REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 339 OF 2011

JAMES JUMA MUCHEMI AND PARTNERS LIMITED……..……
PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD…..…….....……DEFENDANT

RULING

On 8th September, 2011, the Honourable Mr. Justice Njagi held on an injunction application before him thus:-

"The Applicant itself has acknowledged as much by reason of the above provisions. The only dispute seems to relate to the amount actually owed and the modalities of payment. In Halsbury's Laws of England, 4th Edition, Volume 32 paragraph 725, it is stated that:-

"the mortgagee will not be restrained from exercising his power of sale because the amount is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be retrained, however, if the mortgagor pays the amount claimed into court, that is the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

These sentiments have been adopted within our jurisdiction, suffice it to say that in the case of LALVUNA &ORS. v CIVIL SERVANT HOUSING CO. LT. (1995) LLR 336 (CAK), Kwach, J. A. stated that :-

"…. A court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage…."

Applying these sentiments to the facts of this case, I find that the Applicant has not satisfied the 1st condition laid down in GIELLA'S CASE."

With that he granted the Plaintiff's application for injunction on condition that the Plaintiff deposits in court within thirty (30) days the amount claimed by the 1st Defendant. The Amount being demanded as at 01/08/2011 was Kshs. 367,201,556/10. The court directed that failure to deposit the said sum as ordered, the injunction application was to stand dismissed. He extended the interim orders for 30 days to allow the Plaintiff to comply with the order for deposit. He granted the Plaintiff leave to appeal and rejected an oral application by the Plaintiff for a stay of 90 days. He directed that in the event the period of 30 days proved to be inadequate, the parties be at liberty to apply.

On 9th September, 2011 the Plaintiff filed a Notice of Appeal against the said ruling and followed the same on 16th September, 2011 with an Application for injunction in the Court of Appeal on. The Court of Appeal did not certify the said application as urgent as at the time since that court was not sitting for Civil matters in Nairobi. The Plaintiff therefore on realizing that the 30 days extension of the interim orders was elapsing, moved the court on 6th October, 2011 seeking, inter alia, an injunction pending the hearing and determination of the said application in the Court of Appeal.

At the hearing of the said motion Mr. Kingara learned Counsel for the Plaintiff informed the court that the parties were due to appear before the Court of Appeal on 18/10/011 to argue the issue of whether or not the Plaintiff's application before that Court was urgent. He submitted that the Plaintiff was seeking at least a stay of 90 days, that the property that is in danger of being sold is valued at Kshs. 1 billion its construction having been recently completed, that the 1st Defendant had valued that property when it was incomplete at Kshs.850 million, that the 1st Defendant had now instructed an auctioneer to sell it at a reserve price of Kshs. 540 million, that the Plaintiff had exercised its undoubted right of appeal by appealing to the Court of Appeal against the decision of the High Court made on 8/9/11, that the issue before this court is whether the property should be preserved before the Plaintiff is heard on its appeal, that the Application before the court was based on the Principles enunciated in the English case of **Erinford Properties –vs- Cheshire County Council (1974) 2 ALL ER 448** which he referred the court to as well as the Kenya **HCCC No. 789 of 1999 Kenon Ltd –vs- Giro Commercial Bank Ltd. (VR).** Mr. Kingara concluded that the debenture and charge over the suit property **Nakuru Municipality Block 11/649 and block 11/650** was enough security for the 1st Defendant.

On his part, Mr. Munyu, learned counsel for the 1st Defendant opposed the application relying on the Grounds of Opposition dated 7/10/11 arguing that this court is functus officio and lacks jurisdiction to hear the application, that the court had already given conditions for grant of the original injunction which conditions had not been complied with, that the Plaintiff had come to court without doing equity, that this court cannot sit on appeal on its own ruling, that the application was an abuse of the process of the court and that the application was being made because the Court of Appeal had refused to certify the application before it as urgent. Mr. Munyu submitted that the figure of Kshs.540m given to the auctioneer by the Defendant was only a guideline as to the reserve price since the valuation had established such to be the forced sale value, that the Plaintiff's own valuation had given the forced sale value for the property as Kshs.592million, that the issue of the property being Kshs.1billion was not applicable for the purposes of a public auction, that the Plaintiffs had been given 30 days to deposit in court what they had admitted but had failed to do so, that the debentures and charge over the suit property were not adequate security as the same was useless if the suit property could not be sold. Mr. Munyu referred the Court to the text of ***Halsburys Laws of England 4th Edition vol 32 paragraph 68*** (which was relied on by Njagi J. and appears at the beginning of this ruling) in support of his submission that the admitted sum should be deposited in court. He also referred the court to Order 42 Rule 6 (2) of the Civil Procedure Rules to buttress his submission that security was imperative in an application such as the one before me. Concluding, Mr. Munyu urged the court to consider and apply the case of **Naresh Darbar –vs- Thara Orchards Ltd & 2 others (2008) E KLR** wherein Okwengu J, held that where security has been ordered by court for granting a stay, such security must be provided.

