



**Wanyonyi v Equity Bank Kenya Limited & 3 others (Civil Suit
105 of 2018) [2023] KEHC 21863 (KLR) (Civ) (25 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21863 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT 105 OF 2018**

**OA SEWE, J
AUGUST 25, 2023**

BETWEEN

ANDREW MKHISA WANYONYI PLAINTIFF

AND

EQUITY BANK KENYA LIMITED 1ST DEFENDANT

FIVE ELEVEN (511) AUCTIONEERS 2ND DEFENDANT

JOSEPH KASEMBELI 3RD DEFENDANT

SAMUEL NDERITU MATHENGE 4TH DEFENDANT

RULING

[1] The Notice of Motion dated May 20, 2022 was filed herein on May 23, 2022 by the plaintiff. It was filed pursuant to sections 1A, 1B and 3A of the *Civil Procedure Act*, chapter 21 of the Laws of Kenya, as well as section 3(1) of the *Judicature Act*, Chapter 8 of the Laws of Kenya, for orders that:

- (a) Spent
- (b) Spent
- (c) Pending the hearing and determination of the appeal, the defendants by themselves and/or through their employees, servants and/or agents including Robert Waweru Maina trading as Antique Auctions Agencies be restrained by way of an injunction from evicting, dealing, charging, wasting, damaging, alienating, disposing, auctioning or, interfering with the plaintiff's quiet possession, use and enjoyment of the matrimonial property known as Mombasa Title No. Mainland North/I/6985 (C.R. 20841) Bamburi Beach Mombasa.
- (d) The costs of the application be borne by the defendants.



- [2] The application was predicated on the grounds that on May 19, 2022, the 1st defendant sent unknown persons to the plaintiff's property known as Mombasa Title No. Mainland North/I/6985 (C.R. 20841) with a view to value the property without notice to the plaintiff. The plaintiff further stated that he has preferred an appeal against the ruling delivered on May 26, 2021 and therefore prayed for injunction pending the hearing and determination of the appeal; otherwise, the defendants may proceed to auction the suit property to his detriment.
- [3] In support of the application, the appellant relied on his own affidavit, sworn on May 20, 2022 to which he annexed a copy of the Notice of Appeal (Annexure AMW-2) in proof of the fact that the 1st and 2nd defendants had taken action towards the filing of an appeal from the ruling dated May 26, 2021, as well as a Draft Notice of Cross-Appeal in Civil Appeal No. E291 of 2021.
- [4] In response to the application, the 1st and 2nd respondents filed a notice of preliminary objection dated June 8, 2022, contending that:
- (a) The application is incompetent and bad in law as there is no Notice of Cross Appeal filed in the suit herein;
 - (b) The appellant is time-barred from filing the Notice of Cross-Appeal and there is no requisite application or leave of the Court for extension of time to file the Notice of Cross-Appeal.
- [5] Directions were consequently given on June 8, 2022 that the application be canvassed by way of written submissions; and, whereas counsel for the 1st and 2nd respondents filed her written submissions on July 25, 2022, there appears to be no compliance in that regard on the part of the other parties. I have accordingly perused and considered the written submissions filed by Ms. Kaguri on behalf of the 1st and 2nd respondents. She furnished the background of the application, thereby confirming that the plaintiff is the registered owner of the suit property; and that the 1st defendant accepted it as security for a facility to the plaintiff and the 3rd and 4th defendants. Counsel further confirmed that the plaintiff was granted a conditional temporary injunction but failed to comply with the terms thereof; whereupon the 1st respondent proceeded to serve the plaintiff with fresh statutory notices as directed by the court.
- [6] According to Ms. Kaguri, the plaintiff never filed a Notice of Appeal in respect of the ruling dated May 26, 2021, and only attached a draft Notice of Cross Appeal to the instant application. She therefore submitted that the instant application has not only been brought late in the day, but is also an afterthought. In the premises counsel proposed the following two issues for determination:
- (a) Whether the plaintiff has met the grounds for grant of injunction pending appeal;
 - (b) Who should pay for costs of the application.
- [7] Ms. Kaguri relied on *Patricia Njeri & Others v National Museum of Kenya* [2004] eKLR to support her submission that an order of injunction pending appeal is a discretionary remedy which cannot be granted if the appeal is frivolous. She urged the Court to find that the attached Notice of Cross Appeal is an afterthought on the part of the plaintiff and that in any case the same is time barred and inconsequential, for having been filed without leave. She also relied on *Justus Gituma & Others v Daniel Kimathi & others* [2020] eKLR, *Catherine Mutheu Ndung'u v Kenya Commercial Bank Limited & Another* [2020] eKLR, *Giella v Cassman Brown* [1973] EA 358 and *Mrao Limited v First American Bank of Kenya & 2 Others* [2003] eKLR to buttress her argument that since there is no appeal, to grant an injunction would occasion more harm than good to both parties.
- [8] I have given careful consideration to the application dated May 20, 2022 in the light of the grounds set out on the face thereof, as well as the averments in the pertinent affidavits. I have likewise paid



attention to the written submissions filed herein by learned counsel, including the authorities cited therein. The background facts are not in dispute; namely, that the plaintiff filed this suit challenging the intended sale of the suit property by the 1st and 2nd defendants pursuant to the 1st defendant's statutory power of sale. In the interim, the plaintiff filed an application dated 21st November 2018 for temporary injunction pending the hearing and determination of the suit. In its ruling delivered on May 26, 2021 the Court (Hon. D. Chepkwony, J.) was not convinced that the plaintiff had made a good case for the issuance of temporary injunction. Accordingly, orders were granted as follows:

- (a) That the 1st respondent bank is directed to specifically serve the guarantor with fresh statutory notices prerequisite to exercise of its statutory power of sale, through the provided address as well as through his advocates on record.
- (b) That a temporary injunction be and is hereby issued restraining the 1st and 2nd respondents from interfering or otherwise disposing of the subject property pending compliance with Order [a] above.
- (c) The applicant is at liberty to exercise his right of liberty pending compliance with order [a] above.
- (d) Costs to abide the outcome of the suit.

[9] It appears the plaintiff did not consider filing the instant application until one year later on May 23, 2022, when he approached the court under a Certificate of Urgency. That is the order in respect of which the 1st and 2nd respondents filed the notice of Appeal dated June 10, 2021.

[10] As the plaintiff made his approach under section 1A and 3A of the *Civil Procedure Act*, there is no gainsaying that the court has the jurisdiction to grant a temporary injunction pending appeal. Indeed, in the *Erinford Properties v Cheshire County Council* [1974] 2 All ER 446 it was held that:

“No human being is infallible and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistent with this decision, recognize that his decision might be reversed and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal.”

[11] Thus, the Erinford principle was followed by the Court of Appeal in *Madhupaper International Ltd v Kerr* (supra) wherein it was held that:

“Where a judge dismisses an application for interlocutory injunction, he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal and there is no inconsistency in doing so as the purpose of granting the injunction would be to prevent the decision of the appellate court from being nugatory should the appeal succeed.”

[12] In the premises, the question to pose is whether, in the circumstances of this case, the conditions for the grant of an injunction pending appeal have been met. In this respect, the key issue to focus on herein is whether granting the orders sought would inflict more hardship than it would avoid. Indeed,



in Patricia Njeri & 3 Others -Vs- National Museum of Kenya (supra) Hon. Visram, J. had occasion to consider a similar matter and set out the following guiding principles:

“The Appellants did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application?

In the Venture Capital case (Venture Capital and Credit Ltd –Vs- Consolidated Bank of Kenya Ltd Civil Application No. Nairobi 349 of 2003 (UR)) the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in a whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:

- a) The discretion will be exercised against an Applicant whose appeal is frivolous (See Madhupaper International Limited –Vs- Kerr [1985] KLR 840 which cited Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal (J. K. Industries –Vs-KCB 1982 – 88) KLR 1088 (also cited in Venture Capital).
- b) The discretion should be refused where it would inflict greater hardship that it would avoid (See Madhupaper supra).
- c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See Butt –Vs- Rent Restriction Tribunal [1982] KLR 417 (cited also in Venture Capital).
- d) The Court should also be guided by the principles in Giella –Vs- Cassman Brown & Company Ltd [1973] EA 358 as set out in the case of Shitukha Mwamodo & Others (1986) KLR 445 (also cited in Venture Capital).” See also Mukoma –Vs-Abuoga [1988] KLR 645.

[13] Accordingly, I have weighed the competing interests of the parties and noted that the instant application was filed after a delay of one year without any demonstration of leave to appeal having been granted to file notice of intention to cross-appeal out of time. It is also evident that the petitioner has opted to rely on a draft Notice of Cross Appeal. It is therefore doubtful that a valid Notice of Cross Appeal was ever filed. In the circumstances, there is no valid appeal to speak of after counsel for the 1st and 2nd respondents indicated that they are no longer interested in pursuing their appeal. It would therefore be superfluous to consider whether the conditions laid down in the case of Giella v Cassman Brown have been met.

[14] In the premises, I am not persuaded that the plaintiff’s application for injunction pending appeal is merited. That being my view, the application dated 20th May 2022 is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH AUGUST 2023

OLGA SEWE

JUDGE

