



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 49 OF 2018

JAMPEN ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

1. NIC BANK KENYA PLC

2. LEAKEY'S AUCTIONEERS..... DEFENDANTS

R U L I N G

1. Before the court for determination is an application by the plaintiff seeking in the main an order that it be granted an order of injunction pending appeal.
2. That application is consequent to the court's ruling dated the 29/11/2019 by which the court dismissed the plaintiff's application seeking an injunction pending suit. In its determination dismissing the application the court found that the plaintiff had not met the threshold of grant of a temporary injunction; in that there had been carried out a current valuation, there was evidence of service of the statutory notice and that there was indeed evidence of dispatch of the Notice to the correct address.
3. Now, it is that decision the plaintiff has sought to challenge on appeal as discernable from the Notice of Appeal exhibited.
4. The grounds put forth to justify the grant of the orders sought are that there is a preferred appeal which is arguable and which was due to be defeated if injunction pending appeal is not granted because the respondent had put in place steps to sell the suit property which would result into irreparable loss to the Applicant.
5. The Affidavit sworn and filed in support of the application reiterated the grounds and then exhibited the Notice of Appeal, 14 days' Notice by the auctioneer, Newspaper advertisement and a plaint in a suit filed against the 1st Respondent by one APT Commodities Ltd, said to be the principal debtor and borrower.
6. The Application was opposed by the respondents by the Grounds of Opposition dated 21/02/2020 whose gist was that the appeal was plainly frivolous; that any resultant loss would not be irreparable because the same is capable of compensation by an award of damages and that it would be inequitable and prejudicial to grant the orders sought unconditionally.
7. Owing to its nature and the crystalized principles to be applied, the matter was canvassed by oral submission during which the applicant counsel wholly relied on the paper filed while the respondent counsel relied upon some five decisions to guide the court on consideration to be made in an application for injunction pending appeal.
8. I have given due consideration to the submission offered by the parties and I take the view that the only issue for determination is whether the applicant has met the prerequisites of grant of an injunction pending appeal.
9. The principles are that injunction pending appeal, like all injunctions should only be issued where the substratum of the appeal would be dissipated unless the order is granted but such order need not be issued where the appeal is frivolous because to issue an injunction in such circumstances would visit greater hardship than it would avoid[1]. The other consideration is the ever present question of irreparable loss. Even where the appeal raises arguable points, injunction will normally not issue if the possible injury is capable of compensation by an award of damages[2] and that it is the duty of the applicant to demonstrate that the respondent would be unable to refund the proceeds of sale if the appeal succeeds[3]. One arguable point is however sufficient with no obligation that multiple points be disclosed[4].
10. Having applied those applicable principles to the matter before me as disclosed in the Affidavit by the applicant, I have been unable to identify an arguable appeal before me. I do recognize that the decisions relied upon were grounded on the Provisions of Rule 5(2) b of the

Court of Appeal Rules, while what is before me invokes Section 3A of the Act. I do however consider that the object and purpose of injunction pending appeal is one-preserve the substratum of the appeal that should the appeal succeed the appellant does not end up with an academic or just worthless decree.

11. I find that in the absence of an arguable point, there is no basis to grant an injunction pending appeal. I also find that the value of the property is known and may be ascertainable in the future with accurate mathematical certainty hence is capable of compensation by an award of damages. If the appeal succeeds after the property shall have been sold, the loss that shall have been visited upon the applicant would be the value of the property at the time of sale rather than the property itself.

12. In the end, I find that no threshold for grant of an injunction pending appeal has been met and I thus order that the application dated 4/2/2020 be dismissed with costs for being bereft of merits.

Dated and delivered at Mombasa on this 8th day of May 2020.

P.J.O. OTIENO

JUDGE

[\[1\]](#) Madhupaper International Ltd vs Kerr [1985] eKLR

[\[2\]](#) Francis Khatha vs HFCK [2008] eKLR

[\[3\]](#) Mukua Tutuma vs Cooperative Bank of Kenya Ltd[2008] eKLR

[\[4\]](#) Samson Mwathi Nyutu vs Savings and Loan Kenya Ltd [2015] eKLR