REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 235 OF 2010

D.J. LOWE & COMPANY LIMITED ..... PLAINTIFF

- VERSUS-

1. CREDIT AGRICOLE INDOSUEX.....1ST DEFENDANT

2. BANK OF AFRICA KENYA LIMITED .....2ND DEFENDANT

3. REGISTRAR OF TITLES, MOMBASA .....3RD DEFENDANT

RULING

[1] The applicant filed the notice of motion dated 2nd March 2011. He later amended his application on the 4th of March 2011.

He prayed that pending the hearing of the application the respondent, his servants and or agents be restrained through a temporary injunction order from alienating or dealing in any manner with the suit property known a sub-division No. 1280 Section I M.N. Mombasa. He also prayed for similar orders to be made pending the determination of the suit. Finally he prayed that Prime Bank Limited herein be joined in these proceedings as the 4th defendant, and that the said Bank be restrained from proceeding with further transaction of presenting any further transfer documents to the 3rd respondent or to have the name of the 4th respondent registered as the proprietor of the same. Previously by a ruling dated 8th November 2011 by M.K. Ibrahim J (as he then was) read by H.Okwengu J (as she then was) the plaint in this suit was struck out with costs to the 1st, 2nd and 3rd defendants. The plaintiff herein then filed an application for injunction pending appeal dated 1st December, 2011 to restrain the respondent from disposing or transferring the suit property known as subdivision no. 1280 Section I MN Mombasa. The principal ground of the application was that

. . . the applicants appeal will be rendered nugatory and the application will suffer substantial damage and loss."

[2] Before that application could be heard the 1st defendant filed a Notice of Preliminary Objection challenging the jurisdiction of the Court. The application was dealt with by my brother Muriithi J. The Judge held that the court has jurisdiction and directed that the parties appear to fix the application for injunction pending appeal by notice of motion dated 1st December 2011.

[3] In the meantime Mr. Amoko withdrew Mr. C.B. Gor's affidavit sworn on 28th August 2012 in its entirety from the record and this paved the way for the hearing of the Notice fo Motion dated 1st December 2011. The Court had earlier been informed that 2nd and 3rd defendants had not been

participating on the motion dated 1st December 2011 aforesaid.

[4] Mr. Gikandi Learned Counsel for the applicant said that his main prayer was No. 3 to restrain the respondent from using the suit property. he said that this suit was struck out by Ibrahim J (as he then was) and that the Prime Bank the fourth defendant was in the process of purchasing the suit property from 1st defendant. he argued that from the affidavit of Rasik Kantlaia the purchasers paid Kshs. 19 million. he argued that his client needs an injunction to prevent the suit property changing hands. He stated that there was no proof that the alleged sale was done from the 1st to 4th defendant and prayed for an order of status quo. He contended that the applicant had filed a notice of appeal under Order 42 rule 6 and that once the same is filed an appeal is deemed to have been filed. He prayed that the orders be granted to prevent the appeal being rendered nugatory.

[5] Mr. Amoko Learned Counsel for the 1st respondent seriously opposed the motion. he argued that the plaintiffs suit was dismissed because of the plaintiff bringing multiple suits and therefore bringing the administration of justice into disrepute. He added that there was a detailed affidavit before Judge Ibrahim showing how the process of the Court had been abused since 1994 preventing the 1st defendant from exercising its power of sale. He argued that the applicants must show that they have an arguable appeal which is not frivolous. He contended that Muriithi J was determining jurisdiction and not the application. He stated that damages were an adequate remedy for the plaintiffs.

He reiterated that it is not right for the plaintiff to use the property as a commercial entity and insulate itself with the process of litigation and refuse to move out. He finally stated that the application is an abuse of the process of court and that the applicants should deposit 20-50 million shillings as security for costs.

[6] Mr.Khanna learned Counsel for the 4th respondent, supported the arguments of Mr. Amok. He argued that the application is an abuse of the process of the court. That the appeal is frivolous. That the applicant must show the substantial loss he will suffer or irreparable loss otherwise an injunction should not issue. He argued that the applicant had not annexed his grounds of appeal to show an arguable appeal, he stated that the 4th defendant is an innocent victim who has suffered more then the plaintiff. He pleaded with the court that if it is inclined to give an injunction then it should put a condition for adequate security of 20 million shillings as security for costs.

[7] Mr. Gikandi in reply said Counsels should not give evidence from the bar. The application for security should come from the parties themselves not the Counsels who are mare agents. That the ruling of Muriithi J is clear that he found there was an arguable appeal and this court cannot sit on judgement of a court of concurrent jurisdiction. he reiterated that there has been no proof of any loss to the respondents and that Article 47 and 48 of the Constitution demands that Justice be availed to everyone without any impediments.

[8] Justice Muriithi in his judgment considered the principles of preservation of the subject matter pending appeal, He considered the English authorities of the Court of Appeal in ***Porini v Gray, Sturla v Frencia 1879 12 ChD 438*** which was appealed in ***Orion Property Trust Ltd*** and ***Erinford Properties*** and quoted widely from the judgment of ***Cotton L.J. and Jessel M.R.*** he also considered ***Bhutt v Rent Restriction tribunal case No. 6 of 1979*** and ***Madhupaper International Ltd v Paddy Kev (1985) KLR 840.*** I need not rugurgatate his arguments here, but I completely agree with them.

In para 12 of his judgment the Learned Judge rendered himself thus

"In the present case, the issue is better appreciated when one considers the probable successful outcome of the appeal. Without prejudging the merits of the application for injunction pending appeal or the appeal itself, if the appellant succeeds, its suit will be restored to hearing and the plaintiff would be on track to obtaining the orders sought in the plaint, principally a declaration of nullity of charges on the parcel of land subdivision No. 1280 Section I MN and an order for release of title documents. Of what use will such victory be if in the meantime the defendants have transferred the parcel of land in purported exercise of the mortgages power of sale? The successful appellant would have been deprived

of its property, and the declaration and order for release of documents would, in the end, be only paper rights. That is the outcome that the Court is mandated, in an appropriate case, to prevent by the Principle enunciated in ***Poline v. Gray,*** *supra and refined in* ***Orion Property Trust*** *and* ***Erinford Properties*** *cases."*

[9] Although the judge made this powerful statement on an application for jurisdiction, I am not aware nor was it brought to my attention that anyone has appealed from the findings of the Judge. It was not positively argued before me that the intended appeal is frivolous. No hardship was demonstrated to have occurred or likely to occur on any of the respondents at all. The applicant in this case filed a notice of appeal immediately the judgment of Ibrahim J was read by Okwengu J.

[10] In determining whether the applicant has laid a *prima facie* case, the court at this stage can only look at the strength of the pleadings and depositions filed by the parties. In ***Mbao Ltd vs First American Bank of Kenya Ltd & two others 2003 KLR. 125*** the Court of Appeal Bosire JA said,

"So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court, a tribunal property directing itself will conclude that there exists a right which has apparently been infriged by the opposite party as to call for an explanation or rebuttal from the latter."

The Court of appeal will certainly have a say regarding whether the claim by the defendants has ever been rebutted by the defendants as the case was struck out before it was heard.

[11] The applicants argue that the property herein is registered in their name and that is where they live. Their interest in the property cannot be underestimated. I am convinced on a balance of probability that a loss of the suit property to them may never be compensated by an award of damages.

Doing the best I can and relying on the principles set out in ***Giella vs Cassman brown and company ltd. 1973 EA 358*** I am convinced that the balance of convenience favours the applicants. The end result is that the applicants application is allowed with no order as to costs.

Dated and delivered in open Court at Mombasa this 14th day of February, 2013.

S.N. MUKUNYA

JUDGE

14.2.2013

In the presence of:

Gikandi Advocate for the plaintiff

Asige Advocate holding brief for Mr. Khanna for 3rd defendant