



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: O'KUBASU, GITHINJI & DEVERELL, J.J.A.**

Civil Application NAI 51 of 2005

BETWEEN

HUMPHREY KILAMBO MCHARO APPLICANT

AND

**1. KENYA COMMERCIAL BANK
LTD**

2. JOEL TITUS MUSYA T/A MAKURI

ENTERPRISES RESPONDENTS

RULING OF THE COURT

This is an application by Notice of Motion dated 3rd March, 2005 filed by *Humphrey Kilambo Mcharo* (the applicant) under **Rule 5 (2) (b)** of the Court of Appeal Rules seeking a temporary injunction to restrain the respondents (Kenya Commercial Bank Ltd and Joel Titus Musya from advertising or selling by auction or otherwise the applicant's piece of land being L.R. No. 12192/4 Wundanyi Town in Taita Taveta District (the property) pending the hearing and determination of the applicant's intended appeal against the ruling and orders of the High Court of Kenya at Mombasa delivered by the Hon. Lady Justice Khaminwa J.

The record of the application contain two rulings by Khaminwa J one on 10th November, 2004 (the 2004 Ruling) and one a year earlier on 23rd September, 2003 (the 2003 Ruling).

The Notice of Motion, in its heading, indicates that the present application for an injunction arises out of the 2004 Ruling. The Notice of Appeal contained in the record of the current application is dated 3rd October, 2003 and it evidenced an intention to appeal against the 2003 Ruling. Mr. Jengo, one of the learned Counsel appearing at the hearing of the application before us confirmed that there is no appeal against the 2004 Ruling.

The applicant first submitted on the issue as to whether the intended appeal is frivolous or whether it is arguable. It must be borne in mind that, in considering this issue we are considering whether or not there is an arguable appeal against the 2003 Ruling of Khaminwa J in which she declined to issue an interim injunction. The applicant has not exhibited any draft memorandum of appeal and has not in submission disclosed any reasonable grounds of appeal.

Having read that judgment we are satisfied that there are no issues raised in that judgment which are likely to result in her decision to dismiss the application for an injunction being overturned on the appeal.

The learned Judge, prima facie appears to have exercised her discretion in a sound manner. We therefore do not consider that the intended appeal against that refusal has a reasonable probability of success.

On the issue as to whether a refusal by this Court to grant the injunction now sought will render the intended appeal nugatory the applicant relied on the submission that the suit property is the place where the applicant together with his family resides. Part of the suit property is said to be let out to tenants. The applicant stated in his affidavit dated 3rd March 2005 that “*the property is home to me and my family and losing it now would completely traumatize my family and I will not be able to recover it from a third party purchaser for value.*”

In the event that the applicant finally succeeds in the appeal against the 2003 Ruling dismissing the High Court injunction application, it is true that such a success might not result in the suit property being returned to the applicant since by that time it might have been sold.

However, if the applicant succeeds at the final hearing of the substantive suit he will be compensated in damages, it not being suggested that the Kenya Commercial Bank Ltd would not be in a position to pay such damages.

We have come to the conclusion that the application for the injunction sought should be dismissed and it is so hereby ordered. We further order that the costs of this application should be in the intended appeal.

Dated and delivered at Nairobi this 23rd day of September, 2005.

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR