REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli. Nai 132 of 2007 (UR. 85/07)

ANNE N. PARMENA (legal representative of the late

Dr. William Kaaya Parmena Deceased) .... ……….APPLICANT

AND

HOUSING FINANCE COMPANY OF KENYA LTD…........................RESPONDENT

(An application for an injunction pending the filing hearing and determination of an intended

appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Ochieng, J)

dated 5th December, 2006

in

H.C.C.C. NO. 294 OF 2003 (O.S.))

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RULING OF THE COURT

This application expressed to be brought under *rule 5(2) (b)* of this Court's Rules seeks two orders:-

"1. ---------------

2. THAT an injunction do issue to restrain the respondent (sic) their agents and or servants from advertising, selling and or in any other way disposing off (sic) the suit premises being L.R. NO. NRB/BLOCK 32/677 Ngumo Estate pending the hearing of this application.

3. THAT an injunction do issue to restrain the respondent (sic) their agent and or servants from advertising, selling and or in any other way disposing off (sic) the suit premises being L.R. NO. NRB/BLOCK 32/677 NGUMO ESTATE pending the lodging, hearing and the determination of the intended appeal against the judgment and decree of Hon. Justice Fred A. Ochieng delivered on the 5th day of December, 2006.

4. ---------------------"

The decree emanates from the dismissal by the superior court *(F.A. Ochieng, J)* on 5th December, 2006 of a suit commenced by way of an Originating Summons by the applicant and by which she had sought two substantive reliefs; first, that a mandatory order be issued requiring the respondent to surrender the Title documents in regard to Nairobi/Block 32/677 House No. 37, Ngumo Estate ("the suit property"), to the applicant who is the Administrator of the estate of *DR. WILLIAM K. PARMENA* free from all encumbrances; and secondly, that the respondent be restrained from recovering alleged outstanding balances from the said estate and that the mortgage account held by the estate with the respondent be deemed as settled.

The circumstances that gave rise to the dispute may be briefly summarized from the record as follows. *DR. WILLIAM KAAYA PERMENA*, hereinafter referred to as the deceased, borrowed Kshs.1,500,000.00 from the respondent, the well-known housing finance company in the country, through a mortgage on the suit property. One of the conditions was that before approval of the mortgage the deceased was to pay annual Life Insurance premium whereby the concerned insurance would pay the outstanding mortgage debt in case of the demise of the account holder before the redemption of the mortgage. The deceased passed away on 20th April, 1999 and his widow in her capacity as the administratrix of his estate wrote to the respondent on 30th June, 1999, notifying it of the demise of the deceased and requesting the respondent to sort out the mortgage through the Life Insurance Scheme. Promptly, the respondent informed its Insurance Brokers of the death of the deceased and instructed them to lodge the death claim. The applicant thereafter sent to the respondent the death certificate and the deceased's passport to facilitate the processing of the mortgage payments. The respondent acknowledged receipt of those documents and dispatched them to its Insurance Brokers. It is the applicant's case that following those steps, she believed that the insurer would pay to the respondent the sums of money necessary to redeem the mortgage.

However, by a strange turn of events, the respondent, feigning ignorance of the demise of the deceased wrote to him personally on 24th September, 1999, demanding the sum of Shs.2,055,351/70 and notifying him, also, that he was not covered under the insurance scheme and that the insurance company would not redeem the mortgage. This was perplexing and we would think that the move by the respondent was, indeed, mischievous, callous and distressing to the widow and was an act unworthy of a reputable institution of the respondent's standing. We shall say no more on this.

It is further the applicant's case in the court below, as well as in this application, that the respondent was guilty of unreasonable delay in notifying the applicant that there had been no policy in force for the deceased. The applicant also contends that it was the respondent's exclusive responsibility to take out an insurance policy for the deceased and it should, therefore, suffer the consequences of its omission as the insurance cover over the deceased was mandatory prior to the disbursement of the loan.

In answer to these averments, the respondent contended first, that the deceased did not make any payments at all between 26th September, 1998 when the loan was disbursed and 20th April, 1999 when the deceased passed away; and second, that the applicant ought not to be allowed to benefit from the respondent's mistake of disbursing the loan proceeds to the deceased prior to his medical examination; and thirdly, that the account referred in the past correspondence, especially the letter dated 12th November, 1999, was a different one from the account in issue.

There are a number of recent authorities starting with *GITHUNGURI VS. JIMBA CREDIT CORPORATION LTD (NO. 2) (1988) KLR 838,* which set out the principles which guide this Court in applications under *rule 5(2)(b),* aforesaid. First an applicant must show that his intended appeal is arguable or that it is not frivolous. Secondly, that unless he is granted either a stay of execution or an injunction or both, as the case may be, his appeal or intended appeal, if successful, will be rendered nugatory. These principles are now well settled and do not need further discussion or elaboration.

It will be argued, inter alia, the learned counsel for the applicant *Mr. Mwenda* submitted, that the learned Judge erred in law in not finding that the applicant had met the requirements for the grant of a mandatory injunction; that the learned Judge should have held that the outstanding loan ought to have

been sorted out through the Life Insurance Policy and that interest on the mortgage was not payable on account of the respondent's mistakes and errors of omission.

Mr. Lakicha counsel for the respondent candidly conceded that the intended appeal was arguable in that there was a dispute in the accounts of the mortgage. However, he submitted that despite lack of settlement of the final accounts it was plainly clear that some considerable amount of money between Shs.2,000,000/- and shs.3,000,000/- was still due from the applicant. To this assertion, the applicant contends that whatever amount may be found outstanding on the mortgage, she thought, it would not, in her view, be more than Shs.500,000/= which sum she is ready to offer in full and final settlement of the dispute.

We have considered the rival contentions and submission of counsel. With respect, we agree with them that the intended appeal is arguable and not frivolous.

What of the nugatory aspect of this matter? *Mr. Mwenda* argues that if the property is sold the applicant who is retired and has no other place of abode would suffer substantial loss. This *Mr. Mwenda* argued, would cause more hardship than would serve the cause of justice. In the cases of *BUTT VS. RENT RESTRICTION TRIBUNAL [1982] KLR* and *ORARO & RACHIER ADVOCATES VS. CO-OPERATIVE BANK OF KENYA [1999] LLR 118 (CAK),* the common vein running through them is that each case was considered on its merits as regards the nugatory aspect of the intended appeals and the respective merits of the parties' cases before the discretion to grant stay was made.

The main fear expressed by the applicant is that the respondent has notified her that it is proceeding to advertise the property for public auction. We have considered the fact that there is a dispute about the final account which is yet to be calculated and determined. This fact has been conceded by *Mr. Lakicha*. We think that in the particular circumstances of this case, it would be in the best interest of justice to preserve the property until the intended appeal, which may conclusively settle the issues of accounts, is heard and determined.

In the result we grant the application in terms of Order No. 3 as sought in the Motion dated 12th June, 2007 subject to the applicant paying to the respondent the sum of Shs.500,000/= within 30 days from the date of this ruling and in default the application shall stand dismissed. The costs herein shall be in the intended appeal.

DATED and DELIVERED at NAIROBI this 31st day of July, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

……………………………………..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR