



IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: GICHERU, OWUOR & O'KUBASU, J.J.A.)

CIVIL APPLICATION NO. NAI. 453 OF 2001 (UR. 241/2001)

BETWEEN

JACOB OCHIENG' MUGANDA APPLICANT

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED RESPONDENT

(Application for injunction and stay of further proceedings from the Ruling of the High Court at Nairobi delivered on 13th November, 2001 (Ringera, J.)

in

H.C.C.C. NO. 1436 OF 1999)

RULING OF THE COURT

This is an application under Rule 5(2)(b) of the Court of Appeal Rules in which the applicant, **Jacob Ochieng Muganda**, is seeking an order "for injunction and stay of further proceedings from the Ruling of the High Court at Nairobi delivered on 13th November, 2001 by the Honourable Mr. Justice A. Ringera in **H.C.C.C. NO. 1436 of 1999**".

This is a dispute with a long history. The applicant by a plaint filed in the superior court on 24th September, 1998, averred that by a charge dated 22nd August, 1988 the respondent (Housing Finance Company of Kenya Ltd) extended to him a loan of K.Shs.652,000/- but disbursed only K.Shs.448,894.45 with interest thereon at 14½% for a period of 15 years. To secure this loan the applicant offered to the respondent L.R. No. 37/246/28 Nairobi which consisted of a block of flats. The applicant further averred that the respondent loaded inflated and unlawful arrears and penalties into his contract contrary to the contract of charge between them with the result that as at 1st July, 1998 his account reflected an improper loan balance of K.Shs.3,741,373.95. The applicant further averred that he had by July 1998 paid to the respondent a sum of K.Shs.1,408,871/= with interest thereon making an overpayment of K.Shs.353,435/=. He made a demand for the repayment of the said amount but the respondent did not comply with the demand. He therefore prayed for judgment against the respondent for declaration that he did not owe the respondent K.Shs.3,741,373.95 or order restraining the respondent, its agent or servant from disposing or selling his land L.R.37/246/28 in Nairobi West, refund of K.Shs.355,430/- and the costs of the suit. Simultaneously with the filing of the plaint the applicant applied for an interlocutory injunction restraining the respondent from selling, charging, alienating or wasting the said property. He was granted the order of interlocutory injunction restraining the respondent from selling, charging,

alienating or wasting the said property, on 28th October, 1998. That order having been granted, for some unexplained reasons the court file went missing but it (court file) was eventually reconstructed and the substantive suit listed for hearing on 18th July, 2000. The said suit was dismissed for non-appearance of the applicant (the plaintiff). That dismissal of the suit was however set aside on 1st November, 2000, hence the suit was then back on course.

Then on 29th March, 2001 the applicant applied yet again for another order of interlocutory injunction to restrain the respondent from exercising its statutory power of sale in respect of his property. That application was granted by Ringera, J. on terms that the applicant makes monthly repayments in the sum of Kshs.69,304.06 until the hearing and determination of the main suit. It was further ordered that in default of such payment the order of injunction would lapse forthwith. The applicant did not comply with the above order and so the respondent took steps to sell the applicant's property. A sale was advertised for 13th September, 2001, but the applicant had on 5th September, 2001 filed yet another application to restrain the respondent from selling the property in question. That application was dismissed with costs. The advertised sale went on and the property was knocked down to one Githinji Kamau, nominee of Marylene Kamau. But that was not to be the end of the matter.

On 21st September, 2001, the applicant filed a Chamber Summons application expressed to be brought **under order 39 rules 1 and 2 and order 50 rule 7** of the Civil Procedure Rules seeking orders that the sale of his property on 13th September, be set aside and that the respondent be restrained from transferring, alienating or otherwise dealing with the said property until the determination of the suit. Since the property had already been knocked down at the public auction what the applicant actually sought was to restrain the respondent from transferring the same to the auction purchaser. That application was made on the grounds that (a) the proposed sale was fraudulent and unlawful, (b) the property was sold at a gross undervalue as no valuation was done prior to the purported sale, (c) the respondent in selling the property did not exercise care and good faith to obtain the best price available since potential bidders had been deliberately kept off the auction by the auctioneers who had introduced a new condition not earlier advertised which required potential bidders to deposit a refundable participation fee of K.Shs.100,000/- in cash or bankers cheque, (d) the highest bidder did not comply with the terms of the sale as he did not pay 25% of the purchase price at the fall of the hammer and (e) in view of the above matters there was no lawful sale on the 13th September, 2001 and hence the mortgagor's equitable right of redemption had not been extinguished.

That application was argued before Ringera, J. and in a reserved ruling the learned judge finally dismissed the application with costs.

