



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appli 45 of 2006

ABDUL KADER ABDUL KHALIQ SAID (*suing as personal*)

***Representative of the Estate of ABDUL SAID*.....1ST APPLICANT**

HASSAN HUSSEIN AJEB.....2ND APPLICANT

**RITA CHEPTARUS (*suing as the
Administratrix*)**

***of the Estate of REGINALD SITIENEI*.....3RD APPLICANT**

JAMES MWANGI.....4TH APPLICANT

ELDORET DRYCLEANERS LIMITED.....5TH APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

***(Being an application for injunction pending the lodging, hearing and determination of an appeal
from the Ruling of (Emukule, J) dated 17th 2005***

In

H.C.S.C. NO. 42 OF 2005)

RULING OF THE COURT

The notice of motion before the Court is one under *Rule 5(2) (b)* of the Court of Appeal Rules, and it seeks one basic order, excepting that for costs, namely,

“THAT the Respondent through itself, employees, servants and/or agents and/or any other person acting on its behalf be restrained by injunction from advertising, selling, transferring, alienating, and/or disposing off (sic) in any other manner Title Number Eldoret Municipality/Block 3/32 pending the lodging, hearing and determination of the intended Appeal by the Applicants against the decision in HCCC No. 42 of 2005 (Milimani) given on 17th June, 2005”.

The “Applicants” referred to in the above prayer are *ABDUL KADER ABDUL KHALIQ SAID* who sued as the personal representative of the estate of *ABDUL SAID*, the 1st Applicant, *HASSAN HUSSEIN AJEB*, the 2nd Applicant, *RITA CHEPTARUS* representing the estate of *REGINALD SITIENEI*, the 3rd Applicant, *JAMES MWANGI*, the 4th Applicant and *ELDORET DRYCLEANERS LTD*, the 5th Applicant. The Respondent to the motion is the *NATIONAL BANK OF KENYA LTD*. It appears from the material before us that the Respondent, in the course of its business as a banker, advanced money to the 5th Applicant to enable the 5th Applicant conduct its business. As security for the money so advanced, Land Title No. Eldoret Municipality/Block 3/32 was charged to the Respondent and as is not unusual in such cases, the money lent was not repaid or repaid fully. The Respondent sought to exercise its statutory power of sale. The Applicants, in a bid to thwart the power of sale being exercised, filed *HCCC No. 42 of 2005*, at the Milimani Commercial Courts and simultaneously with the filing of the plaint, an application for an injunction in terms similar to the one now prayed for before us, was also filed. That application for injunction came up for hearing before *Emukule, J* and by his ruling dated 17th June, 2005 the learned Judge refused to grant the application for injunction. The applicants were aggrieved by that refusal and on 22nd June, 2005, they filed their notice of appeal against the decision of *Emukule, J*. In the meantime, the Applicants again returned to the superior court and asked for an injunction pending the filing and hearing of their intended appeal. *Ochieng J*, heard the latter application and in a considered ruling dated and delivered on 5th October, 2005, *Ochieng, J* granted an injunction on condition that the applicants

“..... to deposit with the Defendant the sum of Kshs.4,500,000/= within the next sixty days. The same sum is to be held by the Defendant in an interest earning account and shall constitute security to the Defendant in the event that the plaintiff’s appeal is dismissed by the Court of Appeal.

In the event that the plaintiff should fail to deposit the sum of Kshs.4,500,000/= with the Defendant within the stipulated period of sixty days, the injunction herein shall stand vacated.”

The Applicants were again aggrieved by the order of *Ochieng, J.* and on 19th October, 2005, the Applicants lodged another notice of appeal against

“..... the decision (Order) that the plaintiffs/applicants do deposit with the defendant within 60 days from the said date sum of Kshs.4,500,000/= to be held as security and that in default of complying with the said condition the injunction stands vacated”.

In other words, the Applicants were and are still seeking an injunction on their own terms and would not countenance any conditions being placed on the grant of the injunction. Needless to say they did not comply with the orders made by *Ochieng J.* They instead filed the present motion before us on 20th February, 2006 and that must be long after the expiry of the order of *Ochieng J*, as the injunction granted by that Judge must have stood vacated on or by 5th December, 2005. Now we are told in the supplementary affidavit of *George O. Ojiambo*, the Respondent’s Branch Manager at Eldoret, that a public auction was held on 14th March, 2006 and that the disputed land was bought by one *Karuri Mwangi* who was the highest bidder at the auction and who duly paid 25% of the bid price. *Karuri Mwangi* was not served with the motion before us, and we have not heard him.

That being the position, even if the applicants had an arguable appeal and even if his appeal would be rendered nugatory if an injunction is not granted to them, we do not see how we can possibly grant to them the injunction they seek. Their motion has been overtaken by the stated sale to a third party and it would be unreasonable for us to restrain a sale which has already taken place. Nor can we restrain the transfer to the third party who bought the land at the public auction on 14th March, 2006; that party was not served with the current motion and we have not heard him. We cannot make an order adverse to his interest without hearing what he has to say. In any case the applicants had an order of stay and having allowed it to lapse, they can only blame themselves.

We are satisfied that the motion before us is untenable and that being our view of the matter, we order

that the Applicants' notice of motion dated 9th December, 2005 and lodged in Court on 20th February, 2006 be and is hereby dismissed with the cost thereof to the Respondent.

DATED and DELIVERED at NAIROBI this 16th day of June, 2006.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR