



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC.NO. 203 OF 2019

TAHIR SHEIKH SAID INVESTMENT LIMITED.....PLAINTIFF

VERSUS

BANK OF AFRICA LIMITED.....DEFENDANT

ABDULMAJID MOHAMED ADAM.....INTERESTED PARTY

RULING

1. There are two applications for determination. The first one is the plaintiff's notice of motion dated 6th August 2020 seeking an injunction against the defendant from exercising its statutory power of sale of the properties known as MOMBASA/BLOCK XXI/165, 526, 527, 586, and MOMBASA/BLOCK XXVI/381 (the "suit properties") pending the hearing and determination of intended appeal from the decision of the court of 20th July, 2020 and an order restraining the interested party from transferring or interfering with the property known as MOMBASA/BLOCK XXI/147 or the rental proceeds therefrom pending the said intended appeal. The second application is the defendant's notice of motion dated 19th August, 2020, seeking inter alia, orders for the bank to be allowed to exercise its statutory power of sale over the said properties. In the alternative, the application is seeking the plaintiff to pay the defendant the amount owed to the bank plus costs of the suit and auctioneers fees as a condition precedent for the grant of the injunction. From the prayers sought in the defendant's application, it is clear that the same is but a response to the plaintiff's application. The court will therefore treat the defendant's application as part of the response to the plaintiff's application.

2. The plaintiff's application is supported by the affidavit of Fatma Tahir Sheikh Said sworn on 6th August, 2020 in which she swore that by the ruling of 20th July, 2020, this court struck out the plaintiff's suit together with the application by way of motion for injunction. The said orders has the effect of freeing for sale by the defendant, by public auction, the suit properties which have been held by the defendant under impugned security documents and indeed the defendant has advertised for sale several other properties, while the interested party who claims to have purchased one of the properties, MOMBASA/BLOCK XXI/147, has registered the same in his name and intends to take over collection of rent. It is averred that the plaintiff being dissatisfied with the said ruling and order of court filed a notice of appeal. The plaintiff contended that the intended appeal is arguable, and that it is imperative that this court acts to safeguard the efficacy of any orders that may be on appeal.

3. Mr. Omollo, learned counsel for the plaintiff submitted that the plaintiff's application seeks what is commonly now referred to as an Erindford injunction based on the decisions of Megarry J in *Erinford Properties Ltd –v- Cheshire County Council (1974) 2 ALL 448* in which it was stated that when a party is appealing exercising his right of appeal, the court ought to see that the appeal, if successful, is not rendered nugatory. The plaintiff urged the court to allow the application.

4. The plaintiff's application aforesaid is opposed by the defendant through a replying affidavit sworn by Morgan Kinyanjui on 19th August, 2020. It is the defendant's submission that the plaintiff has not met the threshold necessary to be granted an injunction pending the intended appeal as set out in the English case of *Erinford Properties Limited –v- Cheshire County Council (supra)* and has been reiterated by Kenyan courts in several cases including *Madhupaper International Limited –v- Kerr (1985)eKLR*; *Venture Capital & Credit Limited –v- Consolidated Bank of Kenya Limited (2004) 1 E.A 357*; *Patricia Njeri & 3 Others –v- National Museum of Kenya (2004)eKLR*, and *Equip Agencies Limited –v- I & M Bank Limited (2017)eKLR*. It is submitted that from the holding in the above cases, it is now settled that the power of the court to grant an injunction pending appeal is discretionary and the said discretion should be exercised judicially and not in whimsical or arbitrary fashion by following laid down principles namely: i) the discretion will be exercised against an applicant whose appeal is frivolous; (ii) the discretion should be refused where it would inflict greater hardship against the respondent than it would avoid, (iii) the applicant must show that to refuse the injunction would render its appeal nugatory; and, (iv) the court should be guided by the principles in *Giella –v- Cassman Brown & Company (1973)EA 358*. It is the defendant's submission that the court should not grant the injunction as the appeal or intended appeal is frivolous first, because the plaintiff has not demonstrated that it has an arguable appeal on the narrow question of res judicata and has not exhibited the draft memorandum of appeal or memorandum of appeal of appeal already filed. That in the circumstances, the plaintiff has not disclosed any reasonable grounds of appeal to show that the appeal is arguable. It is further submitted that the intended appeal is frivolous because the issues to be canvassed in the Court of Appeal have already been raised and

canvassed in the said court in **Bank of Africa Limited –v- Juja Coffee Exporters Limited & 4 Others (2018)eKLR**, and that even the **Court of Appeal in Juja Coffee Exporters Limited & 2 Others –v- Bank of Africa Ltd & 2 Others (2019)eKLR** declined to grant stay on the basis that the matter was res judicata hence the appeal was not arguable.

5. The defendant’s counsel submitted that the intended appealed is frivolous because to grant an injunction pending appeal will amount to sitting on appeal and overturning the above Court of Appeal decisions, thereby flouting the doctrine of stare decisis. They relied on the case of **Mwai Kibaki –v- Daniel Toroitich Arap Mwai (1999)eKLR** and the case of **Osman Tahir Sheikh Said & 3 Others –v- Bank of Africa Limited HCCC No. 86 of 2019 (unreported)**. It was further submitted that granting the injunction in favour of the plaintiff will inflict greater hardship on the defendant than it would avoid because the more the Bank is delayed in its recovery process, the more the debt increases due to interest, and if the trend continues unabated, the Bank will be unable to recover the entire debt thereby causing irreparable loss to the Bank. The defendant’s counsel relied on the case of **Madhupaper International Limited –v- Kerr (supra)** and **Equip Agencies Limited –v- I & M Bank Limited (supra)**. And while relying on the case of **Julius Musili Kyunga –v- Kenya Commercial Bank Ltd & 2 Others (2016)eKLR**, the defendant’s counsel submitted that the plaintiff’s intended appeal will not be rendered nugatory if the prayers sought are not granted. That in the event the plaintiff succeeds on appeal, an award of damages will be an adequate remedy. In view of the foregoing, it is the defendant’s submission that it should be allowed to exercise its statutory power of sale by selling the remaining properties to recover the loan. In the alternative, the defendant wants the plaintiff to pay the defendant the amount owed to the Bank plus costs of the suit and auctioneers fees as a condition precedent for the grant of the injunction. They relied on the case of **Cieni Plains Company Limited & 2 Others –v- Eco Bank Kenya Limited (2018)eKLR**.

