



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 324 of 2008

JULIUS MUSILI KYUNGA PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

JOEL TITUS MUSYA T/A MAKURI ENTERPRISES2ND DEFENDANT

JAMES MURIUKI KARAYA INTERESTED PARTY

RULING

(1) In a ruling delivered on the 28th May 2010 upon an application for injunction pending hearing of the suit, the court found that the Plaintiff's case did not disclose a prima facie case and therefore dismissed the application, saying of the evidence before it:

“Such a setting does not, from the very beginning disclose a prima facie case to be resolved at the interlocutory stage, through orders of injunction. That position is confirmed by the evidence, which shows clearly that the Applicant was unable to repay the loan advanced to him by the 1st Defendant; that a charge had been executed between lender and borrower; that this charge vested in the chargee the power of sale; that the chargee had not clogged the Applicant's option of redemption; that proper notices under the charge were issued; that the chargee exercised the power of sale by public auction; that the interested party herein, an innocent purchaser for value, purchased the suit property at the public auction. This set of facts shows a valid exercise of the chargee's powers the effect of which was to pass valid title to the interested party; and the same are to be safeguarded by the judicial powers. This rules out scope for any judicial discretion in favour of the Applicant, and excludes the possibility that he can have the injunctive relief which he seeks.”

(2) Being aggrieved by the ruling the Plaintiff filed a Notice of Appeal against the whole said ruling under Rule 74 of the Court of Appeal Rules on 31st May 2010. The Plaintiff subsequently filed a Chamber Summons dated 4th June 2010 for injunction pending appeal to restrain the Respondents from evicting the Plaintiff, transferring or effecting change of registration on ownership of the suit property. The application was supported by the Affidavit of the Plaintiff of the same date. The 1st Defendant's Branch Manager at Kilindini filed a replying affidavit of 3rd August 2010 and the Interested Party filed his replying affidavit on 29th July 2010. The matter came up for hearing on the 25th and 29th November 2011 and the counsel for the parties made their respective oral submissions citing authorities for their contentions on the basis of the pleadings and affidavits filed herein, and ruling was reserved.

(3) Counsel for the Applicant, Mr. Mogaka, urged the court to exercise its discretion to order an injunction pending appeal to ensure that the Plaintiff's appeal, if successful, is not rendered nugatory. Counsel relied on **Madhupaper International Ltd v. Paddy Kerr (1985) KLR 840** to demonstrate the concurrent jurisdiction of the trial court to grant injunction pending appeal from its decision. Relying on the decisions of the Court of Appeal **Mbuthia v. Jimba Credit (1988) KLR 1**; **Russel v. Commercial Bank of Africa (1986) KLR 633**; **Banana Hill Investment v. Pan Africa Bank (1987) KLR 351** and **Margaret Muiruri v. Baroda Bank Civil Appeal No. 9 of 2001 (2001) KLR 183** counsel submitted that in matters of immovable property it is usual for the court to grant an injunction. Counsel submitted that there were serious questions to be put before the Court of Appeal regarding the Applicant's case that he did not borrow the Kshs.2 million for the realization of which the suit property had sought to be sold and that the sale at Kshs.5.5 million was at a gross undervalue for the property which was valued at Kshs.15 million. Counsel offered that the Applicant was ready to give an undertaking in damages so that the injunction was granted upon terms as the decision of **Githunguri v. Jimba Credit (1988) KLR 837**.

(4) Counsel for the Respondent, Mr. Omondi, while conceding the jurisdiction of the court to grant injunction pending appeal **“for good grounds”** submitted that the jurisdiction was to be exercised, under Order 42 rule 6 of the Civil Procedure Rules, on two principles namely: substantial loss to the Applicant and the provision of security. Counsel contended that the Applicant could not show substantial loss as the suit property had become a commodity for sale upon its use as a security for loan and as such could be remedied by damages. On the provision for security, counsel submitted that the Applicant should be ordered to provide security in the sum of the balance of the purchase price of Kshs.4,125,000/= taking into account the 25% deposit paid by the Interested Party. Counsel also pointed out that the Applicant has not filed the appeal 1½ years after the Notice of Appeal was filed on 31st May 2010 and lamented that there was no serious effort to prosecute the appeal.

(5) For the Interested Party, Mr. Maundu submitted that the Applicant should have made this application under Order 42 rule 6 of the Civil Procedure Rules and not Order 39 rule 1 and 2 of the Civil Procedures. Relying on the authority of **Lavuna and Others v. Civil Servants Housing Co. Ltd (1995) LLR 3021** and **John Nduati Kariuki v. National Bank (2006) eKLR** counsel submitted that the question of dispute in the outstanding amount of loan is not a relevant consideration and that the Applicant could be compensated by an award of damages. Counsel maintained that the Interested Party was an innocent purchaser for value and the argument about the low sale value should not be held against the Interested Party.

(6) The issue before the court therefore is the principles for the grant by a trial court of an injunction pending appeal from its decision, and the application of those principles to the present application.

(7) As conceded by counsel for the Applicant in reply to submissions by counsel for the Respondents, Order 39 of the old Civil Procedure Rules (now Order 40 of the Civil Procedure Rules, 2010) does not apply to application for injunction pending appeal. The Order relates to interlocutory injunction **pending hearing of the suit** in the trial court. Order 42 rule 6 of the Civil Procedure Rules (Order 41 of the old Civil Procedure Rules) has also no application to applications for injunction pending appeal. A stay of execution for which provision is made under Order 42 applies to executory orders or decisions of the court, and is not appropriate where the relief sought is an order to restrain the doing of an act or omission which has not been ordered by the court, pending appeal. This is the case for situations where an application for injunction or a suit has been dismissed, without requiring any act or forbearance to act in execution of the court decision.

