



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO 32 OF 2019

ROBINA MWIKALI WAMBUA.....APPELLANT

VERSUS

DAVID C. B. CHEGE T/A DAY OLD SUPPLIES.....1ST RESPONDENT

CONSOLIDATED BANK OF KENYA.....2ND RESPONDENT

RULING

1. The pertinent background to the application filed on 9th May 2019 is as follows. Prior to 2013, **Robina Mwikali Wambua** (the Applicant herein) guaranteed a loan facility advanced to **David C.B Chege t/a Day Old Supplies** (the 1st Respondent) by **Consolidated Bank of Kenya Ltd** (the 2nd Respondent). The property charged to the bank as security was the Applicant's land parcel **LR No. Thika Municipality/Block 2/640** situated at Makongeni Phase 12, Thika which was developed with two sets of flats. It would appear that the loan account fell into arrears and the 2nd Respondent moved to realize the security. The Applicant then filed **Thika CM's Civil Suit No.386 of 2013**, against the 1st and 2nd Respondents. The suit was filed on 30th May 2013 seeking the discharge of the charge dated 27th July 2010 and 29th July 2011 created over the land parcel LR No. Thika Municipality/Block 2/640 (hereafter the suit property); an injunction to restrain the 2nd Respondent from exercising the statutory power of sale and in the alternative, an order compelling the Respondents to pay to the Applicant a sum of KShs.5,318,216.80 being the market value of the suit property.

2. Six years later, on 8th February 2019 the trial court having heard the case delivered its judgment dismissing with costs the Applicant's suit. A decree dated 18th April 2019 was subsequently issued. The Applicant was aggrieved with this outcome and filed a memorandum of appeal in this court. It is not disputed that the memorandum of appeal had by the date of hearing of the instant application in July 2019 not been served on the 2nd Respondent. The 1st Respondent was yet to appear. However, despite filing the appeal, it was not until the Applicant was served with the Notification of Sale by the 2nd Respondents' auctioneers that the Applicant took the next step on this appeal by filing the application dated 6th May 2019. The application was filed over 30 days (filed on 9th May 2019) since the notice of sale was served on the Applicant on 1st April 2019. Despite obtaining *ex parte* orders (by Ogembo J on 9th May 2019) it was not until 12th July 2019 that the application and orders were served upon the 2nd Respondent.

3. In the main, the Applicant's motion sought an order to stay the execution of the decree of the lower court and an injunction to restrain the 2nd Respondent from selling or offering for sale, advertising for sale by public auction or in any other way dealing with the Applicant's property, namely LR No. Thika Municipality/Block 2/640 located at Thika, all pending the hearing and determination of her appeal. On grounds that her appeal which has high chances of success will be rendered nugatory if the orders sought are declined. This is the gist of her affidavit sworn in support of the motion.

4. The application was opposed by the 2nd Respondent through an affidavit sworn by **Billy Ubindi** who describes himself as a Recoveries Officer in the 2nd Respondent. Reiterating the background to the application, the deponent asserted that the issues raised in the appeal concerning the liability of the principal debtor and duties of a guarantor are unlikely to succeed on appeal. He views the appeal as intended to further delay the bank's realization of sums owing under the loan facility, pointing to the fact that the lower court suit filed in 2013 was not prosecuted in time. He annexed to his affidavit copies of statements of accounts showing the outstanding debt on the loan account to the tune of KShs.6,606, 894.64 as at July 2019 and asserted that the Applicant has not made any efforts to settle the debt or to offer security. Regarding the allegation that the appeal may be rendered nugatory the deponent points out that the bank is endowed with adequate means to compensate the Applicant in the event the appeal resolves in her favour.

5. During the oral hearing of the application the parties' respective counsel basically reiterated their affidavit material.

6. The court has carefully considered the material canvassed in respect of the motion. The motion was expressed to be brought under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(2) of the Civil Procedure Rules provides that:

“(2) No order for stay of execution shall be made under Sub rule (1) unless

a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and

b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant. This court is empowered under order 42 Rule 6(6) “in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

7. In view of the wording of the provisions of Order 42 rule 6(1), (2) and (6) I harbor serious doubt that an Applicant can invoke these provisions in seeking both an order to stay execution of a decree and also an injunction pending appeal, as the Applicant has done in this case. It seems to me more plausible that the prayers ought to be sought in the alternative where the application stems from one set of facts. In my understanding of the above provisions, an interim injunction would be granted by the appellate court in lieu of an order to stay execution, pending appeal. The judgment of the lower court dismissed with costs the Applicants suit against the Respondents. Such dismissal is incapable of execution save for costs.

8. In my view the inclusion of the prayer for stay of execution pending appeal is erroneous in the context of this case. Nevertheless, there is no merit in the said prayer. The application was not brought timeously and besides, no substantial loss can result from the payment of the costs amounting to just KShs.100,000/= by the Applicant. The 2nd Respondent can refund such amounts if necessary and the Applicant has not stated that making the payment would occasion her any difficulty. On the issue of security, the Applicant has claimed that the title held as security for the loan is adequate security. The said title is a security for the loan which is already in arrears. So far as the prayer for stay of execution is concerned, the Applicant ought to pledge security for the payment of the costs of the lower suit.

9. Turning now to the prayer for an injunction pending appeal, **Visram J** (as he then was), in my humble view distilled the applicable principles in **Patricia Njeri & 3 Others -Vs- National Museum of Kenya [2004] eKLR**. The learned Judge stated:

“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.”

10. Starting with the well-known principles of **Giella -Vs- Cassman Brown & Co. Limited [1973] EA 358** the Applicants herein has the Applicant established a prima facie case? A *prima facie* case was described in **Mrao Ltd -Vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR**. The Court stated: -

“The power of the Court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence.....

So, what is a prima facie case? I would say in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

11. Concerning the question of a prima facie case which also ties in with arguability of her appeal, the Applicant in her affidavit merely replicated her grounds of appeal key among them the question relating to the responsibility and/or duties of the principal lender *vis a vis* the guarantor. However, during oral arguments, the Applicant did not attempt to demonstrate that indeed her appeal raises serious legal points for consideration on appeal and is not frivolous. It is not merely enough to rehash the grounds in the memorandum of appeal.

12. Secondly, the Applicant has asserted that her appeal will be rendered nugatory if the security is realized by the bank as she will lose her property. Her advocate asserted in his submissions that the sentimental value of the property cannot be compensated adequately by monetary

compensation. This argument holds no water. The moment the Applicant pledged the property as security to guarantee the loan to the 1st Respondent, the property became a chattel liable for sale in the event of default by the principal debtor.

13. In the lower court, the Applicant's claim had stated a monetary value of the charged asset. No doubt the Respondent bank has the means as asserted herein to compensate the Applicant in the event that the appeal determines in the Applicant's favour. In the circumstances, it is difficult to see how the appeal could be rendered nugatory or that the Applicant would stand to suffer irreparable damage in this case. Moreover, an injunction against the Respondent bank would inflict greater hardship than it would avoid. It is undisputed that the loan facility advanced to the principal debtor has been in arrears and outstanding since 2013 and as at July 2019, the total outstanding loan is in excess of KShs.6.6 million.

14. In **Madhupaper International Limited v Kerr [1985] KLR 840** the Court of appeal stated that:

“The Court of Appeal’s jurisdiction to grant an injunction pending an appeal is discretionary and is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid. In this case, to grant an injunction pending appeal would be wrong as it would probably inflict greater hardship than it would avoid.”

15. An injunction is an equitable remedy. The Applicant, as earlier noted having filed a suit in the lower court against the Respondents did not prosecute it fully until 2019. And even after the suit was dismissed, she waited until being served with the fresh Notification of Sale to seek the prayers herein, after allowing 30 days to elapse since service of the notice upon her. This application itself was served on the 2nd Respondent two months after filing. This level of tardiness does not stand in the Applicant's favour at all.

16. Considering all the foregoing, this court is not persuaded that this is a proper case for the granting of an interim injunction pending appeal. The whole application must fail and is hereby dismissed with costs.

SIGNED AND DELIVERED ELECTRONICALLY THIS 30TH DAY OF JULY 2020.

C. MEOLI

JUDGE