



REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION NAI 256 of 2003

1. MAMA NGINA KENYATTA

2. KRISTINA WAMBUI PRATT (suing as

Trustees of Waunyomu Ngeke Ranch) APPLICANTS

AND

MAHIRA HOUSING COMPANY RESPONDENT

RULING OF THE COURT

This is a reference under Rule 54 (1) (b) of the Court of Appeal Rules from the ruling of a single judge (Onyango Otieno, Ag. J.A.), (now J.A.) dated 25th June, 2004 dismissing an application for provision of security for costs. The applicants are the respondents in Civil Appeal No. 267 of 2001 which was lodged by the respondent company on 18th October, 2001. The appeal is against the judgment and decree of the superior court in H.C.C.C. No. 4415 of 1994 dated 26th May, 2000 allowing the applicant's suit against the respondent company with costs.

The dispute in the superior court arose from an agreement of sale of land dated 14th May, 1986 by which the two applicants agreed to sell two parcels of land L.R. No. 10901/36 and 10901/37 South of Ruiru (measuring in total about 82.36 HA) to the respondent for a consideration of Shs.5,000,000/=. The applicants averred that the respondent company breached the agreement by failing to pay the full purchase price as a result of which the applicants rescinded the agreement in May, 1987. The applicants further averred that the respondents forcefully took possession of the land in or about 1990 and refused to vacate.

The main reliefs sought in the suit were vacant possession and an order for eviction. The respondent company contended in the suit that it had paid the full purchase price and produced receipts at the trial to verify the payment. The superior court however found that, except for the receipt for the payment of Shs.500,000/= the other receipts were forgeries. There was evidence from Peter Githuka, the treasurer of the respondent company that the respondent deals with buying land and distributing it to members and that the land in dispute was legally sub-divided into plots of 50 ft by 80 ft which were allocated to 1,600 members who were in possession since 1984 and who had obtained their respective individual titles.

That the suit land was sub-divided and individual members of the respondent company issued with respective title Deeds under the Registered Land Act was confirmed by the evidence of Jackson Kamau Wanjau, the District Land Registrar, Thika. The superior court was nevertheless satisfied that the respondent had not bought the land in dispute as the contract was rescinded. The court gave judgment for the applicants with costs. The members of the respondent company were given 3 months to vacate the land. Subsequently on 27th September, 2000 the bill of costs was taxed by consent at Shs.4,000,000/=.

There are 19 grounds of appeal against the decision of the superior court. That is the brief back-ground in which the dismissed application for security for costs was brought. The application for security for past costs and the cost of the appeal was brought under Rule 104 (3) of the Court of Appeal Rules. The applicants sought an order that the respondent be ordered to provide security for the taxed costs of Shs.4,000,000/= and also to provide security for costs of the appeal in the sum of shs.500,000/=. The application was based on two grounds, namely, that the respondent company, on its own admission, cannot pay the past costs, and, secondly, that the respondent company is insolvent.

The learned single judge appreciated at the outset that rule 104 (3) gave the Court a discretion for he observed in part: "It is trite law that in considering an application of this nature, the court has discretionary powers. It is also trite law, that such powers must be exercised judicially. In short, much as the court has discretion it must exercise such discretion upon reasons".

The learned single judge dismissed the application on five grounds; namely, that he was satisfied that there was no attempt to execute the decree for costs; that it was not established by satisfactory evidence that the respondent company was insolvent; that the appeal is not frivolous; that the suit involves a housing company with many members and land which is a sensitive matter in the country; and that since the appeal had been fixed for hearing on 28th June, 2004 (that is in three days time) it would be oppressive and unfair to order security for costs.

The applicants by this reference are in effect asking the Court to interfere with the exercise of discretion and reverse the decision of the single judge. This Court can only interfere with the exercise of discretion by a single judge on principles enunciated in the case of *Mbogo & Another v. Shah* [1968] E.A. 93 which have been applied in several cases, for instance, in *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* Civil Application No. Nai. 255 of 1997 (unreported). Mrs. Wambugu, learned counsel for the applicants contended that the learned single judge misdirected himself in finding that the inability to pay past costs and the insolvency of the respondent company was not proved. It was further contended that the learned single judge was influenced by extraneous matters, to wit, that the appeal is not frivolous, that the suit involved a housing company with many members.

We have considered the respective submissions. It has not been said that the learned single judge misdirected himself on the law. The learned judge correctly appreciated that he was called upon to exercise a judicial discretion and that the discretion is exercised considering all the circumstances of the particular case. He was particularly guided by the principles set out in the judgment of the Lord Denning M. R. in *Sir Lindsay Parkinson & Co. Ltd v Triplan Ltd* [1973] 2 WRR 632 at page 684.

The matters that the court should consider in exercising its discretion in an application for security for costs were comprehensively, though not exhaustively stated in *Keary Developments v Tarmal Construction* [1995] 3 All ER 534 which was not however cited before the learned Judge. Contrary to what the learned counsel for the applicants submitted, it is an important consideration whether the company's claim is bona fide and whether the company has a reasonably good prospects of success.

The judgment of the superior court, the proceedings of superior court and the grounds of appeal were all before the learned single Judge. The prospects of success of the appeal, the nature of the suit and the number of members of the respondent company who could be affected by the appeal were not extraneous matters. Indeed, they were relevant factors to be taken into consideration. The learned Judge was satisfied that the applicants had not established that the respondent was unable to pay costs or was insolvent. The applicants think otherwise. The fact that a company is insolvent and unable to pay costs or is even in liquidation is not decisive. The court has still a complete discretion whether or not to order security for costs (see *Sir Lindsay Parkinson Co. Ltd v Triplan Ltd* (supra); *Gulf Engineering (East Africa) Ltd v. Amrik Singh Kalgi* [1976] KLR 277, and *Keary Developments v Tarmal Construction* (supra).

Upon our consideration of all the relevant circumstances of the case, the grounds of appeal the lateness in bringing the application for security for costs, we are not satisfied that there are any valid grounds for interfering with the exercise of discretion by the learned single judge. We would accordingly dismiss the application with costs to the respondent. That is our order.

Dated at Nairobi this 6th day of May, 2005.

P. K. TUNOI

JUDGE OF APPEAL

E. M. GITHINJI

JUDGE OF APPEAL

P. N. WAKI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR