



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 54 OF 2015

CATHERINE MUTHEU NDUNG'A.....PLAINTIFF

VERSUS

1. KENYA COMMERCIAL BANK LIMITED

2. NDUTUMI AUCTIONEERS.....DEFENDANTS

RULING

1. This is a ruling on the application dated 30.1.2019 seeking for the following Orders that:

a) Spent

b) Spent

c) That pending hearing and determination of the Appeal, an injunction pending Appeal be issued restraining the Respondents, their servants, employees or assigns from alienating or in any other manner whatsoever dealing with the property known as Title No. L.R No. 10003 (Original Number 52/11) Section II Mainland North.

d) That costs of this Application be provided for.

2. The grounds supporting the application are contained in the Affidavit by the Plaintiff sworn on the 30.1.2019 the same grounds are on the face of the application.

3. The Plaintiff asserts that she is aggrieved by the ruling delivered on the 25.1.2019 and she intends to Appeal against the said Ruling and she has already filed A notice of Appeal dated 29.1.2019.

4. The Plaintiff genuinely believes she has an arguable Appeal and believes she will be prejudiced if the substratum of the Appeal is not preserved as her Appeal will be rendered nugatory and it is in the interest of Justice that her Application ought to be allowed.

5. The Defendants/Respondents opposed the Application by the Replying Affidavit sworn on the 11.6.2019 by **Mr. George Kithi** who is the Counsel in conduct of this matter and Grounds of Opposition dated 11.6.2019. He avers that it had been agreed that the plaintiffs Application dated 21.4.2015 was to be dispensed with by way written submissions. However, when the same came up for highlighting of submissions the plaintiff's counsel was absent and the Application was not heard. Since then, the Plaintiff never prosecute its Application and it was prudent for the Court to dismiss the plaintiffs Application for failing to establish a prima facie case.

6. It is deponed that the 1st Respondent will be prejudiced if it is stopped from exercising its statutory power of sale since the Plaintiff has refused to repay the loan advanced to her and is soliciting sympathy from this Court.

7. In the grounds of opposition, it is stated that the Plaintiff's Application is an abuse of the Court process as the issues being raised have already been adjudicated upon and allowing the same would be tantamount to opening new avenues of Appeal.

8. Parties did file submissions pursuant to the Court's directions. The plaintiffs submissions are dated 25.10.2019 while those of the Defendant are dated 31.10.2019.

Plaintiff Submissions

9. On the conditions to be fulfilled before grant of injunction pending Appeal, the Plaintiff's Counsel relied on the case of **Bilha Mideva Buluku v Everlyne Kanyere [2016]** wherein the principles that guide the exercise of grant of an injunction pending Appeal was laid.

10. Further, The Plaintiff's Counsel submitted that the Plaintiff has an arguable Appeal as the postal address used by the respondent to send the Statutory Notices was different from the one on the letter of offer. Consequently it is the Plaintiff submission that one arguable point is sufficient to discharge the burden of an arguable Appeal. Reliance was placed the Court of Appeal case of **Mombasa Technical Training Institute v. Agnes Nyevu Charo. & others [2012]Eklr.**

11. It was also submitted by counsel that if the injunction is not granted then the sale of the subject property would be irreversible thereby causing greater hardship and rendering the intended Appeal nugatory.

Defendant's submission

12. The Defendant's counsel submitted that this Court ought to do Justice to parties, since it is not in dispute that there is existence of a debt and the Court found that the Plaintiff did not establish a prima facie case and the Defendant will suffer prejudice if its statutory power of sale is curtailed.

13. Counsel for the Defendant further testified that the disputed postal address 127-80122 was actually introduced by the Plaintiff via correspondence between the parties (letter dated 29.1.2013).

14. I have considered the affidavit evidence, the annexures thereto and submissions by both parties' advocates on record and the relevant applicable law and precedents relied upon.

15. The first issue for determination is whether on the evidence and material placed before court, the plaintiff has satisfied the conditions upon which an injunction pending Appeal can be granted?

16. The principles guiding the grant of injunction pending Appeal are now well settled. Those principles were set in the case of **Patricia Njeri & 3 others v National Museum of Kenya [2004] eKLR** namely:-

a) an order of injunction pending appeal is a discretionary one and the discretion will be exercised against an applicant whose appeal is frivolous.

b) The discretion should be refused where it would inflict greater hardship than it would avoid.

c) The applicant must show that to refuse the injunction, would render the appeal nugatory.

d) The court should also be guided by the principles in Giella v Cassman Brown Ltd 1973 EA 358.

17. Similarly, in **Bilha Mideva Buluku v Everlyne Kanyere (supra)**, where the court was considering an application under Order 42 Rule 6(6) Justice E.C Mwita stated that,

“Even though the court is dealing with an application for injunction at appeal stage, the court would have to be satisfied that the applicant has made a case in terms of Giella v Cassman Brown 1973 EA 358, that he has a prima facie case with a probability of success, that he will suffer irreparable damage which cannot be compensated by an award of damages or that if in doubt the court should decide the case on a balance of convenience. The court should at the same time bear in mind that there is an appeal pending and therefore consider the prospects of that appeal succeeding in order to determine whether an applicant has a prima facie case, the ultimate objective of course being to safe guard rights of the appellants in the appeal.

As was held in the case of Butt v The Rent Restriction Tribunal, Civil Appeal No.6 of 1979, in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard. The same position was taken by the Court of Appeal in the case of Mukuma v Abuoga [1988] KLR 645, where the court held that where a party is exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard.”

18. Does the Plaintiff/Applicant have a 'genuine and arguable case' and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must point out that it is common ground that a loan was advanced to the Plaintiff which she has defaulted in the repayment and as a result the Defendant is exercising its statutory power of sale. There is to this court no denial of the debt nor an attempt to pay. That is the stand that this court should not be seen to encourage. Parties are bound by their bargain. Looking at the pleadings here, there was a covenant by the plaintiff to pay the debt. That covenant remains. While I stay appellative and cognizant that the appellate court may in its own right upset my decision declining an injunction, I am also aware of the basic principle of law that account of law cannot re-write a contract for the parties.

19. With that background laid down, I turn to assessing whether or not the Plaintiff/Applicant has met the three conditions for the grant of an injunction pending appeal. On that basis alone, I doubt if the appeal to the Court of Appeal is genuinely arguable. The second reason is that the contract between the parties provide for the application of interests. This matter having been in court for the last 5 years, I shudder to imagine how the debt has bludgeoned and wonder whether the security remains adequate for the payment thereof.

20. In my view, grant of an injunction would erode the value of the security by application of interest a situation that will do more harm than

good to both parties, the plaintiff will have his debt burden made heavier while the defendant will have its security eroded that is not desirable and should not be the object of an injunction by the court.

21. The upshot of the foregoing is that the Plaintiff's application dated 30.1.2019 fails wholly and the same is accordingly dismissed with costs to the 1st Defendant.

Orders accordingly.

Dated, signed and delivered at Mombasa this 24th day of January 2020.

P.J.O.OTIENO

JUDGE