Those were the rival cases of the parties before me. Order 42 Rule 6 (2) under which the Application is expressed to be brought and which Mr. Munyu urged me to apply provides:-

(2) "No order for stay of execution shall be made under sub rule (1) unless –

a) the court is satisfied that substantial loss may result tot eh applicant unless the order is made and that the application has been made without unreasonable delay; and

b) <u>such security as the court orders for the due performance of such decree or order as may</u> ultimately be binding on him has been given by the applicant."

I agree with the submission of Mr. Munyu learned counsel for the Respondent that the above provision is in mandatory terms. For any stay of any order or decree to be given security MUST first be provided and/or given by an applicant. I also agree with the holding of Okwengu, J. in the **Naresh Darbar's case** that once security has been ordered for by a court the same must be provided.

I have seen the Notice of Appeal filed in this court on 8th September, 2011. While I cannot delve into any of the issues which the Plaintiff seeks to agitate in the Court of Appeal as set out in the draft Memorandum of Appeal exhibited in the application before the Court of Appeal, I am of the view that the Provisions of Order 42 Rule 6 (2) may not be applicable in its strict sense to the application before me. That Rule is for stay of execution pending appeal. If I understood Mr. King'ara well, the application has been brought under the principles of the **Erinford Properties case**. In that case, the issue that was considered and decided upon was whether a judge who has dismissed an injunction application can at the same time grant one pending an appeal to the Court of Appeal. Clearly, it was not an issue of a stay of any execution pending appeal. Although granting the prayer sought may amount to the same thing as stay of execution as Megarry J found, the considerations applicable in the Erinford Principle may not be the same to those under Order 42 Rule 6(2). There is no provision to grant an injunction pending appeal to the Court of Appeal under Order 42 Rule 6. My understanding is that Order 42 rule 6 (2) in its strict sense applies in a situation where a stay of execution of an order or decree is being sought whilst under the **Erinford Principle,** it applies where an injunction is being sought pending appeal.

An examination of the application before me will show that the prayers sought are not for stay of execution pending appeal, but grant of the declined injunction pending the hearing and determination of an application under Rule 5 (2) (b) of the Court of Appeal Rules. In my view therefore, when a court in Kenya is applying the **Erinford Properties Principles,** it does so under its inherent jurisdiction.

The Defendant has submitted that this Court is functus officio, that it lacks jurisdiction to hear the application and that it would be sitting on appeal on its own ruling. What is the law regarding this?

In **Erinfold Properties Ltd. –vs- Chesire County Council,** Megarry J had dismissed an application for interlocutory injunction. The Judge, however, proceeded to grant an ex-parte injunction to the Plaintiff pending an appeal to the Court of Appeal of England. The Defendant applied to discharge that injunction on the ground that the court was functus officio. Dismissing the motion by the Defendant and granting the injunction pending appeal Megarry J. held at pg 454

"The questions that have to be decided on the two occasions are quite different. Putting it shortly, on a motion the question is whether the applicant has made out a sufficient case to have the Respondent restrained pending the trial. On the trial, the question is whether the Plaintiff has sufficiently proved his case. On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be freed to act despite the pendency of an appeal. One of the important factors in making such decision of course is the possibility that the judgment may be reserved or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically of otherwise with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending trial the judge becomes functus officio quoad granting any injunction at all."

This position has been cited with approval by the Kenyan Court of Appeal in various matters. In **Butt –**

vs- Rent Restriction Tribunal (1982) KLR 417 at Page 420 Madam J.A with whom the rest of the court agreed held:-

"Megarry J, as he then was, followed Wilson (supra) in Erinford Properties Limited vs Cheshire County Council (1974)2 All ER 448 at pg 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision being rendered nugatory should that court reverse the judge's decision.(underlining mine)

In **Russel Co. Ltd –vs- Commercial Bank of Africa Ltd & Another (1986) KLR 633** the Court of Appeal at page 635 stated:
"Todd, J heard the matter on August 23, 1984 and on August 27, 1984 he came to the conclusion that in the circumstances for the case as put before him, the plaintiff would be adequately compensated by an award of damages, and therefore that the Plaintiff Company had not made out a case whereby he could exercise his discretion to order any of the injunctions applied for. He further declined to follow the well-known decision in Erinford properties Ltd vs Chesire County Council (1974) 2 All ER 448 whereby he might have considered extending interim injunctions granted by Trainor, J pending the appeal against his refusal. Accordingly, the injunctions granted by Trainor, J were discharged. Fortunately, this Court was able to preserve the status quo because the Second Defendant agreed not to sell the property until the disposal of the appeal.

In my view, the Court of Appeal was of the opinion, that the High Court had the discretion to follow and apply the decision in Erinford Properties Ltd and extend an interim injunction to preserve the status quo.

In **Madhu paper International Ltd –vs- Kerr (1985) KLR 840 –**the Court of Appeal held at Pg 845

"The reasoning of the learned judge was, with respect, incorrect. He was referred to Erinford Properties Ltd Vs Cheshire County Council, (1974) 2 All ER 443 in which Mr. Justice Megarry held that where a judge dismissed an application for interlocutory injunction he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal. It is unnecessary for him to apply to the Court of Appeal for it. There is no inconsistency in doing so. The purpose of granting one having just refused to do it is to prevent the decision of the Court of Appeal being nugatory should it reverse the judge below, which sometimes happens."

At page 846, the Court stated:-

"It is preferable for the High Court to deal with such an application, in any event, not so much as to protect this court from a sudden inconvenient dislocation of its lists but more because this court would have the distinct advantage of seeing what the judge made of it. The learned judges of the High Court should take note of this concurrent jurisdiction which the two courts have and exercise theirs."

From the foregoing decisions of the Court of Appeal, I am satisfied and I hold that this court has jurisdiction to entertain a proper application brought under the Erinford Principles. Accordingly, I reject the Defendant's contention that this court is functus officio or lacks jurisdiction or that I would be sitting on appeal on the ruling of 8/9/2011 if I entertained the Plaintiff's application before me.

Is this application an abuse of the process of court? The Defendants contention is that the application has been made upon the Court of Appeal refusing to certify as urgent the Plaintiff's application under Rule 5 (2) (b) of the Court of Appeal Rules. The question is, having invoked the jurisdiction of the Court of Appeal under the said Rule of the rules of that court, is it open to the Plaintiffs to come back to this court and seek the redress they seek.

The Defendant did not cite any law or authority that bars the Plaintiffs from making the present application neither do I know of any. That notwithstanding, prayer number 5 of the motion, that seeks the injunction until the appeal is heard and determined is mischievous. It is the same prayer that is pending before the Court of Appeal, the Plaintiff cannot seek similar orders in two (2) different fora. Obviously, that prayer is an abuse of the process and I reject it. Were the said prayer the only one in the motion, I would have agreed with the Defendant that the application is an abuse of the court process. But there is Prayer 3 and 4.

The said prayer Nos. 3 and 4 seek an injunctive order until the hearing and determination of the application filed under Rules 5 (2) (b) of the Court of Appeal Rules in **C A No. Nai 224 of 2011.**

It is the Plaintiff's contention that their appeal to the Court of appeal is not frivolous, they argue that the property over which the Defendant holds security is a valuable property which can fetch up to Kshs.1billion, that for that reason the Defendant is well secured, that they have filed the requisite application for injunction in the Court of Appeal but they have not been heard, that they would like to have an opportunity of being heard by that court on that application before the subject properties are disposed off, that they moved the court without any delay. On the part of the Defendant, it is urged that the Plaintiffs are not entitled to any discretionary order as they have failed to comply with the court order to deposit the security ordered, that the Defendant has already instructed the auctioneers to go ahead with the sale now that the Plaintiffs defaulted in giving the security ordered, that there is nothing to be agitated on appeal as the amount claimed has been admitted as found by Njagi J.

I have considered these rival submissions of the respective parties. In all the Court of Appeal decisions, I have examined above, the pertinent issue for consideration was the preservation of the subject matter pending the consideration by the Court of Appeal of the issues submitted to it. Further, in exercising that jurisdiction, the High Court is called upon to have regard to the interests of the successful litigant.

I have considered that the subject matter is prime property in Nakuru, it is stated to be a lifetime investment of the Plaintiffs, that its value is substantial and all things remaining constant, the Defendant can realize its outlay in the future if the plaintiffs fail in the Court of Appeal. I have also considered that the Plaintiffs were vigilant after the order of 8th September, 2011, in that they filed a suitable application in the Court of Appeal and came to this court before the period given by Njagi J, had lapsed. I have also taken note of the fact that due to the current circuit system of the Court of Appeal the Plaintiffs application in the Court of Appeal could not have been reached in good time within the time frame fixed by Honourable Justice Njagi for the said application to be heard. Further, Justice Njagi was alive to the fact that the security he ordered to be deposited was substantial (over Ksh.300 Million is being demanded) and that is why he directed that the Defendant should apply for more time if the 30 days period proved too short. I am also satisfied that raising such kind of a security within such a period may be monumental by any standards. Finally, I have taken into consideration that the Court of Appeal is now seized of not only the intended Appeal but an application for injunction pending appeal and in my view, the Court of Appeal should have a chance to consider the said application whereby, it would examine if the intended appeal before it would be rendered nugatory or not. I am satisfied that the Defendant will not suffer any prejudice as the security that it holds will still be good security for the foreseeable future and interest and penalties levied, if any, on the outstanding amount may not water down the value of the security.

Accordingly, I am inclined to exercise my discretion in favour of the plaintiffs and I grant prayer No. 3 of the Motion only limited for 60 days from the date hereof. I will not tie this order to the hearing and determination of the pending application in the Court of Appeal as is sought by the Plaintiffs. I believe that a period of sixty (60) days is enough for the said application to have come before the Court of Appeal for hearing and in any event, for the Plaintiff to have sought and deposited in Court the amount demanded and ordered by the Court. The costs of the application will be in the cause.

Dated and delivered at Nairobi this 1st day of November, 2011.

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JUSTICE A. MABEYA