



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CIVIL CASE NO. 9 OF 2016**  
*(FORMERLY NAKURU HCC. NO. 82 OF 2016)*  
**EQUIP AGENCIES LIMITED.....PLAINTIFF**  
**-VERSUS-**  
**I & M BANK LIMITED.....DEFENDANT**  
**R U L I N G**

**The Notice of Motion**

1. On 9<sup>th</sup> December, 2016 this court dismissed the Plaintiff/Applicant's Notice of Motion, which was primarily seeking an injunction to prohibit the Defendant/Respondents, from *inter alia* advertising for sale, selling, disposing of or completing by conveyance or transfer of any sale, appointing receivers, leasing, letting or interfering with the Plaintiff's ownership of the land parcel described **L.R. No. GILGIL TOWNSHIP BLOCK 2/210**.
2. Dissatisfied with the decision, the Plaintiff filed a Notice of Appeal on 13/12/2016 and subsequently an appeal to the Court of Appeal accompanied by an application under Rule 5 (2) (b) of the Court of Appeal Rules. Although the latter application was certified urgent, the same had not been heard by the 15<sup>th</sup> February 2017. In the meanwhile, the Plaintiff filed the Notice of Motion that is the subject of this ruling, on 16/12/2016.
3. Thus the reference in the subject Notice of Motion, to an *intended* application under Rules 5 (2) b of the Court of Appeal Rules and the *intended* appeal in prayers 3 and 4 which are in the following terms:

**“3.THAT pending lodging, hearing and determination of an intended application in the Court of Appeal under Rule 5 (2) b of the Court of Appeal Rules, 2010 this honourable court be pleased to grant a temporary order of injunction restraining the Defendant whether by itself, its employees, servants, agents or auctioneers from doing any of the following acts that is to say form evicting, advertising for sale, selling whether by public auction or private treaty , disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the ownership or quiet possession over land known as L.R. No. GILGIL TOWNSHIP BLOCK 2/210.**

**4. THAT this Honourable Court be pleased to grant an order of injunction restraining the Defendant whether by itself, its employees, servants, agents or auctioneers from advertising for sale, selling whether by public auction or private treaty, disposing or otherwise howsoever**

**completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing , letting, charging or otherwise interfering with the Plaintiff's ownership or title to parcel of land known as Land Reference Number L.R. NO. GILGIL TOWNSHIP BLOCK 2/210 pending filing, hearing and determination of the intended Appeal."**

4. I have to say at this point, that prayer 4 though couched in respect of an intended appeal might substantially be similar to the key prayer in the application filed subsequently, and now pending before the Court of Appeal. It is not clear to me why the Plaintiff would place two substantially identical prayers before two different courts. I will revert to this matter later.

5. In the grounds supporting the present motion, the Plaintiff restates relevant background and asserts that their intended appeal as reflected in the annexed draft memorandum of appeal, is not frivolous. The Plaintiff expresses apprehension that the Defendant could move to realize the security, namely, **L.R. No. GILGIL TOWNSHIP BLOCK 2/210** (the suit property) and thereby render the appeal nugatory, especially since the Defendant has already served the relevant statutory notice.

6. The grounds are amplified in the affidavit sworn by Plaintiff's Managing Director, **Divyesh Indubhai Patel** in support of the application. Some of the pertinent depositions in the said affidavit are as follows:

**"10. THAT I am advised by our advocates on record which advise I verily believe to be true that despite of having dismissed the application for injunction, this Honourable Court has inherent jurisdiction to hear and determine this application for injunction pending appeal.**

**11. THAT this suit and the application are not aimed at denying the Defendant its entitlement (if any) but has been brought to challenge the Defendant's unlawful actions in the purported recovery of it's entitlement and it is therefore just that the suit properties be preserved pending that determination.**

**12. THAT It is therefore important to preserve the suit property pending appeal and once a determination has been made on appeal, the Applicants rights as well as those of the Respondents in relation to the suit property will be determined and will be at liberty to deal with the same in accordance with the outcome."**