6. The plaintiff’s application was also opposed by the interested party through a replying affidavit sworn on 10th September, 2020. He swore that he lawfully acquired the property known as LR NO.MOMBASA/BLOCK XXI/147 by way of public action and is now the registered owner of the same and has taken possession of it. That the plaintiff had no rights over the said property and that its actions are directly and fundamentally affecting the rights and interests of the interested party over the said property, thus seriously prejudicing the interested party who states has suffered loss and damage. The interested party urged the court to review, set aside and vacate the interim orders issued in the plaintiff’s favour and dismiss the plaintiff’s application with costs.

7. I have considered the applications herein and the submissions made. The plaintiff’s application is seeking an order of the injunction in line with the principle in **Erinford Properties –v- Cheshire County Council (supra)**. In the case of **Venture Capital and Credit –v- Consolidated Bank of Kenya (supra)**, the Court of Appeal stated as follows:

“As regards the second prayer, the court’s jurisdiction to grant an injunction pending an appeal is discretionary and such discretion is exercised judicially and not in whimsical or arbitrary fashion. (See Madhupaper International Ltd –v- Kerr (1985) KLR 840 at 847 paragraph 35). In that case, (Madhupaper), the court said at 846 paragraphs 30;

“There are cases, however, where it would be wrong to grant an injunction pending appeal. These would include where the appeal is frivolous or to grant it would inflict greater hardship than it would avoid. And there will be others which we have not experienced yet.

As a general rule, a court ought to exercise its best discretion in a way so as to prevent the appeal, if successful, from being nugatory (see Butt –v- Rent Restriction Tribunal (1982) KLR 417. And in order to be entitled to an order for maintenance of status quo pending appeal, the applicant must show that a reasonable argument can be put forward in support of the appeal- JK Industries Ltd _v- Kenya Commercial Bank (1982-88) 1KAR 1088. Moreover, the case of Shitukha Mwamodo and Others (1986) KLR 445 shows that the principles stated in Giella –v- Cassman Brown Co. Ltd (1973) EEA at 360 guide both the High Court and the Court of Appeal in deciding whether or not to grant a temporary injunction.”

8. From the foregoing, it is clear that in deciding whether or not to grant the injunction, the court would exercise discretion and take into consideration a number of factors, including whether the appeal is frivolous or not, whether granting the injunction would inflict greater hardship against the respondent than it would avoid. The applicant must also show that to refuse the injunction would render the appeal nugatory. In addition, the court should be guided by the principles in the Giella case.

9. In this case, the appeal or intended appeal is against the ruling of this court delivered on 20th July, 2020. The court, while determining the plaintiff’s application for an injunction, arrived at finding that the plaintiff’s suit was seeking to open issues that were determined in former suits, including in the Court of Appeal. Consequently, the court struck out the plaintiff’s suit together with the application for injunction. In my humble view, the plaintiff has not demonstrated that it has an arguable appeal on the narrow question of res judicata. It is my view that the intended appeal is frivolous because the issues to be canvassed, if at all, in the Court of Appeal have already been raised and canvassed in the said court. Further, to allow the application would no doubt cause the defendant greater hardship as the debt continues to escalate. Moreover, were the plaintiff to succeed in the intended appeal I do not think that the appeal would be rendered nugatory if the prayers sought are not granted because an award of damages will be an adequate remedy. The plaintiff has not suggested, in any event, that the defendant is incapable of paying such damages. In addition, having charged the suit properties, the plaintiff converted them to commercial commodities with monetary value that can be easily ascertained and the loss can always be made good by an appropriate award of monetary compensation.

10. Although on the whole, the court finds that the plaintiff has failed to satisfy the requirements for an injunction pending appeal, the court has noted that the plaintiff has indicated that it is ready and willing to abide by any condition that may be given by the court. The defendant is also agreeable to the injunction being granted, but on condition that the plaintiff pays the amount owed to the Bank plus costs of the suit and auctioneers fees. In view of this, and in order to allow the plaintiff exercise its right of appeal and right to fair hearing as provided under Articles 25 and 50 of the Constitution, I will exercise my discretion and grant the injunction in terms of prayer 2 and 3 of the motion dated 6th August 2020 on condition that the plaintiff pays to the defendant the amount owed to the defendant plus costs of the suit and auctioneers fees within 30 days from the date of this ruling. In default of payment, the injunction granted herein shall automatically be discharged and the application herein shall stand dismissed with costs. For clarity and for avoidance of any doubt, the injunction granted in prayer 3 of the application is only to the extent that the interested party is restrained from transferring the property known as MOMBASA/BLOCK

XXI/147. This is because the interested party is already the registered proprietor of that property and cannot be restrained from interfering with the same if he has already taken possession. Costs of this application are awarded to the defendant and the interested party.

11. Orders accordingly

Dated, Signed and Delivered at Mombasa this 26th day of January 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE