



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL & LAND DIVISION

ELC CASE NO. 422 OF 2012

TENET ENTERPRISES LIMITED1ST PLAINTIFF
CHOM CHOM ENTERPRISES LIMITED2ND PLAINTIFF
ELCHIN GROWERS LIMITED3RD PLAINTIFF
SALOT ENTERPRISES LIMITED4TH PLAINTIFF

VERSUS

TRUST BANK LIMITED (IN LIQUIDATION).....1ST DEFENDANT
THE DEPOSIT PROTECTION FUND BOARD2ND DEFENDANT
THE COMMISSIONER OF LANDS3RD DEFENDANT
THE REGISTRAR OF TITLES.....4TH DEFENDANT

RULING

This court delivered a Ruling on 9th May, 2013 and dismissed the Plaintiffs' Notice of Motion dated 18th July, 2012 that sought for injunctive orders. The applicants' counsel Mr. Billing applied for maintenance of status quo for period of 10 days. The same was not opposed by the Defendants counsel. Thereafter the plaintiffs/applicant filed this instant application under Section 1A,3A and 63(e) of the Civil procedure Act, seeking for orders that the court do grant a stay and/or an injunction pending the hearing and determination of the intended Appeal. The applicants sought for any other order or relief that the court may deem necessary and just.

The application was supported by the grounds that the court has jurisdiction to grant the stay and or injunction or orders of status quo pending hearing and determination of the intended appeal. That applicants have arguable appeal and if preservative orders are not granted, the appeal will be rendered nugatory. That it is for the interest of justice that the court should exercise its discretion in favour of the applicants.

The application was opposed. The Respondents averred that the applicants have not met the conditions required to entitle them to the orders sought. That though the applicants stated that they have an arguable appeal, they did not state the grounds of Appeal. The applicants did not offer how they would pay the

Respondents.

The parties put in various authorities. The Respondents relied on the various cases;- **ERINFORD PROPERTIES LTD V CHASHIRE COUNTY COUNCIL (1974) 2 All ER 448, MADHUPAPER INTERNATIONAL LTD V KERR (1985) KLR 840, GITHUNGURI v JIMBA CREDIT CORPORATION LTD NO. 2 (1988) KLR 838**

The Court has considered the rival arguments. It is evident that this court dismissed an application for injunction. The court in its Ruling of 9th May, 2013 did not issue order capable of being enforced. There is therefore nothing to stay. The court cannot stay a dismissal, as dismissal is incapable of execution. I rely on the case of **DAVID ANDAJE V NAKURU WATER & SANITATION SERVICES LTD, Civil Appeal No. 171 of 2009 in Nakuru High Court.**

The applicant has also sought for injunction pending appeal. There is no doubt that the court has jurisdiction by way of exercise of discretion to grant an injunction pending appeal, however the said discretion must be exercised judiciously and upon material placed before the court.

The applicants herein stated that they have an arguable appeal. However apart from stating that, they did not state their grounds of appeal. The applicants did not state to this court why an injunction should be granted. In the case of **UMOJA SERVICE STATION LTD AND OTHER v HEZY JOHN LTD, Civil application No. 39 of 2006**, the court held that;

“the jurisdiction of the court in an application for stay of execution pending appeals is discretionary, which discretion should be exercised judicially and the applicant is obligated to show that his appeal or intended appeal is arguable and that unless he is granted the order he seeks, the appeal or intended appeal if successful will be rendered nugatory.”

The applicants herein did not show that his intended appeal is arguable and if the sought orders are not granted, then their appeal will be rendered nugatory.

Again in the case of **PRAFULA ENTERPRISES LTD V NORLAKE INVESTMENT LTD AND ANOTHER** at Kisumu High court, civil case No. 336 of 1999, the court further held that

“In an application for injunction pending appeal, if the grounds stated are those of stay of execution and the substantial loss is not argued application will be dismissed.”

The applicants have been in default since 2000. The land in question was charged to the 1st Respondent. The same had even been invaded by squatters and one of the applicants had at one time given a go ahead for sale of the land. The applicants have not demonstrated the substantial loss they will incur if orders not granted. I will borrow the words of Justice Kasango in the case of **RAMESH DATT VASHIST & ANOTHER v FINA BANK LTD** Civil Case No. 176 of 2005 in Milimani Commercial Court, where she stated,

“From the moment the property was charged it become a commodity for sale and it has not been argued that the Defendant would not be in a position to compensate the plaintiff.”

From the above analysis, the court finds that the applicants' Notice of motion dated 16th May, 2013 is not merited. The same is dismissed with costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 23rd day of August ,2013

L. N. GACHERU

JUDGE