7. Much of the Replying affidavit by the Defendant's Relationship Manager, **Gilbert Banda** was taken up with matters previously raised in respect of the dismissed application. These include the alleged admissions of debt by the Plaintiff and material non-disclosure on the part of the Plaintiff. The Defendant also points out to the unexplained delay by the Plaintiff in serving Defendant with the present Motion; that the Plaintiff had completely stopped repayment of the debt and was on 19<sup>th</sup> December 2016 served with the statutory 40 days notice; and that the bank should not be restrained from exercising its statutory power of sale, upon expiry of the said notice. That the forced sale value of the charged property is Shs 300 million while the current debt level exceeds the security, thereby exposing the Defendant to irreparable loss.

### **The Parties' Submissions**

8. Appearing on behalf of the Plaintiffs during the hearing of the application, Mr. Njenga reiterated the contents of the application and urged the court to grant the temporary orders sought, in order to preserve the suit property. That the Plaintiff's appeal was not frivolous. Without making any specific references, he stated that he relied on the Plaintiff's filed authorities. For its part, the Defendant placed reliance on the Replying affidavit. Asserting alleged refusal by the Plaintiff to pay the admitted debt, Mr. Wawire for the Defendant insisted that the Plaintiff should not be allowed to also enjoy an injunction while the debt escalates, and to the Defendant's detriment.

9. Thus Mr. Wawire urged the court to order payment of the sum of Shs 300 million being the equivalent of the charged property's value, before an injunction is granted. He pointed out that the total debt now stands at Kshs 1.4 billion, well in excess of the value of the charged property. That the Plaintiff will not

be prejudiced by the sale of the property or its appeal rendered nugatory, as the Defendant being a reputable bank was capable of making a refund. He urged the court to balance the interests of both parties.

10. Most of Mr. Wawire's arguments touched upon the conditions governing the granting of orders for stay pending appeal, namely, proof of substantial loss, timeous application and offer of security by an Applicant. For these submissions he relied on his filed authorities.

11. In his response, Mr. Njenga stated that substantial loss has been made out and reiterated the Plaintiff's position that the entire debt was already paid. That refund of monies paid cannot compensate the loss of land which also carries sentimental value.

### **Analysis and Determination**

12. I have considered the affidavits and arguments of the respective parties in respect of the application before me. The uncontested facts can be stated briefly. The Plaintiff and Defendant had a mortgage/mortgagor relationship. In May 2016 the Defendant served a notice on the Plaintiff asserting alleged breach in respect of a charge created by the Plaintiff over the suit property on 4<sup>th</sup> March 2014. The Defendant evinced an intention to exercise its statutory power of sale in respect of a sum in excess of Shs 1.2 billion. The Plaintiff filed this suit disputing *inter alia* the amount of debt and whether the debt in question was secured by the stated charge and also challenging the adequacy of the notice by the Defendant regarding the exercise its statutory power of sale. An application for injunctive orders against the Defendant in this regard was heard, and dismissed by this court on 9/12/2016.

13. The present Notice of Motion is expressed to be brought under Section 1A, 1B, 3A, 75 (1) of the Civil Procedure Act, Order 42 Rule 6 and Order 50 Rule 1 of the Civil Procedure Rules. In arguments made before this court, it seemed that the application was a hybrid, that is, one brought under the court's inherent power under the Section 3A of the Civil Procedure Act, but also invoking Order 42 Rule 6 of the Civil Procedure Rules. The question of the applicable grounding provisions, while important, was not addressed by any of the parties.

14. Order 42 Rule 6 (6) of the Civil Procedure Rules provides for the granting of a temporary injunction in lieu of a stay. This is clear from a reading of Order 42 Rule 6 (6) together with Order 42 Rule 6 (1) of the Civil Procedure Rules. First, Order 42 Rule 6 (1) of the Civil Procedure Rules relates to applications for stay of **“execution or proceedings under a decree or order appealed from.”** This court, in dismissing the Plaintiff's earlier application cannot be said to have issued an order capable of execution as anticipated in the rule. Secondly there is no decree in this matter. Subrules 2, 3, 4, 5 and 6 are tied to Subrule (1) of Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6 (6) of the Civil Procedure Rules states as follows:-

**“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power 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.”**

The operative words are that **“the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction.....”**

15. Visram J (as he then was) stated in **Patricia Njeri & 3 Others -Vs- National Museums of Kenya [2004] eKLR** that:

**“.....[T]here was nothing which this court could stay. The Appellants sought from an order for injunction which was refused. That refusal did not result in any positive order that was capable of execution and the application to stay such refusal is, therefore, superfluous (See Venture Capital & Credit Ltd -Vs- Consolidated Bank of Kenya Ltd Civil Application No. 349 of 2003 (174 of 2003 UR).”**

16. Thus it is clear to me that Order 42 Rule 6 of the Civil Procedure Rules is not applicable in the present matter. However, it is available to the Applicant to invoke the court's inherent jurisdiction under Section 3A of the Civil Procedure Act.

17. **Mabeya J**, while dealing with an application brought under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, but seeking injunctive orders pending appeal, had occasion to consider the application of the cited rule in **James Juma Muchemi and Partners Ltd -Vs- Barclays Bank of Kenya Ltd [2011] eKLR**. The learned judge stated as follows:-

**“.....I am of the view that the Provisions of Order 42 Rule 6 (2) may not be applicable in its strict sense to the application before me. That Rule is for stay of execution pending appeal. If I understood Mr. King'ara well, the application has been brought under the principles of the Erinford Properties case. In that case, the issue that was considered and decided upon was whether a judge who has dismissed an injunction application can at the same time grant one pending an appeal to the Court of Appeal. Clearly, it was not an issue of a stay of any execution pending appeal. Although granting the prayer sought may amount to the same thing as stay of execution as Megarry J found, the considerations applicable in the Erinford Principle may not be the same to those under Order 42 Rule 6(2). There is no provision to grant an injunction pending appeal to the Court of Appeal under Order 42 Rule 6. My understanding is that Order 42 rule 6 (2) in its strict sense applies in a situation where a stay of execution of an order or decree is being sought whilst under the Erinford Principle, it applies where an injunction is being sought pending appeal.**

**An examination of the application before me will show that the prayers sought are not for stay of execution pending appeal, but grant of the declined injunction pending the hearing and determination of an application under Rule 5 (2) (b) of the Court of Appeal Rules. In my view therefore, when a court in Kenya is applying the Erinford Properties Principles, it does so under its inherent jurisdiction.”**

18. The learned judge continued to state:

**“In Erinford Properties Ltd. -vs- Cheshire County Council, Megarry J had dismissed an application for interlocutory injunction. The Judge, however, proceeded to grant an ex-parte injunction to the Plaintiff pending an appeal to the Court of Appeal of England. The Defendant applied to discharge that injunction on the ground that the court was *functus officio*. Dismissing the motion by the Defendant and granting the injunction pending appeal Megarry J. held at pg 454**

**The questions that have to be decided on the two occasions are quite different. Putting it shortly, on a motion the question is whether the applicant has made out a sufficient case to have the Respondent restrained pending the trial. On the trial, the question is whether the Plaintiff has sufficiently proved his case. On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be freed to act despite the pendency of an appeal. One of the important factors in making such decision of course is the possibility that the judgment may be reserved or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. 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 consistently with his 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. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise with holding**

**that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending trial the judge becomes *functus officio* quoad granting any injunction at all.”**

This position has been cited with approval by the Kenyan Court of Appeal in various matters. In **Butt –vs- Rent Restriction Tribunal (1982) KLR 417** at Page 420 Madam J.A with whom the rest of the court agreed held:-

