REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLI 78 OF 2009 (UR 47/2009)

PETER NG'ANG'A MUIRURI.....APPLICANT

AND

1. PETER NGANGA MUIRURI

2. BARCLAYS BANK OF KENYA LTD.....RESPONDENTS

(Application for injunction pending an intended appeal from the order of the High Court of Kenya at Nairobi, Milimani Commercial Courts (Kimaru, J.) dated 16th March, 2009

in

H.C.C.C. NO. 1928 OF 2000)

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RULING OF THE COURT

The appellant in the notice of motion dated 23rd March, 2009 and filed into the Court on 25th March, 2009, Peter Nganga Muiruri, obtained a loan from Housing Finance Company of Kenya (HFCK). That loan was secured by a charge over his land parcel Reference Number 7752/225 situate on Kibagare Way within Nairobi City Area. He alleges that the advance made was Ksh.3,000,000/= and not Ksh.5,000,000/= as alleged by the respondents. He was unable to service the loan and he blamed that failure on high interest rate which was being charged on a wrong amount of Ksh.5,000,000/= as opposed to a lower rate of interest which should have been charged on Ksh.3,000,000/=. The Housing Finance Company threatened to sell his property. He went to Court and sought injunction in High Court Civil Case Number 1724 of 2000 filed at the Central Registry in October 2000 against Housing Finance Company of Kenya and Auctioneers. That case was transferred to Milimani Commercial Court and was assigned No. 1928 of 2000. An injunction was obtained by consent in that case but later the defendant applied for dismissal of that case for non prosecution and it was in a ruling dated and delivered on 13th July 2007, dismissed by the superior court (Lesiit J.) on ground that the applicant had lost interest in the suit and had demonstrated that loss of interest by failing to take any steps for five years to set down the case for hearing. The applicant then filed HCCC No. 287 of 2008 at Milimani Commercial Court seeking the same reliefs as the ones in HCCC No.1928 of 2000. He, however, included Chiera Waithaka and Barclays Bank as two additional defendants. The Auctioneer was no longer the defendant. That was perhaps because Housing Finance

Company of Kenya had in the meanwhile sold the subject property to Chiera Waithaka who had charged it to Barclays Bank as financier which enabled Waithaka to buy the property. The application was made in that suit (No. 287 of 2008) for temporary injunction and apparently that was granted on 21st July 2008. Later another application was made to review the orders of 21st July 2008 and to discharge the temporary injunction. That application came up before Khaminwa J. for hearing but before it could be heard on merit, a preliminary objection was raised seeking to dispose of the entire suit. That objection was raised by Barclays Bank, the third defendant in that suit. After hearing the objection, the learned Judge of the superior court in a lengthy, and we, with respect say, a well considered ruling upheld the preliminary objection and ordered the suit and application dismissed for being an abuse of the court process. It is clear to us that the learned Judge used the word dismiss inadvertently for what was open to her was to strike out the suit as her ruling was on a preliminary objection. Be that as it may, the suit No. 287 of 2008 was struck out. The main ground for striking out the suit was stated by the learned Judge in a summary as follows:-

"***Upon examining the provisions of ITPA as it relates to the mortgagor and mortgagee, it is clear that once the mortgagor has lost his right of equity of redemption he has no other rights other than to sue for damages in appropriate cases. Such issue can be pursued in the first suit still in existence namely HCCC No. 1928 of 2000 above mentioned."***

She referred to HCCC No. 1928 of 2000 as being in existence because after Lesiit J. dismissed it, it was later reinstated so that at the time HCCC No.287 of 2008 was also before Khaminwa J. that case HCCC No.1928 of 2000 was also in existence though on the same subject matter.

The Civil Case No. 287 of 2008 having been dismissed, the applicant reverted to HCCC No. 1928 of 2000 and filed chamber summons dated 21st October 2008 seeking orders as follows:-

"***1. That the plaintiff be granted leave to join Chiera Waithaka and Barclays Bank of Kenya Ltd as defendants.***

2. That the plaintiff be granted leave to join causes of action in suit with additional causes of action.

3. That the plaintiff's plaint be amended to plead additional causes of actions and cite additional defendants.

4. The Honourable Court be pleased to grant any other orders deemed expedient for the ends of justice.

5. Costs hereof be in the cause."

It is apparent to us that this application was meant to seal the gaps that were left open when HCCC No. 287 of 2008 was struck out, for example, to join Waithaka and Barclays Bank, two defendants who were in HCCC No. 287 of 2008 but who would now not be involved if HCCC No. 1928 of 2000 remained as it was with only HFCK and the Auctioneer as the parties. That however, is not before us and we make no further comment. That application was opposed by the original defendants and the intended new defendants. It was placed before Kimaru J. who after full hearing dismissed it in part saying:-

"***I am not persuaded by the plaintiff's argument that the intended 3rd and 4th defendants are in the circumstances necessary parties in this suit. I decline to grant the plaintiff's application. The plaintiff's application seeking to enjoin the intended 3rd and 4th defendants in this suit is hereby dismissed with costs. I will however exercise my jurisdiction and allow the plaintiff to amend his plaint in terms of the proposed amended***

plaint provided that any reference to the intended 3rd and 4th defendants in the said amended plaint is deleted."

The above is the genesis of this application before us brought under ***rule 5 (2) (b)*** of this Court's Rules. The applicant felt aggrieved by that ruling of the superior court and hence filed notice of appeal as he intends to appeal. In the meanwhile he is seeking in this application two orders which are:-

"***1. That pending hearing and determination of the applicant's intended appeal an injunction do issue.***

(a) Restraining the 1st and 2nd respondents by themselves their servants or agents from offering for sale, selling, transferring or howsoever discharging the charge by the 1st respondent to the 2nd respondent over title to suit property LR. No. 74677/1 i.e LR. No. 7752/225 or howsoever dealing therewith in any manner inconsistent to claims of the applicant to ownership and possession thereof.

