



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Case 313 of 2009

HAITHAR HAJI ABDI ..... 1<sup>ST</sup> PLAINTIFF/APPLICANT

ABDI MAJID HAJI HAITHAR ..... 2<sup>ND</sup> PLAINTIFF/APPLICANT

V E R S U S

DUBAI BANK OF KENYA LIMITED ..... DEFENDANT /RESPONDENT

**RULING**

1. Land Parcel known and described as MN/VI/1162 (CR No. 4318) Magongo Area, Mombasa (the property) was charged in favour of the Defendant as security for an overdraft extended to the 2<sup>nd</sup> Plaintiff. The 1<sup>st</sup> Plaintiff is the registered owner thereof. This action seeks to restrain the Defendant from exercising its statutory power of sale which right the Plaintiffs contend has not arisen. Simultaneously with filing the plaint, the Plaintiffs filed an application for a temporary injunction to restrain the Defendant from proceeding with the public auction on 11<sup>th</sup> September 2009 until the hearing and determination of the suit.

2. By a ruling dated 7<sup>th</sup> February 2012 Justice J. B. Ojwang dismissed the Plaintiffs application. I am now asked to stay execution of that decision. The Plaintiffs through a Notice of Motion dated 22<sup>nd</sup> February 2012 seek the following prayers-

***“(b) That this Honourable Court do issue a stay of***

***execution of this Court’s Ruling of 7<sup>th</sup> February 2012 pending the hearing and determination of the Plaintiff/Applicants intended appeal of this Court’s Ruling of 7<sup>th</sup> February 2012 to the Court of Appeal.”***

3. The Plaintiffs have filed a Notice of their intention to appeal against that decision and urge me to grant the orders on the following grounds-

(a) *The Plaintiffs refute that they are indebted to the Defendant.*

(b) *That the sale of the Plaintiffs property will cause them great loss and damage*

(c) *That the current constitution gives them an opportunity to seek a fresh interpretation of the contractual relationship between them and the Defendants*

(d) *That if stay is not granted, the appeal would be rendered nugatory as the market value suit property exceeds the amount claimed by the Defendants.*

4. The Defendants are opposed to the application. The Defendants take this position-

(a) *The application in so far as it seeks to stay a negative order cannot be granted*

(b) *Even if this court were to treat the application as one for an injunction pending appeal it would still fail as-*

(i) *The Notice of Appeal is incompetent.*

(ii) *It fails the test established in Giella –Vs- Cassman Brown [1973]EA 358.*

5. Let me start by considering the Defendant's argument that I should dismiss the application *in limine* because the court cannot stay a dismissal, which is a negative order. For this proposition the Defendant's counsel relied on the decision in David Kamau -Vs- Savings & Loan (K) Ltd Milimani Commercial Division No. 1566 of 1999 and the Court of Appeal decision in Civil Application No. 81 of 2010 Peris Wakiuru Gaita –Vs- Grace Wanjiru Mbugua where Bosire JA said-

***“A dismissal is a negative order ... The Superior court did not order the doing of any act, nor did it order the Respondent, to absent from doing a particular thing respecting which a stay order may issue.”***

6. The application that was dismissed by J. B. Ojwang, J (as he then was) sought the following orders:-

***“That the Defendant either by itself, servants, employees and/or agents, specifically Expeditions General Merchants, be restrained by this court from in any way disposing, alienating, selling by public auction or otherwise on 11<sup>th</sup> September 2009 or whenever, all their parcel of land known as MN/VI/1162 (CR No. 4318) Magongo area in Mombasa, until the hearing and determination of this suit.”***

Upto the point of the dismissal of the application, the plaintiffs were shielded by an interim order that was to lapse at the determination of the application. Upon the dismissal of the application, the Plaintiffs were exposed and Defendant was at liberty to pursue its statutory power of sale.

7. What would be the efficacy of granting stay in these circumstances? I think non. The interim orders lapsed once the Judge determined the application. From then on the Defendant was at liberty to exercise its statutory power of sale. A stay of the ruling dismissing the application for injunction would not restrain the Defendant from exercising this right. The Plaintiffs would still be unprotected unless some

restraining orders were granted alongside the stay. It is circumstances such as this that it would be futile to grant a stay.

8. The Plaintiffs concern is that the suit property needs to be preserved pending the hearing and determination of its intended appeal. The course that was open to them was to seek the grant of a temporary injunction pending appeal. A High Court has jurisdiction to grant such an order pending an appeal from its own decision dismissing an application for interlocutory injunction and there is no inconsistency in doing so. (As the Court of Appeal held in **Madhupaper International Ltd –Vs- Kerr [1985]KLR 840 at 845** when adopting **Erinford Properties Ltd –Vs- Cheshire County Council [1974]2 ALL ER 443**).

9. Now I am urged by the Defendant to dismiss the application before me as stay of a negative order is not available. I am also told by the Defendant that the Plaintiffs should not be allowed to get away with an order of injunction pending appeal under the guise of an application in which they have expressly sought a stay. To do otherwise, it is argued, would be to grant them an order not applied for. This in the view of the Defendant would be to allow the court to descend into the arena of litigation (**Peris Wakiuru Gaita – Vs- Savings & Loan (K) Ltd**).

10. When the matter came up for oral highlighting of the written submissions, the Defendants Counsel addressed me as well on whether an injunction should be granted instead of a stay. That became an issue alive for my determination. In any event this court can, in exercise of its inherent jurisdiction, grant such an order in deserving circumstances. Is this one such circumstance?

11. In **Madhupaper International** the Court of Appeal gave the rationale for a Court granting an injunction pending appeal having just declined to grant an interlocutory application for injunction. Principally it is -

***“... to prevent the decision of the Court of Appeal being nugatory should it reverse the Judge below, which sometimes happens.”***

The Court of Appeal, nevertheless, in a rider held that there would be instances where it would be wrong to grant it. These ***“would include where the appeal is frivolous or to grant it would inflict greater hardship than it would avoid.”***

12. The Plaintiffs submit that they stand to lose property which is of considerable value. It is argued that the property is unique, is in a prime location and its value outstrips the debt claimed. The uniqueness, the location and value of the property were attributes known, and perhaps cherished, by the Plaintiffs when they offered the property as a security. The property was charged on an explicit promise that it would be sold in the event that the Plaintiffs defaulted in servicing the overdraft. The Defendant has furnished prima facie evidence that default has occurred. The possibility of sale of the charged property was a contemplated event and it is not open to the Plaintiffs to argue that such a loss is so momentous that it should be stopped at all costs and even at the expense of the Defendants contractual rights.

13. It is possible that the Court of Appeal may reverse the decision of the High Court. It is also possible that the Plaintiffs suit herein may succeed. If this were to happen after the Defendant has sold the suit property then the Plaintiffs will have lost that particular property. But will this have the effect of rendering the courts decisions nugatory? I think not. The Plaintiffs gave the suit property a commercial value and character by putting it out as a security. That is a value that can be compensated by payment of damages. The Plaintiffs do not doubt the ability of the Defendant (a bank) to meet those damages.

14. I now turn to exam the flipside, the effect a grant of injunction would have. The Plaintiffs have benefited from the loan but have failed to perform their side of the bargain. In the words of Judge Ojwang;

***“They are not paying-up, they are relying on their own misgivings about quanta of debt to decline to pay and to so withhold payment for long periods running into months and years, and in the meantime,***

***levels of accrued interest mount, and continue to mount.”***

I must endorse these words as the Plaintiffs have not placed any evidence to show that they have paid or are now paying the debt. Their stance has not changed.

15. Surely the Defendant, too, has rights and the following words of Justice Waki in **Portreitz Maternity -Vs- Karangi Kabi (Court of Appeal No. 63 of 1997)** would be ever so true-

***“the right of appeal must be balanced against an equally weighty right of the Plaintiff to enjoy the fruits of judgement delivered in his favour. There must be just cause for depriving him of that right.”***

A decision was made that the Plaintiffs are undeserving of an interlocutory injunction, I do not find any just cause for preventing the Defendants from pursuing their statutory right of sale.

16. Whichever way I look at it, the application of 22<sup>nd</sup> February 2012 would have to fail. It is hereby dismissed with costs.

***Dated and delivered at Mombasa this 5<sup>th</sup> day of June, 2012.***

**F. TUIYOTT  
JUDGE**

**Dated and delivered in open court in the presence of:-**

**Dr. Khaminwa for Plaintiff - absent**

**Sittonik for Kipngeno for the Defendant**

**Court clerk - Moriasi**

**F. TUIYOTT  
JUDGE**