(8) This court had opportunity to consider the issue of the principles for the grant of injunction pending appeal in a ruling on Preliminary Objection in **Mombasa HCCC 235 of 2010 D.J. Lowe & Co. Ltd v. Credit Agricole Indosuez & 3 Others** of 20th February 2012 where I said as follows:

“Although Order 42 rule 6 of the Civil Procedure Rules does not expressly provide for application for injunction pending appeal the same is, in accordance with the authorities, part of the body of common

law, doctrines of Equity and procedure and practice of Courts of Justice in England as incorporated in Kenya by virtue of section 3 (1) of the Judicature Act, Cap. 8 Laws of Kenya, and in the absence of express procedure rules, the inherent jurisdiction of the Court under Section 3A of the Civil Procedure Act provides a basis for applications for injunction pending appeal in accordance with principles set out in relevant case law authorities. Indeed, the Court of Appeal of Kenya has adopted the principles in Erinford Properties in many cases notably the Bhutt v. Rent Restriction Tribunal CACA No. 6 of 1979 and Madhupaper International Ltd v. Paddy Kerr (1985) KLR 840. The Court of Appeal Rules do however provide for injunction pending appeal under Rule 5 (2) (b) of the Rules.”

(9) The object of the injunction pending appeal is to preserve the subject matter to ensure that the appeal, if successful, will not be rendered nugatory. As I noted in the above ruling:

“Of course, the discretion to grant an injunction pending appeal must be exercised judicially and carefully in the light of the circumstances of each case. As Meggery, J. in Erinford Properties noted, there will be cases where it will be wrong to grant an injunction pending appeal “as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on” and when damages would be a suitable alternative.”

(10) In considering the principles for the grant of injunction pending appeal, the Court of Appeal has developed the tests that the appeal must not be frivolous, or the applicant must show that he has an arguable appeal, and that the appeal, if successful, should not be rendered nugatory. See **Madhupaper v. Paddy Kerr** and **Githunguri v. Jimba Credit**, supra. Although the jurisdictions of the trial court and the appellate court are concurrent, the High Court being required to exercise its own jurisdiction (see **Madhupaper case**) and the Court of Appeal being required to assess denovo the suitability of grant of the relief (see **Githunguri case**) the emphasis to be placed by each court on each of the two tests of arguable appeal and nugatory appeal is, in my view, different. While both the trial court and the appellate court must consider in equal weighting the question whether the appeal would, if successful, be rendered nugatory, the trial court must defer to the decision of the Court of Appeal with respect to the existence of an arguable appeal because the former court cannot be expected to sit an appeal from its own decision. So that at the trial court level the principle should be considered, that as held in **Bhutt v. Rent Restriction Tribunal CACA No. 6 of 1979**, where a party is exercising its undoubted right of appeal, the court ought to ensure that the appeal, if successful, would not be rendered nugatory. For both the trial and the appellate courts, it would be useful to demonstrate an arguable appeal or serious questions for investigation on appeal through a draft Memorandum of Appeal.

(11) However, the trial court ought not to go into any great length to examine whether the intended appeal demonstrates an arguable case, rather only whether there are serious questions to be put before the appeal court. I have considered the twin issue of the alleged non-advancement of the money sought to be recovered and the sale at an under value and I am not prepared to find that the appeal does not raise serious questions for determination by the Court of Appeal. The trial court may however also consider whether an appeal has already been filed to justify the injunction pending appeal.

Considering that the Applicant had not, as at the date of hearing of the application, filed the appeal notwithstanding the payment for certified copy of proceedings of the trial court on 8th July 2010 and the certification thereof by the Deputy Registrar of the Court of 29th July 2010 after which the Applicant had under rule 82 of the Court of Appeal Rules only 60 days to file the Appeal, unless the time was enlarged by the Court, it would appear that there is no appeal upon which the Applicant's application for injunction would be based.

(12) As regards the rendering of the appeal nugatory, I would agree with the majority of the Court of Appeal decisions as cited by the Applicant that in matters of land, it is usual to grant injunctions and as held in **Githunguri's case**, supra “if the charged premises were sold during the pendency of the proceedings, the whole object of the suit and the intermediate appeal would be defeated.” However, because of the uncertainty as to the existence of the appeal, the injunction would, as in that case, be granted upon terms.

(13) As the Applicant's appeal to the Court of Appeal would in view of the certification of the court proceedings on 29th July 2010 only be available with leave of the Court of Appeal by extension of the time for filing thereof, this court will defer to the Court of Appeal by allowing that court to deal with both the possible application for extension of time to file the appeal (if this has not already been secured) and the application for injunction pending the hearing and determination of the appeal. This court will therefore only hold the situation until the Applicant is reasonably able to move the Court of Appeal for the two orders as it may be necessary.

(14) Accordingly, for reasons set out above, I grant the Applicant's application for injunction pending appeal for a period of 60 days only within which period the Applicant will have opportunity, if so advised, to move the Court of Appeal appropriately. The Applicant will as a condition for the grant of the injunction pending appeal within 7 days hereof give his undertaking in damages for any loss that may become due and payable by him in respect to the court order for injunction pending appeal.

(15) Costs of the application will be costs in the cause.

Dated and delivered this 20th day of December 2012.

EDWARD M. MURIITHI
JUDGE

In the presence of:

No appearance for the Applicant

Mr. Mutiso for the Respondents

Miss Sudi for Mangofor the Interested Party

Miss Linda Osundwa - Court Clerk