(b) Restraining 1st and 2nd respondent by themselves, their servants or agents from interfering with the plaintiff's quiet possession and enjoyment of buildings and developments erected on LR. No. 7752/225 and/or letting or demolishing premises thereof.

2. That the Honourable Court be pleased to make any other orders deemed fitting within its inherent jurisdiction."

The grounds for the application were made part of the application and were further contained in the supporting affidavit sworn by Peter Nganga Muiruri and annexed to the application. In a summary, the main grounds are that the intended appeal is arguable, is not frivolous and that if the application is not allowed, the success of the appeal should it succeed, will be rendered nugatory as the applicant will have been evicted from his residence where he has lived with his entire family for the last over 27 years. Mr. Wamalwa, the learned counsel for the applicant, in his submission before us raised four grounds in support of his contention that the intended appeal is arguable. These were first that in allowing the amendment to the plaint which would introduce new causes of action and refusing the joinder of the intended defendants, the learned Judge overstepped his jurisdiction and made it possible for the offending parties to escape justice; secondly that the learned Judge erred in law in holding that facts were not in dispute while there were affidavits filed by all parties which demonstrated that the facts were indeed in dispute; thirdly that the property was given as a security for a maximum of Ksh.5,000,000/= but only Ksh.3,000,000 was advanced. This was not considered and it was at the base of the matters before court as interest was charged on a wrong amount of money and hence the difficulties experienced in servicing the loan and lastly, that the learned Judge conducted the hearing in a biased way as he accepted an authority in respect of his own judgment to be introduced by the adverse party at the eleventh hour of submissions and without allowing the applicant's counsel an opportunity to adequately respond to the authority. On nugatory aspect, Mr. Wamalwa's case was that if the application is not granted, everything done in the case would become nugatory including any further proceedings as the parties sought to be joined must be joined so as to ensure justice. Lastly he stated further that if the application is not granted, the applicant will be evicted from his own house.

Mr. Ibrahim, the learned counsel for the first respondent submitted that the intended appeal is not arguable as the decision of Khaminwa J. in HCCC No. 287 of 2008, which was on the same subject matter, made it clear that as the property had been transferred to Waithaka, the right of redemption was extinguished and all the applicant could do is to proceed by way of suit for damages against HFCK which sold the property to Waithaka. He made other submissions which we do not consider important in this ruling. Mrs. Nungo, the learned counsel for the

second respondent adopted Mr. Ibrahim's submissions and added that the learned Judge of the superior court came to the right conclusion when the history, the facts and the law are considered.

As we have stated above, this application is brought pursuant to ***rule 5 (2) (b)*** of this Court's Rules. The law as to the principles that guide this Court when considering such an application is now well settled. An applicant who comes to this Court under that rule must satisfy the Court on two aspects. First that the appeal, if one is already filed, or the intended appeal, if none is as yet filed, is arguable, that is to say it is not frivolous. The second aspect is that the results of the appeal or the intended appeal, as the case may be, will be rendered nugatory if the application is dismissed and later the appeal or the intended appeal succeeds. For these proposals see cases of ***Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227 (CAK)*** and ***Madhupaper International Limited vs. Karr [1985] KLR 840***

We have considered the application in the light of the above legal principles. We have set out the above facts and the history of the case in an attempt to see if the intended appeal would be arguable and if the success of it should it succeed would be rendered nugatory by our refusal to grant of this application. In our view, without going into the merits or would be merits of the intended appeal but noting what Khaminwa J. stated in her ruling which was not challenged on appeal and which the learned Judge (Kimaru J.) extensively referred to, and the law, we cannot state for certain that on the record before us as it stands, the intended appeal is arguable. However, because of the history of the matter, we are nonetheless prepared to give the benefit of doubt on that limb to the applicant and doing so, we assume that the intended appeal is arguable.

That leaves the second limb which is whether if this application is refused and later the intended appeal succeeds, such success would be rendered nugatory. Mr. Wamalwa says, if this application is refused and the appeal eventually succeeds, everything including the proceedings in HCCC No.1928 of 2000 would be rendered nugatory and the applicant will be evicted from his property. With respect, we do not agree. If the intended appeal succeeds, Chiera Waithaka and Barclays Bank of Kenya Limited who are not parties in HCCC No.1928 of 2000 will be made parties. The plaint as amended will be prosecuted and if the applicant succeeds in his suit, the two, plus HFCK and David Wandui t/a Taifa Auctioneers will be condemned for having illegally sold the applicant's property which as is on record, is already sold and transferred to Waithaka. In that scenario the applicant, will have his remedy in damages against the defendants. At paragraph 33 of the applicant's affidavit in support of this application he states the current value of the property at Ksh. 60,000,000/=. It may fetch higher amount by the time the applicant moves to Court for damages against the respondent's but that there is that avenue open to him is certain and the proceedings will proceed as advised by Khaminwa J. If he had not sought damages as alternative in HCCC No. 1928 of 2000, the applicant can still proceed by way of seeking to amend and amending the plaint further to cater for that claim. We think justice must be even handed. Waithaka is already the registered owner of the suit property and has been so for sometime. We have no good reason to disturb that situation for the time being.

In short, we are not satisfied that the second limb has been demonstrated. In law, an applicant can only benefit from the provisions of ***rule 5 (2) (b)*** of this Court's Rules if he proves both limbs to the satisfaction of the Court. In the result, this application fails. It is dismissed with costs to the two respondents named in the notice of motion namely Chiera Waithaka and Barclays Bank of Kenya Limited.

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

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR