REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI 263 OF 2009 (UR 183/09)

STEPHEN BORO GITIHA.....APPLICANT

AND

FAMILY FINANCE BUILDING SOCIETY.....1ST RESPONDENT

GEORGE MWANGI HIUHU.....2ND RESPONDENT

MUIBAU AGENCIES.....3RD RESPONDENT

THE LAND REGISTRAR, NAIROBI.....4TH RESPONDENT

(Application for extension of time within which to file and serve notice of appeal and record of appeal from the Ruling and Order of the High Court of Kenya at Nairobi, Milimani Commercial Courts, (Kimaru, J) dated 17th June, 2009

in

H. C. C. C. NO. 360 OF 2003)

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RULING

This is an application dated 31st August 2009 under Rule 4 of the Court of Appeal Rules for extension of time within which to file and serve a Notice of Appeal and to file and serve a Record of Appeal.

The applicant intends to appeal against ruling of the superior court (Kimaru, J) delivered on 17th June, 2009 in the High Court case number 360 of 2003, in which the court held that the applicant had no cause of action against the second defendant and now the second respondent in this suit, and struck out the suit against the applicant herein and also ordered that the respondent's reply to further amended defence and defence to counterclaim filed on 28th November 2008 be struck out and entered judgment against the applicant. The substance of the prayer granted in the counterclaim is that the applicant gives vacant possession of the suit property to the second respondent within 45 days failing which the second respondent be at liberty to forcefully evict the applicant from the premises.

The origin of what gave rise to the dispute is a sale to the second respondent by a public auction of property LR No 278, New Huruma Estate Nairobi then belonging to the applicant. The sale was by the 1st respondent then a building society (and now a bank) pursuant to chargee's statutory power of sale. The 3rd respondent is an auctioneer and the 4th respondent is a Land Registrar in Nairobi. The sale is said to have taken place on 15th May 2003 where the 2nd respondent was declared a purchaser. The property was sold to the purchaser at Kshs 9 million. Dissatisfied with the said sale the applicant has filed several suits and applications in court and I consider it important to set out a chronological order of the events from the date of sale to the institution of this application because without a proper grasp of the genesis of the dispute and the nature of the applications filed and the verdicts given it would not be possible to understand the substance of the dispute, its uniqueness and finally it would not be easy for anyone to appreciate which way to go in the face of what appears to have been a long battle between the parties herein.

The events are:-

1. On 13th November, 2002 and 19th March 2003 sought orders to restrain the sale of property and applications were never perused, High

Court Civil Case No. 1711 of 2002.

2. Property sold by public auction on 15th May 2003 and sold to the 2nd respondent for Kshs 9 million.

3. The applicant filed suit on 31st July 2000 in Milimani commercial Court High Court Civil Case No. 360 of 2003 seeking a restraining order against the 1st respondent from transferring the suit property to the 2nd respondent on the ground that the property was sold irregularly.

4. On 21st October 2003 the superior court Mohammed Ibrahim after the hearing the matter on merit dismissed the application with costs. The findings of the judge included:

(i) That the plaint filed by the applicant (plaintiff) did not disclose any single allegation of fraud against the 2nd defendant (the applicant herein).

(ii) That the sale had taken place and effect and that the applicants' equity of redemption had been extinguished and his only remedy was in damages against the 1st and 3rd defendants.

(iii) The plaintiff's dispute was based on accounts and the court could grant an injunction purely on the basis of a dispute as to the actual amount due to the bank.

5. The applicant has informed the superior court and this Court that the ruling referred to in (3) above as plucked off the court file and the superior court has confirmed that indeed the ruling cannot be traced.

6. On 24th October 2003 the 2nd respondent was registered as the owner of the property in the lands office.

7. On the same day the ruling was given that is 21st October 2003 the applicant filed a Notice of appeal but for nearly six years he has not pursed the appeal.

8. On 27th June 2004 Kasango, J declined to allow the applicant's application seeking to amend the plaint and an appeal was filed to this Court namely CA 173 of 2004. This appeal has nothing to do with ownership of the suit property. Notice of appeal was lodged in this Court on 10th August, 2004.

9. On 22nd April 2008 the 2nd respondent filed an application for the applicant to deposit the rent proceeds from the property.

10. On 16th October, 2008 the 2nd respondent filed an application to further amend the amended defence and counterclaim filed herein on 23rd March 2004 in order to claim damages against the applicant.

11. On 26th January 2009 the 2nd respondent filed an application under Order VI Rule 131(b)(c) and (d) of the Civil Procedure Rules to strike out the suit ruling *High Court Civil Case No. 360 of 2003* ***as against the 2nd respondent and for the applicants' reply to Further Amended Defence and defence to counterclaim filed on 28th November, 2008 be struck out and for judgment to be entered in favour of the 2nd Respondent as against the applicants in terms of 2nd defendants. Further Amended Counterclaim dated 10th November 2008 and that the claim for mesne profits of the 2nd respondent do proceed to formal proof. It is the ruling of 17th June, 2009 in respect of the application which has given rise to this appeal.***

In ***Mokua Otwori alias Richard Meroka Monari*** and ***Mosota Otwori CA 263 of 2009 Omolo JA*** in a ruling brought under rule 4 of the Court of Appeal Rules rendered himself thus:-

"I have said that under rule 4 the discretion of the Court is wholly unfeltered but over the years the Court has developed well known principles upon which the discretion is to be exercised. The matters the Court considers are the length of the delay, the reason or reasons for the delay, the chances (possibly) of the appeal succeeding and any prejudice to the respondent should time be enlarged see for example *PATEL v WAWERU & 2 OTHERS [2003] KLR 361 at page 363, paragraphs 5 …* ***But the position is now clear and well settled that where there is delay some explanation ought to be offered for it, otherwise there would be no reason for setting down time lines."***

In this particular application the fact that there was delay is quite apparent and has not been denied. From 17th June, 2009 when the ruling of Kimaru, J was given the applicant had a stay of 45 days. After the applicant's disagreement with his former advocate and the applicant's instructions on 18th August 2009 to the third advocate in the same proceedings ***Mr Sumba***, there was a further delay of 19 days. The reasons for the delay in respect of the 45 days was the alleged disagreement with the advocate and as regards the 19 days the explanation is that the newly appointed advocate needed the 19 days to peruse the court file and to produce copies since the second advocate had refused to part with the file. With respect, both explanations are not acceptable to me because as regards a disagreement springing from advocate/client relationship is confidential to them and cannot in my view be a valid reason for a party not taking any action. Again the need to take copies could have arisen from other unacceptable reasons like the second lawyer's exercising his right of lien on the file for non-payment of fees. In any event in my estimation the third advocate did not require 19 days to photocopy documents and I agree with the 2nd respondent counsel ***Mr Kang'ethe*** that two days would have been sufficient and I therefore reject the explanation given especially when it is clear that the applicant had given instructions for a notice of appeal to be filed immediately the ruling was given. Accumulative unexplained delay of 64 days is in my view inordinate.

As regards the chances of appeal succeeding, as a single judge I deliberately wish to refrain from delving into the issue for obvious reasons. However it is clear from the chronology of the applications filed by the parties and in particular the revelation that he has had two chances of filing appeals in the past and in both instances after giving a notice of appeal he has failed to pursue the appeals. Instead he appears to have a propensity for opening new fronts with the apparent result of reopening past determination by competent courts touching on the same issue. For example before me, there has not been a serious challenge to the ruling of Ibrahim J on 21st October 2003 which as set out elsewhere in the chronology of events, made what appears to be final findings on the matters he intends to pursue or to relitigate in the intended appeal yet he did not appeal against the ruling given over six years ago.

In my view the opening of new fronts after the said ruling which according to the respondent has disappeared from the court file in the superior court, is not a reflection of good faith and in my view borders on abuse of the court process and is a clear attempt to deny the finality of the said ruling. I believe I have said enough on this, and if I have not, the chronology of events as set out above is self explanatory.

On whether the respondent is likely to suffer prejudice what I consider pertinent is that the property the subject matter of the application was sold on 15th May 2003 and registered in favour of the 2nd respondent on 24th October 2003 and as deponed by the 2nd respondent and as at October 2008 the appellant had collected rent from the suit property of Kshs 12 million and the ***mesne*** profits of Kshs 14 million had accumulated as at 17th September, 2009, and this state of affairs is likely to continue to the advantage of the applicant and to the detriment of the respondent who is a registered owner. In my assessment of the situation there cannot be greater prejudice that this taking into account that it has not been demonstrated that the respondent has the means to refund these moneys to the applicant should the intended appeal fail.

One other factor which I consider relevant is that the applicant has deemed it fit to come to court after failing to comply with a court order giving possession to the 2nd respondent. Surely such a litigant who has literally knocked on the doors of this Court with unclean hands must know what to expect. Court orders must be respected by all and sundry until set aside. This is a factor I have considered in the exercise of my unfettered discretion.

Finally on 23rd July 2009 both the Civil Procedure Act and the Appellate jurisdiction Acts were amended to incorporate sections 1A and 1B in the Civil Procedure Act and Sections 3A and 3B in the case of the Appellate Jurisdiction Act. These provisions incorporate into the civil process an overriding objective which has also been defined. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective. The relevant provisions state:-

"1. The overriding objective of this Act and of the rules made hereunder, is to facilitate the just expeditions, proportionate resolution of civil disputes governed by the Act.

2. The court most seek to give effect to the overriding objective when it exercises any power given to it by this Act or by rules made hereunder and when it interprets any provision of the Act or of any such rule."

The principal aims are:-

3A.(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2) The Court shall, in the exercise of it powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and orders of the Court.

3B.(1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –

(a) the just determination of the proceedings;

(b) The efficient use of the available judicial and administrative resources;

(c) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(d) **The use of suitable technology.**

I have no doubt that the opening of new fronts in litigation every time a ruling is given against a party as has happened here is a clear breach of the principal aims of the overriding objective especially those emphasizing on the need to reduce cost and delay. Similarly, I am concerned that the institution of interlocutory proceedings or other proceedings where there is a final ruling by a court and which has not been appealed against is an abuse of the court process and this lies in the face of the principal aims of the overriding objective. Finally contempt of a court order constitutes non co-operation with the smooth operation of the court process and the administration of justice and is also in conflict with the principal aims of the overriding objective requiring advocates and parties to co-operate. The overriding objective overshadows all technicalities precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. I must warn litigants and counsel that the courts are now on the driving seat of justice and the courts in my opinion have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as it is practicable the scourge of the civil process

starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.

I would also disallow this application on this ground as well.

For the above reasons I hereby exercise my unfetted discretion and dismiss the application with costs.

It is so ordered.

DATED and delivered at Nairobi this 20th day of November, 2009.

J. G. NYAMU

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JUDGE OF APPEAL