



IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: TUNOI, LAKHA & BOSIRE, J.J.A.)

CIVIL APPLICATION NO. NAI. 356 OF 2000 (174/2000 UR)

BETWEEN

KARANJA WAGICIENGO

ANASTASIA WARIARA WAGICIENGO APPLICANTS

AND

NYAKIO NDWIGA 1ST RESPONDENT

SAM CONSOLIDATED HOLDINGS 2ND RESPONDENT

AGROMASTERS (KENYA) LIMITED3RD RESPONDENT

BARCLAYS BANK OF KENYA LIMITED INTERESTED PARTY

(Application for stay of execution pending the hearing and determination of anintended appeal from a ruling of the High Court of Kenya at Nairobi (Rawal, J.) dated 5th December, 2000

in

H.C.C.C. NO. 25 OF 1996)

RULING OF THE COURT

On 5th December, 2000, the superior court (Rawal, J.) in a considered ruling dismissed the application dated 31st October, 2000 by which the applicants herein sought orders, firstly, to compel the second and third respondents to redeem a charge in favour of Barclays Bank of Kenya Limited, the interested party, over a property registered as L. R. No. 209/1498/5, the suit property; and, secondly, to restrain the first and second respondents from disposing of the said property pending the hearing and determination of the suit commenced by a plaint dated 4th January, 1996 and later amended on 3rd May, 1996.

By the action the applicants claimed that on or about 11th June, 1993, they as the registered proprietors of the suit property entered into a sale agreement with the second respondent whereby the latter was to purchase the suit property under certain terms and conditions one of which was that the completion date would be one month from 11th June, 1993, time being of essence. They averred that the second respondent neglected to complete the said purchase on the agreed date and thus entitling the applicants to invoke Clause 11 of the said agreement and rescinded the sale. However, despite the first and second

respondents being informed and notified of the rescission and in total disregard of their (applicants) instructions, the first and second respondents fraudulently transferred the suit property to the third respondent. The applicants sought a declaration that the transfer was unauthorised, unlawful, null and void. They further prayed for the cancellation of the transfer.

The written statements of defence were duly filed and in answer to the application before the superior court which gave rise to the application before us, the respondents raised a preliminary objection to the effect that:

"1.On 16th August 1994 the same applicants filed HCCC No. 2972 of 1994 (O.S.) against the same respondents the proceedings in which the matters in issue were directly and substantially the same as issues raised in the current suit.

2.On 16th 1994 in HCCC No. 2974 (O.S.) the applicants filed a Chamber Summons under Order XXXIX Rules 1 and 3 of the Civil Procedure Rules seeking Orders that are identical and/or directly and substantially the same as in this present suit.

In a reserved ruling the learned Judge substantially found in favour of the respondents and dismissed the application. The applicants were thus provoked into filing the present application for a stay under **rule 5(2)(b)** of the **Rules of this Court**. The principles on which this court grants a stay under rule 5(2)(b) of the Rules of this court are now well settled and we need not rehash them.

In the intended appeal, the applicants will argue that the learned Judge erred in failing to appreciate that the matter before her was based on new facts namely the impending sale of the suit property and the issue of res judicata did not arise. There is also the issue whether or not the decision in HCCC NO. 2972 of 1994 (O.S.), which was made at interlocutory stage would operate as res judicata in view of the fact that the suit did not thereafter proceed to finality the same having been withdrawn. Though we cannot in this application express any concluded view because the ruling of the superior court is the subject of appeal to this court, we are of the view that on the material before us the applicants may have an arguable appeal.

Further , we are of the opinion that if we do not grant to them a stay their intended appeal, if successful, would be rendered nugatory. On this aspect of the matter, we also believe that the applicants and indeed the respondents and the interested party would suffer grave and irreparable loss if this application is not granted. We would grant the application and order that the proceeds of the disputed sale, namely, Shs.1,350,000/= together with interest accrued to date and now in possession of the first respondent be paid over to the interested party, Barclays Bank of Kenya Limited, forthwith.

The costs of this application shall be in the intended appeal.

Dated and delivered at Nairobi this 22nd day of December, 2000.

P. K. TUNOI

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR