



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 142 OF 2017

1. T.S.S. INVESTMENTS LIMITED

2. JUJA COFFEE EXPORTERS LIMITED.....PLAINTIFF

VERSUS

NIC BANK LIMITED.....DEFENDANT

RULING

1. On the 31/01/2018 this court delivered a judgment by which the Plaintiff suit against the defendant was dismissed with costs. That decision followed a case conference on the 4/5/2017 when by consent parties framed one issue for determination by court by way of case stated based on the materials filed by the parties as at that date.

2. Having been aggrieved and dissatisfied by that decision of the court, the plaintiff filed a Notice of Appeal and on the 13th day of February 2018, filed the current application which essentially seek an injunction pending appeal. The substantive prayer is couched as followed:-

“There be a temporary injunction pending the inter-parties hearing and determination of the present application, restraining the Defendant, its servants, employees, agents or anyone claiming under them from advertising for sale, selling by public auction or private treaty, leasing or in any other manner interfering with the 1st & 2nd plaintiff’s use, occupation and enjoyment of Mombasa Block XX/95 and L.R. No. MN/1/5207.

There be a temporary injunction pending the filing, hearing and determination of the intended appeal to the Court of Appeal, restraining the Defendant, its servants, employees, agents or anyone claiming under them from advertising for sale, selling by public auction or private treaty, leasing or in any other manner interfering with the 1st & 2nd Plaintiffs’ use, occupation and enjoyment of Mombasa Block XX/95 and L.R. No. MN/1/5207.

3. The application is premised on the fact that there is a pending appeal to the Court of Appeal by virtue of the Notice of Appeal dated and filed on the 13/2/2018; that unless the stay is granted the defendant respondent would proceed advertise and sell the suit property prior to the conclusion of the Appeal which will destroy the substratum of the appeal and defeat its purpose in that there would have been a sale and alienation of the suit property to a third party and if the appeal is upheld, such sale shall have been conducted contrary to law demanding that specific notices be served. In addition it was contended that the defendant continues to receive atleast Kshs.10,000,000/= from an asset of the plaintiffs under management.

4. The Application was opposed by the defendant/deed holder who so contends and term it and sees nothing in it more than a gimmick intended to delay the statutory right of sale vested upon the defendant by statute because the defendants take the stand that it fully complied with the statutory requirements by serving notices. It was additionally contended that the intended appeal is premised on the mis-construction of the section 96(3) Land Act when in reality the plaintiff held not established a prima facie case to merit an injunction pending Appeal. The defendant admitted the existence of other securities but pointed out that the securities in the name of the 2nd plaintiff cannot be realized because it is not trading yet the other securities so held are the subject of litigation in Mombasa HCC 65 OF 2017.

5. Parties did file written submissions complete with decided cases to support respective stand points. The plaintiff’s submissions are dated 4/4/2018 and filed in court the same day while those by the defendant are 6th April and filed on 9th April 2018.

6. Having read the Application, the Affidavit in support thereof on one side and the Replying affidavit on the other side, as well as the submissions, the question that call upon the court for determination is whether the plaintiff/judgment debtor has met the threshold for grant of an injunction pending Appeal.

7. Whether or not to grant an injunction pending appeal is a matter for the discretion of the court^[1] and purposed to preserve the status and prevent the appeal, if successful, from being rendered nugatory^[2]. Whether or not an appeal would be rendered nugatory depends on the subject matter of the litigation in the intended appeal and whether or not if dissipation or alienation is allowed the same is capable of reversal^[3]. The other considerations are whether the appeal is frivolous in which event it is difficult to comprehend the difficulty that would be entailed in reversal and lastly whether the grant would inflict a greater hardship than it would prevent.

8. In this matter, I am not in doubt that in coming to the decision I rendered on the 31/01/2018, I was wholly convinced that the plaintiff (now applicant) had failed to prove a prima facie case. However, that was my determination which the said party has sought to challenge in the Court of Appeal. I do not feign infallibility and therefore well aware that however convinced I was in dismissing the plaintiff suit for failure to prove a prima facie case, the court of appeal is entitled in its own mandate to re-examine and re-appraise the proceedings and record of this court and come to own conclusions. Such own conclusions may as well include reversal of my decision.

9. In that eventually, unless the substratum of the Appeal be preserved by an Order that it be not alienated, there would be nothing for the appellants if successful to show for his litigation in the Court of Appeal. That is to me what would amount to such endeavours being rendered nugatory or purely academic. I say nugatory or academic for I consider and appreciate that the subject matter of the litigation is an immovable property which if sold transferred there would be a third party who shall have acquired an interest for valuable consideration and that to me the court would have created a greater hardship that it would have avoided by grant of the orders sought.

10. For that reason, and I repeat, that I don't doubt nor to I intend to revisit my findings on the matter, I am only reiterating being cognizant of my decisions being subject to the court above. I am also appreciative that the Applicant has an undoubted right of Appeal and that such a right need not be impeded or rendered merely academic.

11. All considered, I grant to the plaintiff/applicant an order of injunction pending appeal but equally recognize that the debt disclosed to exist between the parties which is not disputed is huge and colossal. Being so colossal I reckon that every day the appeal pends, while the plaintiff does not pay the debt or part thereof both sides suffer. The plaintiff suffers the burgeoning debt while the defendant suffers being kept away from a debt which is not denied. I do grant the injunction pending Appeal but on terms that would protect both parties. The terms I consider just and expedient are that:-

- **The plaintiff shall continue to pay monthly, towards the liquidation or reduction of the debt, a sum of at least 2% of the outstanding debt. Such payment shall commence on the 10/6/2018 and then on the 10th of each succeeding month with pending the determination of the Appeal.**
- **I direct that costs of the application be costs in the appeal.**

Dated and delivered at Mombasa this 31st day of May 2018.

P.J.O. OTIENO

JUDGE

^[1] **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**

^[2] **Charter House Bank Ltd vs Central Bank of Kenya & Others [2007] eKLR**

^[3] **Bilha Midea Buluku vs Everlyn Kayere [2016] eKLR**