



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 46 of 2006

ROSE WAKUTHII MWANGI NJUNU Administratrix of the Estate of the

Late JULIUS MWANGI NJUNU
APPELLANT/APPLICANT

AND

EDWARD KITHINJI

HOUSING FINANCE COMPANY OF KENYA

ABDILLAHI WARSAME ALI T/A NADHIA AUCTIONEERS
RESPONDENTS

**(An application for injunction from the Ruling and Order of the High Court of Kenya at
Milimani (Azangalala J) dated 6th February, 2006**

in

H.C.C. NO. 504 OF 2005)

RULING OF THE COURT

This is an application under **Rule 5 (2) (b)** of the Court of Appeal rules for an order of injunction:

“restraining the Defendant/Respondent/his servants or agent from evicting or harassing the applicant trespassing into L.R. Nairobi/Block/99/244 charging mortgaging transferring sub-dividing or in any manner interfering with peaceful possession of the suit land”.

The applicant being aggrieved by the ruling of the superior court (Azangalala J) dated 6th February, 2006 wherein the superior court dismissed an application for *interlocutory* injunction pending the hearing and determination of *High Court Civil Case No. 504 of 2004* intends to appeal to this Court against that ruling. The applicant lodged the notice of appeal on 9th February, 2006.

The applicant is the widow and legal representative of one Julius Mwangi Njunu (deceased) who died on 5th July, 2005. On 13th September, 2005, the applicant obtained a Limited Grant of Letters of Administration *ad Litem* limited for purposes only of filing suit. On 16th September, 2005 the applicant filed High Civil Case No. 504 of 2005 against the three respondents. On the same day the applicant filed an application for interlocutory injunction pending the hearing and the disposal of the suit. That is the

application that was dismissed by the superior court.

The following brief background facts are not in dispute.

By an application dated 16th April, 1998 the deceased applied to **Housing Finance Company of Kenya Limited** (HFCK), 2nd respondent herein, for a loan of Shs.6,300,000/=. The application for the loan was approved and the money was disbursed to the deceased. The loan was secured by a charge dated 2nd December, 1998 over L.R. No. Nairobi/Block 99/244 situated at Runda Estate Nairobi registered in the name of the deceased.

The deceased ultimately defaulted in the servicing of the loan as a result of which HFCK issued a statutory notice dated 26th May, 2004 claiming Shs.19,390,386/60 together with interest. After mutual discussions and negotiations, HFCK gave consent to the deceased to sell the charged property and pay HFCK Shs.10,500,000/= in full and final settlement of the loan.

On 8th February, 2004, the deceased entered into a sale agreement with Edward Kithinji Rintaugu (first respondent) for the sale of the charged property at a consideration of Shs.12,000,000/=. The agreement provided, among other things, that Shs.10,500,000/= would be paid to HFCK in full satisfaction of the debt and the balance of Shs.1,500,000/= would be paid to the vendor (deceased) "upon registration of the transfer in favour of the purchaser".

The agreement of sale further provided that:

- (i) The shs.1,500,000/= would be paid to M/s. Kamotho Maiyo & Mbatia Advocates as stakeholders pending completion and upon completion the deposit would be paid to the vendor by the said advocates.**
- (ii) The Shs.10,500,000/= would be paid directly to HFCK upon registration of the transfer in favour of the purchaser.**
- (iii) Upon undertaking by advocates for the purchaser, for such payment to be made, HFCK would discharge the charge together with a signed transfer and all documents for title to facilitate the registration of the transfer.**
- (iv) Property was sold in vacant possession to be given on the completion date upon payment of the full purchase price.**

The vendor's advocates paid Shs.1,500,000/= to M/s. Kamotho Maiyo & Mbatia Advocates by cheque dated 8th February, 2005. The deceased ultimately executed the transfer of the lease dated 7th April, 2005 in favour of Edward Kithinji Rintaugu on 30th March, 2005 in the presence of M/s. Kamotho Waiganjo Advocates. The transfer of the lease was registered on 12th May, 2005.

The deceased failed to give vacant possession of the house. By a letter dated 21st June, 2005 the purchasers' advocates paid a cheque of Shs.2,000,000/= to HFCK intimating that 'the balance of Shs.8,500,000/= would be released on delivery of vacant possession. By a letter dated 15th August, 2005 the advocates for HFCK intimated to the purchasers' advocates that as a gesture of good will and with a view to securing amicable settlement of the matter, HFCK had opted not to enforce the undertaking. By the same letter the advocates of HFCK promised to contact the purchasers' advocates for the handing over of the property in exchange for the cheque for Shs.8,500,000/=.

