



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 563 OF 2015**

**PAUL SITEIYA LOORKIPONY.....1<sup>ST</sup> PLAINTIFF**

**NAPOLEON WAKUHA MURENDE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MOLYN CREDIT LIMITED.....1<sup>ST</sup> DEFENDANT**

**REGENT AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling relates to the Plaintiffs' (herein "the Applicants") Notice of Motion Application dated 13<sup>th</sup> July 2016. The Applicants are seeking for orders that, a temporary order of injunction be issued restraining the 1<sup>st</sup> Defendant, whether by itself, agents, servants, and/or employees from doing any acts of advertising for sale, selling by public or private treaty, leasing, letting or otherwise charging or interfering with the ownership of parcels of land known as ***L.R.NO.Kajiado/ Kisaju/10733***, pending initially the hearing and determination of this Application and thereafter pending the lodging, hearing and determination of the intended Appeal in the Court of Appeal. The costs of the Application be provided for. The Application is based on the grounds on the face of it, and the Affidavit sworn by 1<sup>st</sup> Applicant, Paul Siteiya Loorkipony.

2. The background facts to the matter are that, the Applicants are the registered proprietors of all that parcel of land known as LR. No.Kajiado/Kisaju/10733 ("herein the suit property") on which the 1<sup>st</sup> Applicant allegedly resides with his family. The 1<sup>st</sup> Applicant averred that the 1<sup>st</sup> Defendant instructed the 2<sup>nd</sup> Defendant to sell the suit property, by way of public auction on 18<sup>th</sup> November 2015. Upon notice of the advertisement for the same, the Applicants through a Notice of Motion Application dated 10<sup>th</sup> November 2015 applied for an order of injunction to stop the sale. On the 8<sup>th</sup> July 2016 the Honourable Court dismissed the said Application with costs.

3. Being dissatisfied with that order, the Applicant instructed its lawyers to apply for typed proceedings and file a Notice of Appeal which was done, hence the prayers sought for herein.

4. The Application was however opposed vide the Replying Affidavit sworn by Moses Anyangu dated 5<sup>th</sup> August 2016. He deposed in a nutshell that, on or about the 14<sup>th</sup> January 2015, the Applicants applied for and were granted a loan by the Respondent of a sum of Kshs.7,200,000. The same was secured by a duly

registered legal charge over the subject suit property. However the Applicants defaulted in the repayment of the loan where upon the Respondent initiated realization process. The Applicants then filed the Application dated 10<sup>th</sup> November 2015 to stop the sale but as aforesaid the same dismissed

5. That previously the Court had directed the Applicants to pay Kshs.7.5million on or before the 16<sup>th</sup> February 2016, failure of which the Respondents would be allowed to exercise its power of sale. The Applicants did not comply and the time for compliance was extended on 18<sup>th</sup> June 2016 to 18<sup>th</sup> March 2016. The Applicants were to pay, a sum of Kshs.3,500,000 and the balance of Kshs.4,000,000 by 31<sup>st</sup> March 2016. The Applicants issued post dated cheques, out of the time frame and upon presentation, they were returned unpaid due to insufficient funds.

6. The Parties agreed to dispose of the Application vide filing of written submissions. I have considered the rival submissions alongside the grounds and Affidavit in support of, and in opposition to the Application. I find that, the issue for determination is whether, the Applicants has satisfied the threshold for grant of an order for injunction pending the Appeal under Section 5(2) of the Court of Appeal Rules.

7. I find that as stated in the case of **Jared Sagini Keengwee Vs Walter Onchwari & 2 others 2014** the Court will only grant an interlocutory injunction pending intended Appeal if it is satisfied that;

***“The Applicant has demonstrated that his intended appeal or appeal is arguable and that unless stay or injunction is granted the appeal or intended appeal, if successful, will be rendered nugatory”.***

8. The Principles above echoed the principles laid down in the case of **Chris Mungai N. Bichage V. Richard Nyagaka Tongi & 2 Others 2013 eKLR.** Thus, the Applicant must show that, the intended Appeal is not frivolous, and will be rendered nugatory if the order of injunction is not granted.

9. The Applicant submitted that, based on the grounds of Appeal in the Draft Memorandum of Appeal which states inter alia that, the Court erred in law and fact by failing to rule on the validity of the charge, failing to hold the Respondent applied unlawful interest, and failing to address the legal principles applicable on defective charge, the intended Appeal raises arguable issues. The Applicant further argued that, as held in the case of: **Hashmukhlal Virchand Shah & 2 others Vs Investment & Mortgages Bank Ltd (2014) eKLR,** it is now settled law that an arguable point need not be one which will succeed, but one which is worth of the Court’s interrogation. The Applicant cited the following cases to buttress that legal principle:

- **Joseph Gitahi Gachu & Another Vs Planner Holdings Ltd & 2 others Civil Application No. 124 of 2008.**
- **Stanley Kangethe Kinyanjui Vs Tony Ketter and 5 others (2013) eKLR.**
- **Francis Odhiambo Omondi t/a Omondi & Co. Advocates Vs National Bank of Kenya Ltd & 2 others 2014 eKLR.**

10. The 1<sup>st</sup> Applicant further submitted that, even one arguable point, is sufficient for the Court to consider an Appeal. That the suit property is his residential home with the wife and they derive their sustenance therefrom through farming. If the Court fails to grant the orders sought, he will lose the land and source of livelihood, thus rendering the Appeal nugatory. Reference was laid on the case of **Chris Munga Vs N Bichange Nyagera Tongi (Supra).**

11. Finally, the Applicants also made reference to the principles that govern the grant of interlocutory injunction as laid down in the case of **Geilla Vs Cassman Brown (1973) EA 348,** namely

***a) Whether the Applicant has established a prima facie case;***

***b) Whether the Applicant will suffer irreparable injuries which cannot be compensated by award of damages, and;***

***c) In case of doubt, whether the balance of convenience favours the Applicant.***

12. Further reference was also made to the case of **Mrao Ltd Vs First American Bank of Kenya Ltd Vs 2 Others 2013 I KLR 125**, which defines a prima facie;

***“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case 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”.***

13. The Applicant reiterated that, the grounds of Appeal referred to above are not only genuine but arguable, and prove that the Applicants have a prima facie case. If the orders sought are not granted, the Applicants will suffer untold shame and suffering which cannot be compensated with award of damages. Reliance was placed on the cases of **Lucy Njoki Waithaka Vs Commercial Development Corporation Hccc No. 321 of 2001** and **Joseph Mbugua Gichanga Vs Co-operative Bank of Kenya Ltd, Hccc No. 74 of 2000.**

14. Finally, the Plaintiff submitted that, the balance of convenience favours the Applicant in that, it is more convenient to save the suit property from sale since the 1<sup>st</sup> Defendant still holds the charge over the suit property. The case of **Dhariwal Hotels Limited Vs Southern Credit Banking Corporation Ltd 1248 of 2002**, was cited to state that, if there is a substantial question to be investigated, the status quo should be preserved until the question can be finally disposed of.

15. The Plaintiff rebutted the content of the Replying Affidavit under Paragraphs 10, 11, 15, 17, 18 to 20<sup>th</sup> alleging that the matters raised in the Application are Res Judicata; and relied on the case of **Francis Odhiambo Omondi t/a Omondi & Co. Advocates Vs NBK & 2 others (2014) e KLR**, to argue that the Applicants are entitled to apply for an injunction pending Appeal. The Applicants submitted that, they are willing to furnish reasonable security if so directed by the Court.

16. In response to the Applicants' submissions, the 1<sup>st</sup> Respondent joined issues with the Applicants, on the principles laid down in the cases of **Geila and Mvao**. However the 1<sup>st</sup> Respondent argued that, the intended Appeal has no reasonable chance of success and it only re-opens the matters which the Court has already decided. It does not disclose a prima facie case and that the Applicant can be adequately compensated in damages. The balance of convenience tilts in favour of the 1<sup>st</sup> Defendant as the Applicants are indebted to the 1<sup>st</sup> Defendant, and the loan continues to attract interest. The accumulated amount was Kshs.23,881,551 as at 13<sup>th</sup> July, 2016. The Applicants are merely using the Court to absolve themselves from carrying out their financial obligation. The 1<sup>st</sup> Respondent said that since January 2014, the Applicants have not made any efforts whatsoever to pay off the amount claimed. Thus, this Application is an abuse of the court process.

17. The Respondent further submitted that, the grounds stated in the Memorandum of Appeal lacks merit as the same have already been dealt with and determined, vide the Application filed by the Applicants dated 10<sup>th</sup> November 2015 and the resultant ruling dated 8<sup>th</sup> July 2016. That the issue of spousal consent, is introduced for the first time in the intended Memorandum of Appeal which is contrary to the law and procedure. That in any case, since the Appeal has no merit, it cannot be rendered nugatory.