In dismissing the applicant's application the learned judge of the superior court made the following observations:-

"I have now weighed the arguments canvassed before me. It appears to me that both counsel are agreed that if there was a valid contract of sale between the defendant and the auction purchaser at the auction of 13.9.2001, the plaintiff's equity of redemption was extinguished and he could not obtain an injunction to restrain the defendant from transferring the suit property to the purchaser. The position is correct in law for it is well established that a mortgagor's right to redemption is extinguished by the mortgagee's entry into a binding contract for sale of the mortgagor's property either by public auction or private treaty (see section 60 of the T.P.A. as amended by Act no. 20 of 1985). So the real issue is whether the defendant did enter into such a contract on 13.9.2001."

The learned judge considered the issue of the sale agreement pursuant to the auction and was of the view that there was no irregularity. He then went on to conclude his ruling thus:-

"But even if it was an irregularity, I think the remedy of a person who can prove he has been damaged by the irregularity would be damages against the auctioneer as per section 26 of the Auctioneers Act which provides that subject to the provisions of any other law, a person who suffers any special or general damages by the unlawful or improper exercise of any

power of a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action. Having taken that view of the matter, I am impelled to conclude that the plaintiff's equity of redemption was extinguished by the auction sale on 13.9.2001 and accordingly he has no right that can be protected by the prohibitory injunction that he seeks. In the premises, he has not shown a prima facie case with a probability of success at the trial."

In this ruling we have given a brief history of the dispute and one thing that cannot escape some consideration is the conduct of the applicant while pursuing various orders from the superior court. He is the kind of a litigant that is ordered to do something but chooses to ignore those orders only to come back to court asking for fresh orders. For his conduct the learned judge had the following to say:-

"Let me also state that the conduct of the plaintiff herein cannot escape judicial censure. He was granted an injunction on terms on the 5th April, 2001 by this court. He did not abide by those terms and the order lapsed. In my opinion, such is the kind of conduct which even if all other things were equal would disentitle the plaintiff to equitable relief. He who comes to equity must do equity. And he must abide by orders of a court of equity. For all those reasons I would reject his application for injunction."

In his submissions before us Mr. Odero for the applicant argued that the statutory notice upon which the sale was conducted was not only defective but illegal. We have looked at the statutory notice at page 260 of the record of appeal and we find that it clearly stated that the applicant was given three months in which to settle the amount owing failure of which would entitle the respondent to exercise its Statutory rights under **section 69** of the **Indian Transfer of Property Act** as amended and applied to Kenya. This in our view was in conformity with what this Court stated in **Trust Bank Ltd v Eros Chemists Ltd & Another - Civil Appeal No. 133 of 1999 (unreported)**:-

"The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months' period to lapse after service of notice. In our judgment, a notice seeking to sell the charged property must expressly state that the sale shall take place after three months' period. To omit to say so or to state a period of less than three months for sale (as in the Russel case) is to deny the mortgagor a right conferred upon him by a statute. That clearly must render the notice invalid."

As we deal with this matter we must remind ourselves that what is before us is an application under Rule 5 (2) (b) of this Court's Rules. In **Trust Bank Limited & Another v Investech Bank Limited & 3 Others**, Civil Application Nos. Nai. 258 and 315 of 1999 (unreported) this Court made the following observations:-

"The jurisdiction of the court under rule 5 (2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, or put another way, it is not frivolous and secondly, that unless he is granted a stay the appeal or intended appeal if successful, will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case."

In the applicant's intended appeal what he will be challenging is the statutory notice which as we have indicated cannot really be faulted since it gave the usual three months' period. However, there is the issue of validity of the sale as it will be argued that the sale agreement was signed by a stranger. In our view, this issue is arguable. What about the nugatory aspect of the appeal? The property in issue is a block of flats in Nairobi West. The property was knocked down at a public auction. If there was any irregularity in the conduct of the auction the applicant would be entitled for damages against the auctioneer pursuant to **section 26** of the Auctioneers Act which provides that subject to the provisions of any other law, a person who suffers any special or general damages by the unlawful or improper exercise of any power of a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer

by action.

In view of the foregoing we are of the opinion that having regard to the long history of this dispute and taking into account the conduct of the applicant in the superior court, this is not a proper case in which a stay can be granted. Indeed what the applicant is seeking is to stop the transfer of the property sold at the public auction to the auction purchaser. We have already stated what remedy would be available to the applicant in the event that his intended appeal is successful. Accordingly and, for the reasons above stated the application fails and must be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 1st day of February, 2002.

J. E. GICHERU

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR