



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 87 OF 2019

EQUIP AGENCIES LIMITED.....PLAINTIFF

VERSUS

I & M INVESTMENT BANK LIMITED.....1ST DEFENDANT

JOHN GIKONYO T/A

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

TOWER SACCO SOCIETY LIMITED [LUCAS

KIIRU NGIGI, PAUL MBUGUA, MARY WANGARI

GITHUME sued on their own behalf and in

their capacities as Office Bearers of

GILGIL TOTAL INVESTMENTS SELF HELP GROUP.....3RD DEFENDANT

RULING

1. The Notice of Motion dated 19th September 2019 seeks to have this Court extend orders of injunction issued on 5th August 2019 for a period of thirty (30) more days or such other period as the Court may determine to enable the Plaintiff/Applicant prosecute Civil Appeal (Application) No. 412 of 2019 in the Court of Appeal.

2. In a Ruling dated 26th July 2019, this Court dismissed an application by Equip Agencies Limited (Equip) in which it sought a temporary order of injunction restraining the Defendants from disposing of or otherwise completing by conveyance or transfer the sale of L. R. No. Gilgil Township Block 2/210 (The charged property). The property is said to have been sold by way of public auction by I & M Investment Bank Limited (I & M or the Bank) in exercise of its statutory power of sale to Gilgil Total Investment Self Help Group (Gilgil Self Help).

3. Aggrieved by that Ruling, Equip has filed Civil Appeal No. 421 of 2019 and an application for stay before the Court of Appeal under the provisions of Rule 5(2) (b) of the Court of Appeal Rules. So as to obtain interim protection, Equip came before this Court through a Notice of Motion dated 29th July 2019 for a temporary injunction pending the hearing and determination of the Rule 5(2) (B) Application.

4. On 5th August 2019, Counsel for the parties entered a consent granting Equip an injunction for 45 days only to enable it prosecute the Application before the Court of Appeal. The 45 days lapsed before the Application was prosecuted and at the hearing of the present Application Mr. Kingara ,appearing for Equip, informed Court that in a court appearance before Okwengu J.A the matter was certified as urgent. This Court is told that parties now await a hearing date from the Registrar of the Court of Appeal and hence the current Application.

5. Equip has told Court that both its Appeal and Application will be rendered nugatory if the orders made by consent are not extended. Equip also offers security being a conditional attachment of its decree in **Nairobi Judicial Review Application no 55 of 2017 ,In the matter of The Principal Secretary ,Ministry of Health , exparte Equip Agencies Limited.**

6. But the Bank and Gilgil Self Help Group state that they would be prejudiced if the extension were to be granted. For the Bank it is said that Equip continues to owe it money and has refused to pay notwithstanding making promises. It is said that the debt now stands in the sum

of over Kshs.2 Billion and the Plaintiff has already demonstrated its inability to pay.

7. For Gilgil, it invokes the general proposition that as a bonafide purchaser for value without notice its position is insulated. Secondly, that its members are already repaying loans for the 25% deposit it paid at the auction.

8. As I turn to consider the request by Equip, I need to address a somewhat ingenuous argument made by the Bank. Ingenuous not because it is not based on a common place statement of the law but because of how the Bank seeks to apply it in the present circumstances. This Court is told that because the order sought to be extended was entered by way of a consent then to extend it further without the concurrence of the parties would be to vary the consent in the absence of conditions for variation or setting aside of a consent order. Fraud, coercion or such similar incidences lacking.

9. Whilst there is no faulting the validity of that general position, it would have been within the powers of this Court to grant an injunction in terms of the application of 29th July 2019 anyway and I do not think that the Court's power to extend any such order is hamstrung merely because the temporary injunction of 45 days was in the first instance by consensus of the parties. If there is reason that warrants an extension, then this Court will not hesitate to grant it.

10. This Court is told that the Rule 5(2) (b) Application has been certified urgent and at the time of prosecution of this application parties were awaiting a hearing date. If no protective order is given to Equip then the property may be transferred to Gilgil Self Help Group and could possibly be placed beyond the reach of the Court. Yet there is no knowing whether the Court of Appeal will agree with this Court about the infallibility of the purchase by Gilgil. A possible outcome of the Appeal is that the sale will be impeached. For that reason the argument that the Appeal and the Application could be rendered nugatory if the orders sought are not granted is not frivolous .

11. On the other hand, granting further respite to Equip delays the completion of the transfer of the property to Gilgil. This prejudices both the Bank and Gilgil. The Bank for the reason that it is kept out of the monies in realization and Gilgil because it is unable to take possession of a property for which it has already made a substantial down payment.

12. This Court has to strike a balance between competing interests. The way to resolve this tension is to give a short extension to Equip to enable it try its hand at the Court of Appeal but to ensure that there is sufficient security to compensate any further loss that the Bank and Gilgil may suffer because of the extension granted. The orders I grant presently, hopefully, reflects this balancing act.

13. I grant prayer 3 of the Notice of Motion of 19th September 2019 for a period of 30 (thirty) days only from the date this Ruling on condition that the Plaintiff shall within 7 days hereof give a written undertaking for damages to the Defendants if ultimately it will be held by the Court of Appeal that the injunction ought not to have been granted . The undertaking shall be supported by a deed assigning such portion of the Decree in **Nairobi Judicial Review Application no 55 of 2017 ,In the matter of The Principal Secretary ,Ministry of Health , exparte Equip Agencies Limited**, but in any event not less than Ksh 1,000,000,000.00 (Kenya shillings one billion) , towards meeting the said Damages. In addition, the Directors of Equip shall give personal guarantees in support of the undertaking for damages. The Deed of Assignment and Guarantees to be filed in Court within 7 days hereof together with the undertaking for Damages.

Dated, Signed and Delivered in Court at Nairobi this 25th Day of October 2019.

F. TUIYOTT

JUDGE

PRESENT;

Wawire for 1st & 2nd Defendant

Rop Holding brief Ngugi for 3rd Defendant

Mirei holding brief Kingara for Plaintiff

Court Assistant: Nixon