save only for such illegal sums charged by defendants in terms of penalties, interests and other charges unlawfully loaded by plaintiff on the loan account*; that HFCK had not served the company with a statutory notice of sale in breach of **section 69 A (1) (a)** of TPA and that the sale of the suit property by private treaty while the suit was pending was fraudulent, null and void. The superior court in dismissing the application made findings of fact that; *prima facie*, the loan account was in arrears; that the HFCK having sent the statutory notice through registered post of the company's postal address, the company is deemed to have received such notice and

there was no proof otherwise; that even if the sale was null and void the company's remedy did lie in damages only and that the court could not grant an injunction to restrain the sale of the suit property which sale has already taken place.

The principles upon which this Court exercises its original and unfettered discretion in applications for stay of execution or for an injunction or for stay of proceedings pending appeal are well settled. The applicant is required to satisfy the court both that the appeal or intended appeal is arguable and further that unless the order sought is granted, the intended appeal or appeal would be rendered nugatory.

The applicant company contends in the application that the intended appeal is indeed arguable and has attached to the application the proposed memorandum of appeal containing nine grounds of appeal. Mr. Okeyo, learned counsel for the applicant stated from the bar at the hearing of the application that the company indeed filed *Civil Appeal No. 84 of 2007* in this Court on 3rd May, 2007. He has addressed us at length on the grounds of appeal. It is apparent to us that the company will be contending in the appeal, among other things, that the transfer of the suit property, when the suit was pending and when an order prohibiting the registration of the transfer was subsisting was in breach of the doctrine of ***Lis Pendence*** encapsulated in **Section 52** of TPA, thus:

“During the active prosecution in any Court of a contentious suit or proceedings in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to effect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose”.

Mr. Issa, learned counsel for the HFCK and the purchaser has similarly addressed us on the grounds of appeal at length and submitted that the appeal is not arguable. He contended that by the time the suit and the application were filed in the superior court, the company's equity of redemption had already been extinguished vide **section 60** of TPA by the contract of sale and subsequent transfer. He further contended that **Section 52** as read with **Section 69** of ITPA shows that the doctrine of ***Lis Pendence*** applies where parties are contesting as to the right to the property and does not apply to transfer under statutory power of sale as in this case.

Now that the appeal has been lodged, it is, in our view inappropriate and indeed preemptory to discuss in some detail the merits of the appeal. The grounds of appeal set out including the legal issues raised in this application such as whether the doctrine of ***Lis Pendence*** applies to sale by mortgagee in exercise of statutory power of sale should be determined after the full hearing of the appeal. It is sufficient to say at this stage that after due consideration of the grounds of appeal, we are satisfied that the appeal is not frivolous.

The next question is whether the applicant has shown that unless the application is allowed, the appeal, if successful, would be rendered nugatory. Jacinta Wanjiru Kigo deposes in the supporting affidavit that the appeal would be rendered nugatory if the respondents interfere with her possession of the suit land or if the suit land is alienated. We have already set out the two interlocutory reliefs which the appellant had sought in the superior court in the Amended Chamber Summons dated 21st December, 2006. The first relief was an order of injunction to restrain HFCK from conveying or transferring the suit land to the purchaser. The second relief was an order to restrain the registration of the transfer which had already been executed by the time the amended application was filed.

By the time the application was determined by the superior court, the transfer had already been executed and the purchaser had been registered as the proprietor of the suit land. In the circumstances, in the event that the appeal succeeds, the effect would be apparently to protect the suit property from alienation as well as the applicant's possession pending the determination of the pending suit in the superior court. That seems to be the main purpose of the present application. However, if the applicant is dispossessed of the suit land, and the appeal ultimately succeeds, the appeal will not thereby be rendered nugatory as the effect of the success of the appeal would be, among other things, to restore the applicant into the premises pending the hearing of the suit.

The applicant seeks an equitable remedy. The purchaser has already paid Shs.11,000,000/- as purchase price and has been registered as proprietor of the land and a certificate of title has been issued to him. Unless and until the registration of the purchaser as proprietor is cancelled he is by virtue of **section 23** of the Registration of Titles Act, the absolute and indefeasible owner and is entitled to the possession of the land. It would be inequitable in the circumstances to deny the purchaser the possession of the land before the determination of the appeal and the pending suit in the superior court. Prayer 1 of the applicant, thus fail.

However, we readily agree that the intended appeal would be rendered nugatory if the purchaser alienates the suit land before the appeal is heard and determined. Although the third prayer in the application is not well drafted, it can be modified to restrain the alienation of the land by the purchaser. The second prayer in the application is incompetent because the superior court did not grant any order capable of execution, save the order for the payment of costs.

In the result, we reject prayers 1 and 2 of the application. However, we allow the application in respect of prayer 3, to the extent that, we grant an order of injunction restraining the second respondent **JOHN GITHUA NJOGU** from disposing of, alienating, charging or registering any dealing in the suit land L.R. No. 209/11475 title No. I.R. 17003 until the determination of *Civil Appeal No. 84 of 2007*. The costs of this application shall be costs in the cause of appeal.

Dated and delivered at Nairobi this 8th day of June, 2007.

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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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