



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: KWACH, SHAH & O'KUBASU, JJ.A
CIVIL APPLICATION NO. NAI. 251 OF 2000 (UR. 119/2000)
K.H. OSMOND.....APPLICANT
AND
DAIMA BANK LIMITED.....1ST RESPONDENT
WHITESTONE AUCTIONEERS (K) LTD.....2ND RESPONDENT

**(An application for stay of execution in the matter of an
intended appeal from the judgment of the High Court
of Kenya at Nairobi (Hon. Commissioner of Assize
Jeanne Gacheche) delivered on 12th July, 2000**

in

H.C.C.C. NO. 3052 OF 1997)

RULING OF THE COURT

The applicant, Mr. K.H. Osmond, seeks stay of execution of the judgment and orders of the superior court (Ms. Jeanne Gacheche, Commissioner of Assize) dated 12th July, 2000 whereby that court dismissed the applicant's suit in which suit the applicant was seeking orders to restrain the respondents, their agents, servants advocates and/or officers from selling the applicant's property known as Plot L.R. 1/185 Argwings Kodhek Road, Nairobi (the suit property). In addition to the said relief the applicant was also seeking reliefs such as (1) a declaration that the 'purported' mortgage in relation to the suit property was null and void, (2) that accounts be taken of moneys lent to him by the first respondent including interest properly accruable thereon, and (3) damages for breach of contract and the alleged wrongful exercise of the statutory power of sale.

The application before us is under rule 5(2)(b) of the Rules of this Court which rule gives this Court unfettered discretion to order stay of execution of a decree of the superior court pending the hearing and determination of an intended appeal or an appeal if already lodged. Primarily there are two issues which we have to consider in dealing with an application brought under rule 5(2)(b) and these are (1) that the intended appeal is arguable or that at least it is not frivolous and (2) success in the intended appeal will be rendered nugatory if no stay is granted.

The learned Commissioner of Assize found that the statutory notice served on the applicant was invalid.

Having so found it is at least arguable that the proposed auction sale should take place. Recently this Court considered the issue of the format of the notice to be given under section 69(A)(i) of the Transfer of Property Act. The Court consisting of five judges was constituted as there was a conflict of judicial opinion in two previous decisions of this Court as regards the period Of such notice.

After carefully considering the two decisions namely The Russell Company Limited vs. Commercial Bank of Africa Limited & Another (Civil Appeal No. 89 of 1991) (unreported) and Trust Bank Limited vs. Okoth, Civil Appeal No. 177 of 1998 (unreported) this Court (five judges) in the case of Trust Bank Limited vs. Eros Chemists Limited & Another, (Civil Appeal No. 133 of 1999) (unreported) stated:-

"For that right (right to redeem) 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 the three months period. To omit to say so or to state a period of less than three months for sale (as in the Russell case) is to deny the mortgagor a right conferred upon him by the statute. That clearly must render the notice invalid."

Mr. Sheetal Kapila who appeared for the respondents with Mr. P.C. Njuguna countered the finding that the notice was invalid by urging that such invalidity was more germane to an interim injunction application rather than full hearing of a suit. At this stage we cannot say any more save that the point in issue is arguable and will need full arguments before the bench hearing the appeal itself.

The auctioneer (the second respondent) caused to be printed a notice in the press advertising the intended auction sale of the suit property, which notice gave less than 45 days for such sale whereas a rule made under the Auctioneers Act, that is, rule 15 (d) of the Auctioneers Rules, 1997 provides for a notice of not less than 45 days. Whether the said rule 15(d) extends or can extend the three month period provided in section 69(A)(i) of the Transfer of Property Act will need full arguments before the bench hearing the appeal itself.

Mr. Kapila argued that as his client (the first respondent) had a judgment on its counter-claim the auction sale had become an issue unconnected with the statutory power of sale. That is an arguable point. And there is also the issue of penal interest charged by the first respondent. All these factors lead us to hold that the intended appeal is not a frivolous one. The question whether success in the intended appeal will be rendered nugatory if a stay is not granted poses no difficulty to us. If the suit property is sold and if the appeal succeeds the same would be no longer available to the applicant whose livelihood depends on his legal practice carried on from the suit property.

We allow this application and order a stay of execution of the decree in H.C.C.C. No. 3052 of 1997 pending the hearing and determination of the intended appeal or further orders. Costs of this application will be costs in the intended appeal.

Dated and delivered at Nairobi this 8th day of September, 2000.

R.O. KWACH

JUDGE OF APPEAL

A.B. SHAH

JUDGE OF APPEAL

E. O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.