18. Finally, the Respondent submitted that, the Applicants should be ordered to furnish security if the orders sought have to be granted. Reliance was placed on the case of **Ann Njeri Mwangi Vs Muzaffer Musofee Essajee & Another (2014) eKLR**.

19. At the conclusion of the arguments by the respective parties, and in considering all the legal principles cited and applying the same to the facts herein, I find that, the Applicants have not made response to the Respondents averments that, they received a loan facility from the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant has submitted that the outstanding sum is Kshs.23,881,551. This has not been rebutted either.

20. Be that as it may, in an Application for stay, as stated in the case of *Kenya Commercial Bank Limited Vs Suncity Properties Ltd & 5 others 2012*, the Court has to consider two competing interests: the rights of a successful litigant, whereby the litigant should not be denied the fruits of the judgment and the right of an unsuccessful litigant to have the intended Appeal against the offending order heard and not rendered nugatory. In a bid to balance the two competing interests, the Courts usually order for security for the due performance of the decree, or as an assurance to the Respondent that, if the Appeal is not successful, the sum owed will be paid. The saving grace is that, the Applicant is prepared to offer a security for the same.

21. The question that arises is what kind of security would be sufficient and serve the interest of the parties and justice? I have had the benefit of going through the ruling of the Court delivered on 8<sup>th</sup> July 2016. I note that indeed, the issues in particular, issues relating to, statement of accounts, taking of accounts, and prohibition in dealing with the suit property to the detriment of the Applicant were addressed. I have also noted therefrom that, the Applicant was given indulgence severally to pay the 1<sup>st</sup> Respondent a sum of Kshs.7,500,000/- on or before 16<sup>th</sup> February 2016 which was extended as aforesaid, and eventually discharged on 14<sup>th</sup> April 2016. The aforesaid ruling clearly reveals that, the Applicant attempted to negotiate repayment of the debt and at one time, the cheques which were not honoured.

22. It is therefore clear that, the loan amount sought is outstanding. The Applicant has not contested the same. If the Court is to grant the Applicants a temporary injunction to restrain the 1<sup>st</sup> Respondent from disposing of the suit property in exercise of its statutory power of sale, then the Applicants ought to pay the outstanding loan amount in a joint interest earning bank account in the names of the lawyers. It's also clear to me that, the previous indulgence given to the Applicant to pay the loan amount has not been embraced positively. The issuance of cheques that were subsequently dishonored, and of which the Applicant did not disclose in the Affidavit in support of the Application, clearly show that the Applicants are not either willing or able to liquidate the outstanding loan balance or are not ready to conclude this litigation. Justice is weighed on a scale. The scale cannot be allowed to tilt in favour of one Party always.

23. I also note that, the Applicant been enjoying injunctive orders initially from 19<sup>th</sup> November 2015, to 8<sup>th</sup> July 2016, when it was discharged. Thereafter, the Applicant moved the Court again and received an order stopping the sale. The Applicant has thus been able to keep off the 1<sup>st</sup> Respondent from exercising the statutory power of sale over the suit property from 19<sup>th</sup> November 2015 to date.

24. To expedite the hearing of this matter and at the same time accord the Applicants an opportunity for the intended Appeal to be heard, I allow the Application dated 13<sup>th</sup> July 2016, in terms of prayers 3, 4, and 5, on condition that:

- i. The Applicants pay the 1<sup>st</sup> Defendant/Respondent 50% of the total outstanding loan amount within two (2) weeks of this Order.
- ii. The balance of the loan amount to be deposited in an interest earning bank account in the joint names of the lawyers of the parties as aforesaid within thirty (30) days of this Order.
- iii. The Parties to facilitate the pre-trial requirements, in for main hearing of the case. The Case Management Conference to be held and concluded within two (2) months of this order.
- iv. The suit to be set down for hearing within Ninety (90) days of this order.
- v. Failure to comply with conditions given under (i) and (ii) above, and within the time limit set, the injunctive order issued herein will automatically lapse, without further reference to the Court.
- vi. The costs of this Application to abide the outcome of the main suit.

25. Ordered accordingly.

**Dated, signed and delivered on this 26th day of May 2017 at Nairobi.**

**G. L. NZIOKA**

**JUDGE**

**In open Court in the presence of:**

Mr. Mirie for Kingara for the 1st Plaintiff

Mr. Mirie for Kingara for the 1st Plaintiff

No Appearance for the 1<sup>st</sup> Defendant

No Appearance for the 1<sup>st</sup> Defendant

Teresia – Court Assistant