



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 45 OF 2020

SAMUEL GIKURU

NELLIE WAMBUI WAWERU

KISIWA GUEST HOUSE LIMITED..... PLAINTIFFS

VERSUS

HFC LIMITED.....DEFENDANT

RULING

1. By a notice of motion dated 9th November, 2020 the Plaintiffs/Applicants seek orders that pending the hearing and determination of the Appeal, an injunction pending appeal be issued restraining the respondents, its servants, employees or assigns from alienating or in any other manner whatsoever dealing with the property known as LR NO.MOMBASA MUNICIPALITY/BLOCK XXI/328. The application is supported by the affidavit sworn by Samuel Gikuku Waweru on 9th November 2020. It is the applicant's case that they were aggrieved by the ruling delivered by this court on 29th October, 2020 in which the court dismissed the applicants' notice of motion dated 13th March, 2020, and intend to appeal and have filed a Notice of Appeal dated 5th November, 2020. It is contended that the intended appeal raises fundamental questions of law and fact and that as a result of the ruling delivered on 29th October, 2020, there is a real and imminent risk that the respondent will sell the applicants property which action will be to the grave prejudice of the applicants as the said property is the very substratum of the appeal that the applicants intend to pursue in the Court of Appeal. That this will render the applicants appeal nugatory and will also make the applicants suffer irreparable losses. To the supporting affidavit, the applicants have annexed a copy of the ruling delivered by the court on 29th October, 2020; Notice of Appeal; letter requesting for certified copies of proceedings; draft Memorandum of Appeal; Notice of Proclamation issued by M/s Legacy Auctioneers Services on 19th October 2020; and a valuation report for the suit property dated 5th March, 2020. It is the Applicants contention that the court is under a duty to preserve the substratum of the intended appeal so that if the applicants succeed on appeal, the success does not become a pyrrhic victory. They aver that the respondent alleges that the applicants owe the respondent a sum of Kshs.6,025, 756.11 and the property known as LR. MOMBASA MUNICIPALITY/BLOCK XXI/328 is valued at Kshs.60,000,000/= and therefore the respondent is fully secured as the interest which will accrue during the appeal cannot exceed the sum of Kshs.60,000,000/=. The 1st applicant added that he is prepared to deposit security for the sum of Kshs.1,000,000/= in a joint interest earning account to cover for the interest which might accrue during the period within which the appeal will be determined by the Court of Appeal within any reasonable timelines that will be set by the court. Further, that the loan granted to the applicants was to be repaid within a period of 20 years, and as such the respondent will not be prejudiced by the time that will be taken to determine the applicants appeal if an injunction is granted to restrain the respondent from selling the suit property during that period.

2. In opposing the application, the respondent filed a replying affidavit sworn by Anthony Mugendi on 16th November, 2020. It is the respondent's contention that the proposed grounds of appeal are ex facie frivolous. That notices were duly served and in some cases, receipt acknowledged. That the argument that the valuation report is outdated is plainly frivolous as there is on record a valuation report carried out as recently as 27th January, 2020, and that even if the applicants succeed in proving that no valuation was carried out, that is cured by simply carrying out another valuation. The respondent avers that even if an injunction pending appeal is refused, the applicants' intended appeal will not be rendered nugatory because the only loss will be a commercial property which can be valued and the applicants' fully compensated in the event of a successful appeal, and that if the applicants payout the amount they dispute, if they succeed on appeal and the suit, they can still obtain an order for the refund of the amount. That in the circumstances of this case, to grant an injunction would be highly prejudicial to the respondent because it is not clear how long it would take to hear the intended appeal and during that time, the successful respondent will be denied an opportunity to exercise its statutory rights and at the same time not get a single shilling towards repaying the loan. The respondent added that if the court is minded to grant an injunction, then it should be on condition that the applicants deposit at least half of the demanded Kshs.7,227,501.40 within fourteen (14) days.

3. Both parties filed written submissions which I have read and considered. The only issue to consider is whether to grant the order of

injunction sought pending the determination of the intended appeal. By a ruling delivered by this court on 29th October, 2020, the court dismissed the applicants' application dated 13th March, 2020 which sought temporary injunction pending the hearing and determination of the suit herein. The applicants' aver that they were aggrieved by the whole of that decision and intend to appeal. The applicants now pray for an order of injunction pending the determination of the intended appeal.

4. In the case of **Madhupaper International Ltd –v- Kerr (1985)eKLR**, the Court of Appeal held that where a judge dismisses an application for interlocutory injunction, he has jurisdiction to grant an applicant an injunction pending appeal so as to prevent the appeal being rendered nugatory in the event the appeal is successful. A similar principle was held in the case of **Eriford Properties Ltd –v- Cheshire County Council (1974) 2 ALL ER 448**.

5. The principles upon which an interlocutory injunction may be granted are well settled. An applicant must demonstrate the criteria set out in the case of **Giella –v- Cassman Brown Ltd (1973)EA 358**. The applicants must establish a *prima facie* case with high chances of success and that damages would not be adequate compensation if the injunction was not granted. This court found that there was no dispute that the applicants were advanced financial accommodation by the respondent which was secured by the suit property. The court further found that the applicants defaulted in payment resulting in the sale of one of the properties offered as security by private treaty and part of the proceeds paid over to the respondent to settle the loan. What is left is clearly a dispute over accounts which this court found not to be a valid ground for restraining the respondent from exercising its statutory power of sale. Indeed this court found that having charged the suit property, the applicants converted it to a commercial commodity with a monetary value that can be easily ascertained and its loss can always be made good by an appropriate award of monetary compensation. It is true that if an order of injunction is not given the suit property will probably be sold by the respondent before the intended appeal is heard. However, the applicants have not shown that the respondent has no financial means to compensate the applicants' if the appeal ultimately succeeds. The applicants therefore have not persuaded this court that the intended appeal would be rendered nugatory.

6. Accordingly, having considered the affidavit evidence, the written submissions and the case law that the parties relied upon, this court comes to the conclusion that the applicants' have not demonstrated that they are entitled to an injunction pending the hearing and determination of the intended appeal. A careful perusal of the applicants' affidavit evidence showed that they did not demonstrate that they had established a *prima facie* case with high chances of success and that damages would not be adequate compensation if the interlocutory injunction was not granted.

7. For the foregoing reasons, this court finds that the applicants notice of motion dated 9th November, 2020 is not merited and the same is hereby dismissed with costs to the respondent.

8. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 20th day of January, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE