



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HIGH COURT CIVIL APPEAL NO.3 OF 2016

GLADYS KIENDE MUTHAURA.....APPELLANT

VERSUS

REAL PEOPLE KENYA LIMITED.....RESPONDENT

RULING

1. Gladys Kiende Muthaura (the Applicant) is aggrieved by the Decision of Hon. M Obura P.M made on 11th July 2016 and intends to appeal against it. For now the Applicant has moved Court vide a Notice of Motion dated 7th November 2016 for the following Prayers:-

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3. Pending hearing and determination of the this Appeal, the Respondent/Respondent herein be restrained either by itself, servants, agents and/or representatives from attaching for sale, selling, or whatsoever or otherwise interfering with the Appellant/Applicant's use, enjoyment, possession and ownership of the Motor vehicle Registration No. KBW 092U, Toyota S. Wagon.

4. Time for filing the appeal be enlarged and the memorandum of appeal herein be deemed as duly and properly filed.

2. That Motion is expressed to be brought under the Provisions of Sections 1A, 1B, and 3A of the Civil Procedure Act and Order 42, Rule 6, Order 5b Rule 6 and Order 51 Rule of The Civil Procedure Rules.

3. In an affidavit sworn in support of the Motion the Applicant explains that sometime in April 2014 he guaranteed a loan of Ksh.2,000,000/= advanced to one Julius Nduati t/a Creative Computer World by Real People Kenya Limited (The Respondent). In support of that Guarantee, she offered her Motor Vehicle Registration No. KBW 092U as security and surrendered the Log Book therefor to the Respondent.

4. The Applicant's contention is that the alleged guarantee was never reduced into a written deed and was neither stamped nor registered. Further that there was never a Chattels mortgage taken over the vehicle.

5. The Applicant allege breach of some direct and/or implied terms of the Guarantee. These include that:-

- (i) The borrower would repay the entire loan by June 2015 whereupon the Respondent would release the Log Book to her.
- (ii) She would be entitled to full information, including full accounts of the transactions and loan repayments upto the time of default.
- (iii) The Lender was obliged to recover any arrears from the Borrowers security before turning to her.
- (iv) She would be entitled to all information on efforts and amounts recovered for realization of Borrower's securities.
- (v) The loan terms were never to be varied or rescheduled without notice to her and before her concurrence was given.

6. The Applicant became aware of alleged default by the Borrower sometimes on 9th June 2015. Subsequently there was communication between the Applicant and Respondent but which did not bear any agreement. On 15th January 2016 the Respondent demanded payment of Kshs.865,536/- within 7 days of the demand. Matters did not improve and the Applicant filed Milimani CMCC No. 2062 of 2016 in which she sought, inter alia, a declaration that she did not owe the Respondent any money in respect to the loan.

7. Simultaneously with the presentation of the suit, the Applicant filed an Application for Injunction. After giving her some temporary Protection, the Subordinate Court heard the matter interpartes on 16th May 2016.

8. The Applicant alleges that the Court reserved its Ruling for 17th June 2016 but on that day the Court was not sitting and Parties were informed that Ruling would be delivered on Notice.

9. It is a complaint by the Applicant that her advocate did not receive Notice but that the Ruling was nevertheless delivered on 11th July 2016 in the absence of the parties. The outcome of the Ruling was a dismissal of her Application for Injunction, needless to say, at the pain of costs.

10. The Applicant has filed a lengthy Memorandum of Appeal with no less than 13 grounds. This Court is told that the Intended Appeal is arguable and has good chances of success. The Court is also told that should the Application not be granted then there is a real risk that the Respondent will attach and sell the Applicant's Motor Vehicle and that will render the hearing of the Appeal nugatory.

11. The Application is opposed and the Respondent raises the following five (5) grounds in opposition-

1. The Court has no jurisdiction to grant a temporary injunction in the absence of a valid appeal.
2. There is no valid reason behind the delay in seeking leave to lodge the appeal out of time, the application having been filed close to three (30 months after the last expected date of filing.
3. That no efforts were taken to pursue the delivery of the ruling and or find out the date for delivery, and similarly there is no effort exhibited in pursuing the matter until three months after the ruling.
4. The Applicant has variously admitted having guaranteed the facility and having offered her vehicle as security for the said facility.
5. That the obligation upon the Applicant to the facility arose upon default, and the Applicant

admits notification of the default and receipt of the demand letter.

12. The Provisions of Order 42 Rule 6(6) of the Civil Procedure Rules are in the following terms:-

(6) 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.

13. And while it is true that, ordinarily, an order of Temporary Injunction pending an Appeal from the Subordinate Court to High Court will only be granted once the procedure for instituting an Appeal has been complied with, this Court takes a view that it is within its inherent jurisdiction, to simultaneously, consider an Application for Leave to enlarge time for the filing of an Appeal and an application for Stay or Injunction. There will be occasion when a party, for excusable reason, does not file an appeal on time and to insist that such a Party can only seek protection through Stay or Injunction after filing an Appeal would be to leave the Party vulnerable and open to injustice.

14. Being of that view, I now turn to consider the Application for Leave to enlarge time for the filing of the Appeal. The Applicant states that it did not file the Appeal on time as the Ruling was not delivered on the due date of 17th June 2016 but on 11th July 2016. And when it was, the Advocate for the Parties were not notified and Ruling was therefore delivered in their absence. The facts as set out by the Applicant are not controverted by the Respondent and this Court would have no reason to disbelieve them.

15. The Applicant also states that her Advocate learnt of the Ruling just before the presentation of the Application before Court. This again is not disputed by the Respondent.

16. In so far as there is a good explanation for failure to file the Memorandum of Appeal within time and also because the plea for enlargement of time was filed timeously, this Court will allow it as being meritorious. Ground 4 of the Notice of Motion of 7th November is easily allowed.

17. It has been stated before that there is no inconsistency with an Appellate Court granting a Temporary Injunction which a Subordinate Court has declined to grant and which decision is the subject of the Appeal. That really is the purport of Order 42 Rule 6(6) which is reproduced in paragraph 12 above.

18. While the Applicant would have chosen to file this Application before the Subordinate Court, the Provisions of Order 42 Rule 6(1) allows for the filing of an Application of this nature, at a first instance, before the High Court.

19. The principles to be applied in considering an application under the provision of Section 42 Rule 6(6) were set out by Visram J. (as he then was) in **Particia Njeri & Others vs. National Museum of Kenya** [2004] eKLR as follows:-

“In the Venture Capital case 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 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 (cited in *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 than 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*)”.

20. And just like my brothers and sisters in ***Bilha Mideva Buluka Vs. Everlyne Kenyere*** [2016] eKLR, ***Molo Group Shuttle Ltd Vs. Sub-County Administrator Naivasha & Another*** [2015] eKLR, I accept that these are the principles to guide my hand.

21. First, the Applicant must demonstrate that its Appeal is not frivolous. Put differently that Appeal is arguable. This test is especially important because this Court is considering an Application for Injunction pending an Appeal, not from its own decision to the Court of Appeal, but an appeal from the Subordinate Court to itself in its Appellate jurisdiction. To be deserving of this Court’s discretion then the Applicant must in the minimum demonstrate that the Appeal is not frivolous.

22. This, unfortunately for the Applicant, is where the Application runs into difficulty because the Applicant simply relies on the Memorandum of Appeal to argue that the Appeal raises serious issues which the Trial Court overlooked! As correctly pointed out by the Respondent, the Applicant has not attached a copy of the Ruling of the Lower Court and also the Proceedings to enable this Court assess the viability of the Appeal.

23. As this Court is unable to make out whether or not the Appeal is arguable then it cannot exercise its discretion in favour of the Applicant.

24. Even if my view is hasty and wrong, the Court is not persuaded that the Application will pass the second criteria in ***Giella vs. Cassman Brown*** [1975] EA 358. The subject matter sought to be protected is a Motor vehicle that was offered as security for a loan advanced from the Respondent to a third party. Even if it is found that the attachment and sale of the vehicle is wrongful and unlawful, the Applicant has not demonstrated how compensation by way of damages will not be an adequate remedy.

25. The Application for Injunction is without merit and is hereby declined.

26. This Court allows the Notice of Motion of 7th November 2016 only in terms of prayer 4. The Memorandum of Appeal shall be deemed as duly and properly filed and served upon payment of the requisite Court fees which must be done within 14 days hereof.

27. Each party to bear its own costs of the Notice of Motion of 7th November 2016.

Dated, Signed and Delivered in Court at Nairobi this 20th day of April, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Momanyi for Appellant

Serem for Respondent

Alex - Court Clerk