**“Megarry J, as he then was, followed Wilson (supra) in *Erinford Properties Limited vs Cheshire County Council (1974)2 All ER 448* at pg 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision.” ( underlining mine)**

I agree entirely with the reasoning of **Mabeya J.**

19. In **Madhupaper International Limited –Vs- 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.”**

20. In the case of **Ruben & 9 Others -Vs- Nderito & Anor [1989] KLR 460** the Court of Appeal granted injunctive orders pending appeal to the Appellant after observing that:

**“On the material before us, we are satisfied that the intended appeal raises a serious question for submissions to this court on appeal. Secondly, in this case there is a very real possibility of the appeal being rendered nugatory if the reliefs sought by the Plaintiffs are not granted.”**

21. From several decisions of the High Court’s exercise of its inherent jurisdiction, and on occasion, Order 42 Rule 6 (6) of the Civil Procedure Rules, the test applied is that laid down by the Court of Appeal in the exercise of its discretion in regard to applications for injunction pending appeal (See **Muriithi J in Julius Musili Kyunga -Vs- Kenya Commercial Bank Ltd & Anor [2012] eKLR**). In my humble view, it is, perhaps time to codify the Erinford Principles within the Civil Procedure Rules.

22. **Visram J** (as he then was), in my humble opinion 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.**

23. As can be seen from the decisions of the Court of Appeal such as, **Madhupaper International & 9 Others, Butt** and the decisions cited by Mr. Njenga, in particular the most recent of them, **Surinder K. Mediratta -Vs- Kenya Commercial Bank Civil Application No. NAI 131 of 2005 (VR 74/05); [2005] eKLR** this court in its exercise of its discretion for the grant of an injunction pending appeal must consider whether:

(a) the Applicant has demonstrated that he has an arguable appeal

(b) the Applicant has shown that that to refuse the injunction would render the appeal nugatory bearing in mind that the purpose of the discretion is to preserve the subject matter pending the determination of the appeal.

(c) the order sought will inflict greater hardship than it would avoid and therefore refuse the injunction.

24. The position taken by the Plaintiff is that it disputes the debt and the charge giving rise to the statutory notice and that if the suit property is sold, no amount of refund can be adequate compensation for the loss of the same. Their prayer is therefore that the orders sought be granted to safeguard proprietary interest therein. The Defendant too has interests which must be balanced against those of the Plaintiff.

25. Although the Defendant’s submissions and authorities appear to target an application for stay of execution pending appeal, it is also evident that the grant of such application brought under Order 42 Rule 6 of the Civil Procedure Rules, by the court is discretionary and that the element of substantial loss, relevant to such consideration is equivalent to the consideration herein as to whether an appeal would be rendered nugatory if the orders sought are refused. Thus the submissions are not all together off tangent.

26. This view is supported by the words of **Platt, Ag. J.A.** (as he then was) in **Kenya Shell Ltd -Vs- Benjamin Karuga Kibiru and Another (1986) eKLR**. Although the matter before the court related to an application to stay execution, the words are relevant here:-

**“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms; is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”**

27. Having given due consideration to the foregoing, I do not doubt, first of all, that the Plaintiffs may have an arguable appeal. A cursory perusal of the draft memorandum of appeal annexed to the supporting affidavit reveals serious questions regarding some of the findings of this court in its impugned ruling. In addition there are allegations of prejudice and/or bias on the part of the court. A litigant who expresses such a serious assertion against the court appealed from, must be given opportunity to ventilate the grievance before the appellate court, in my view, as an exercise of his undoubted right of appeal.

28. In considering whether the appeal will be rendered nugatory and whether the granting of orders may inflict greater hardship than it would avoid, the court is called upon to balance the interests of the parties. The Plaintiff says that the loss through sale, of the suit property which has great sentimental value would occasion it irreparable or substantial loss. Further, at paragraph 11 of the supporting affidavit it is deponed that:

**“11. THAT this suit and the application are not aimed at denying the Defendant its entitlement (if any) but has been brought to challenge the Defendant’s unlawful actions in the purported recovery of it’s entitlement and it is therefore just that the suit properties be preserved pending that determination.”**

29. What the Defendant appears to emphasise in their submissions and Replying affidavit is that the debt attributed to the Plaintiff stands at 1.4 billion, in excess of the suit property value of Shs 300 million, that the Plaintiff has stopped making any payments and that the debt continues to escalate. Further, that an order of injunction in favour of the Plaintiff will mean irreparable loss for them, or in other words greater hardship for the bank.

30. Whether the debt is fully paid or due at all is a matter to be conclusively determined on evidence. Once sold, the suit property, it is true, cannot be recovered, even though the bank is capable of making compensation. On the other hand, if the rather substantial debt or some of it is still outstanding and continues to grow, to restrain the Defendant would cause greater hardship, as the debt may well exceed the value of the security.

31. In this case, as in **Milestone Engineering Ltd and Francis Karugu Njoroge -Vs- Co-operative Merchant Bank of Kenya Ltd and Watts Enterprises Civil Application No. NAI 305 of 2001 [2001] eKLR** which the Plaintiff relied on, a key complaint was accounts between the mortgagor and mortgagee. The court in **Milestone Engineering Limited** observed *inter alia* that:-

**“We realize that the circumstances in which a mortgagee can be restrained from exercising its statutory power of sale are strictly limited and even a dispute on accounts is not a ground for doing so. We think though that this is one of the exceptions to the general rule.....”**

32. The court then proceeded to fault the bank *inter alia* for mislaying the Applicants’ title documents and breaching the agreement regarding the mode of payment, while the Applicants had on the face of it fully cooperated with the bank. The conduct of the bank was in part the basis of the exception to the general rule in that case.

33. As observed in my earlier ruling, the alleged admissions of the debt herein by the Plaintiff as demonstrated through annexures, appear to contradict assertions that the Plaintiff does not owe the Defendant any money in respect of the impugned charge, or that the payments demanded are based on excessive levying of charges and interest. The argument that the suit land has irreplaceable sentimental value is a weak one. All in all, I am of the view that allowing the notice of motion as presented might visit greater hardship on the Respondent, and indeed the Applicant eventually, than it is intended to avoid in the short run.

34. It is unfortunate that the Plaintiff having timeously filed its current application took a month to serve it on the Respondent, by which date the 40 day statutory notice had been served and started to run. As counsel for the Plaintiff stated, the notice is due to lapse by the end of March 2017. No explanation was given for the delay, but the court ought not to grant prayers merely because time has run out on an Applicant. The application must be deserving.

35. As earlier indicated in this ruling, prayer 4 of the Notice of Motion cannot be granted by this court as I believe that a similar prayer is in the application pending before the Court of Appeal. Neither am I persuaded, considering all the matters foregoing, that I should grant Prayer 3 of the Notice of Motion in the terms therein.

36. In the interest of justice, and to allow the Plaintiff to agitate its application under Rule 5 (2) (b), now pending in the Court of Appeal, I would grant a temporary injunction against the Defendant, for a period of SEVEN (7) DAYS with effect from 25<sup>th</sup> March 2017, restraining the Defendant from selling by public auction or private treaty the land known as **L.R. No. GILGIL TOWNSHIP BLOCK 2/210**. To that extent only the application has succeeded. The costs of the application will be borne by the Plaintiff in any event.

**Delivered and signed at Naivasha this 24<sup>th</sup> day of March, 2017.**

In the presence of:-

Mr. G. M. Njuguna holding brief for Muraya King'ara Advocates for Plaintiff/Applicants

Mr. F. I. Mburu holding brief for Mr. Wawire for Defendant/Respondents

Court Assistant – Quinter Ogutu

**C. MEOLI**

**JUDGE**