



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. E003 OF 2020

JOSEPHAT NDUNGO MAIMBAH.....APPELLANT

VERSUS

VISION AFRIKA SACCO SOCIETY LTD.....RESPONDENT

RULING

1. The Applicant herein approached the Chief Magistrate’s Court with a Plaint seeking an injunction against the Respondent over the parcel of land known at Dundori/Mugwathi Block 1/650 Wanyororo (Subject Property). The Applicant’s claim was that he guaranteed an Asset Purchase Facility (loan) for one Patrick Waweru Foro with which the loanee purchased a Motor Vehicle. The loan was given by the Respondent. The Applicant used the Subject Property as the security for the loan. A charge was duly registered in favour of the Respondent.

2. It would seem that the loanee defaulted on the loan repayments. As a first port of call, the Respondent attempted to recover the loan – at the time amounting to Kshs. 3,226,311/- - by selling the motor vehicle. However, the Respondent found the Motor Vehicle cannibalized and to be worth only Kshs. 525,000/-. The Respondent, therefore, decided to go after the secondary security – namely the Subject Property.

3. It was when the Subject Property was advertised for sale by the Respondent in the exercise of its statutory power of sale, that the Applicant filed the suit in the Lower Court. He contemporaneously filed a Notice of Motion Application seeking an interlocutory injunction. That Application was heard inter partes and a ruling delivered on 09/09/2020. The Honourable Trial Magistrate dismissed the Application with costs. Since the Applicant had enjoyed some interim orders preventing the sale of the Subject Property while the Application was pending in the Lower Court, the delivery of the ruling left it exposed to possible forced sale of the Subject Property.

4. The Applicant is aggrieved by the ruling in the Lower Court dismissing the Application. He timeously filed an appeal to this Court. In addition, the Applicant has filed the present Application. The Application is dated 30/09/2020. It has the following prayers:

5. Order 42 Rule 6 provides that:

Notwithstanding anything contained in sub-rule 1 of this Rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just. Provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with.

6. There is no dispute that the Court can, in the appropriate circumstances, grant an injunction pending an appeal to this Court. The conditions for such grant were concisely stated by Visram J. (as he then was) in Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR:

There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application?

*In the **Venture Capital** case the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:*

*(a) The discretion will be exercised against an Applicant whose appeal is frivolous (See **Madhupaper International Limited vs Kerr (1985) KLR 840** (cited in **Venture Capital**)). The Applicant must state that a reasonable argument can be put forward in support of his appeal (**J. K. Industries vs KCB (1982 – 88) KLR 1088** (also cited in **Venture Capital**))*

*(b) The discretion should be refused where it would inflict greater hardship than it would avoid (See **Madhupaper supra**).*

*(c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See **Butvs Rent Restriction**)*

Tribunal (1982) KLR 417 (cited also in Venture Capital).

(d) The Court should also be guided by the principles in Giella vs Cassman Brown & Company Ltd (1973) EA 358 as set out in the case of Shitukha Mwamodo & Others (1986) KLR 445 (also cited in Venture Capital).

7. Hence, there are four conditions to be met before the Court will exercise its discretion to grant an injunction pending appeal.

8. First, the Applicant is required to demonstrate that the appeal filed is not frivolous. This is a different way of saying that the appeal should be arguable; a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn or vary the original verdict.

9. In the present case, the Applicant says that he has filed Grounds of Appeal which raise eminently arguable points. The key point raised on appeal is whether the Learned Trial Magistrate erred in holding that the Court lacked jurisdiction to entertain the suit by dint of section 76 of the Cooperatives Societies Act. In the second place, the Learned Trial Magistrate held that there was prima facie evidence that the Applicant had been served with the statutory notice based on the material before him. The Applicant says both points are arguable on appeal.

10. The Respondent argues that both points are inarguable: that section 76 of the Cooperatives Act is quite express that jurisdiction lies in the first instance to the Cooperatives Tribunal and that, therefore, the Learned Trial Magistrate correctly applied the doctrine of exhaustion in declining jurisdiction. Secondly, the Respondent argue that the material placed before the Learned Magistrate was so overwhelming that all the notices were served on the Applicant that the point is not truly arguable on appeal.

11. There are number of decisions of the High Court that have already interpreted section 76 of the Cooperatives Act in the same manner as the Learned Trial Magistrate did. The Applicant does not really say how his case is distinguishable from this line of cases. There is, therefore, reason to doubt that the appeal is arguable on this point.

12. Secondly, if the Learned Trial Magistrate found that the Court lacked jurisdiction, then he ought to have dismissed the entire suit outright. The Learned Trial Magistrate no longer had a place to stand to make provisional factual determinations about the awareness of the Applicant about the statutory notices and the debt generally. All the factual determinations by the Learned Magistrate in this regard were, therefore, obiter dictum. They cannot truly form the basis of an appeal. Consequently, the only plausible issue on appeal is on the question of jurisdiction – and I have expressed doubts that it is a truly arguable point.

13. In any event, let us turn to the second and third conditions: a demonstration that the Applicant would suffer substantial loss if the injunction is not granted and that the injunction would not otherwise cause more hardship than it would avoid. The Applicant here argues that the Subject Matter is land and if the injunction is not issued the Respondent would sell the land. However, that in itself does not satisfy the conditions here. This is because the Subject Matter is a parcel of land which the Applicant knowingly submitted as security for a loan. That is not denied. That offer of the land as security is an act of admission that the property has a commercial value and is otherwise fungible. If so, in the event the land is sold and the Applicant succeeds on appeal, he would be entitled to the commercial value of the land. There will be, therefore, no substantial or irreparable loss.

14. What the Court of Appeal stated in Nyanza Fish Processors Limited v Barclays Bank of Kenya Limited [2009] eKLR is relevant:

It is conceded by the applicant that it offered its property herein as security for the borrowing ...[and that] that company has not made any repayment of the money borrowed a fact which has not been challenged by the applicant. What the applicant says is that it does not know how much money was borrowed and how much is outstanding.

If the property, the subject matter of this litigation is sold, the loss to the applicant will be financial. True, it may be the property is unique. Its value, however, is ascertainable. That being our view of the matter, and weighing one thing against the other, it cannot be said that if the property is sold and the applicant eventually succeeds in its intended appeal, that success will be rendered nugatory.

The applicant itself had offered the property as security. No matter that the validity of the charge is being challenged. The conduct of the applicant in charging the same made it a commercial property the loss of which in an appropriate case would entitle the applicant to damages. The respondent is a bank and there is no gainsaying that it will be able to satisfy the loss.

15. The position is on all fours with the one obtaining here. There is no plausible deniability that the Applicant offered the Subject Property as security for the loan. There is, similarly, no plausible deniability that the loan secured has not been paid to the Respondent. The result is that there will be no substantial loss if the Subject Matter is actually sold in realization of the loaned amount. If the sale is found to be wrongful, the Respondent, a going concern as a Sacco, will be able to repay the value of the Subject Property.

16. **The upshot is that the Application dated 30/09/2020 is without merit. It is hereby dismissed with costs.**

17. Orders accordingly.

Dated and delivered at Nakuru this 10th day of December, 2020.

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.