On 23rd June, 2005 the deceased and HFCK entered into a written agreement by which the deceased agreed to vacate the property on 18th July, 2005 upon payment of Shs.2,000,000/= to facilitate the moving from the property. By a handwritten letter dated 25th July, 2005 the applicant applied to HFCK for extension of time to vacate the house and HFCK extended the time to 30th August, 2005.

The applicant did not vacate the house. Instead she filed *High Court Civil Case No. 504 of 2005* and an application for interlocutory injunction and obtained an *ex parte* injunction. In the suit, she avers, among other things, that the first respondent and HFCK conspired to grab the house fraudulently, that the house was transferred without payment of any consideration, and that the alleged sale agreement was not binding as it was never finally agreed by the parties.

By the suit, the applicant seeks judgment for, *inter alia*, a declaration that purported sale of L.R. Nairobi/Block 99/244 to 1st defendant is invalid; that the court do order re-transfer of the property to plaintiff's name and that the defendants be restrained from trespassing, charging or evicting the plaintiff.

The present application for injunction is supported by a long affidavit sworn by the applicant on 13th February, 2006.

The principles upon which the Court exercises its jurisdiction to grant an injunction pending appeal are well known. The jurisdiction is discretionary and is to be exercised judicially and not arbitrarily. As this Court said in *Madhupaper International Limited v Kerr* [1985] KLR 840, it would be wrong to grant an injunction pending appeal where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid. It is to be remembered that the applicant is appealing against the refusal by the superior court to grant a discretionary and equitable relief and that an appellate court does not normally interfere with the exercise of a discretion by a trial court unless the strict conditions enunciated in *Mbogo v Shah* [1968] EA 93 have been shown to exist.

The application is opposed mainly on the ground that the intended appeal has no merit. The applicant is required to satisfy this Court, among other things, that the intended appeal is arguable and not frivolous.

As stated above, the applicant intends to appeal against the ruling of the superior court dismissing the application for *interlocutory* injunction pending the hearing and determination of the suit pending in the superior court.

The superior court dealt with all the issues raised in the dispute in an elaborate ruling. All the issues raised in this application were raised before the superior court and were fully considered. The superior court found, *inter alia*, that a valid statutory notice was issued and served, that the applicant did not exhibit any evidence that the deceased was forced to enter into an agreement of sale or that deceased was incapable of understanding the agreement due to mental sickness; that on *prima facie* basis, he was not persuaded that the sale agreement is invalid; that the challenge to the validity of the charge on the ground that it does not indicate how the deceased was identified and the challenge to the validity of the transfer on the ground that it showed that deceased was identified merely by his identity card were frivolous; that the deceased acknowledged the indebtedness and did not challenge the validity of the charge or transfer in his life time. The superior court ultimately concluded that the applicant was not entitled to an injunction which may not have been available to the deceased.

The applicant has not either in the application or otherwise attempted to show that the learned judge erred in the manner he exercised his discretion or that grounds exist for interfering with the exercise of discretion by the judge.

The suit property is a leasehold registered under the Registered Land Act (RLA). The deceased transferred the property to the first respondent in his life time and the first respondent was registered as the proprietor and thereby became indefeasible owner of the lease (**s.27 (b) and 28** of RLA).

The registration of the first respondent can only be rectified on grounds of fraud to which first respondent is a party (**s. 143** RLA). The deceased had an advocate during the transaction. By a post sale agreement dated 23rd June, 2005 the deceased acknowledged that the sale had been completed and agreed to give vacant possession of the property by 18th July, 2005. The Shs.1,500,000/= part of the consideration payable to him was paid to his advocates. The purchaser's advocate has not released the balance of the purchase price of Shs.8,500,000/= deposited with him to HFCK because the applicant has

not given vacant possession of the property. The Shs.8,500,000/= is payable to HFCK to discharge the debt by the deceased and not to the estate of the deceased. It is clear that the payment of Shs.8,500,000/= is a matter between the first respondent and HFCK and not between the first respondent or HFCK and the applicant. The applicant claims that the loan was subsequently fully repaid by proceeds of mortgage Protection Insurance Policy.

But HFCK explains that the mortgage protection policy was effected by HFCK; that deceased was not a beneficiary of the policy and that Shs.5,819,625/= the proceeds of the insurance policy was applied to the loan account on 14th September, 2005.

In the circumstances, we are satisfied that the intended appeal is not arguable and is frivolous. We are further satisfied that an order for injunction would occasion great hardship to the first and second respondents.

For those reasons, the application is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 26th day of May, 2006.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR