



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL APPEAL NO. 19 OF 2019

JOHN NG'ANG'A MUGAIAPPELLANT

VERSUS

JITEGEMEA CREDIT SCHEME LIMITED.....RESPONDENT

RULING

1. Through the application dated 11th July 2019, the applicant/appellant seeks orders for temporary injunction to restrain the respondent herein either by itself, servants, agents and/or representatives from selling, auctioning, transferring or otherwise dealing with land parcel No. Muguga/Gitaru/1929 (hereinafter **“the suit property”**) pending hearing and determination of the appeal.

2. The application is supported by the applicants affidavit sworn on 11th July 2019 and is premised on the grounds that:

a) The Senior Resident Magistrate, Honourable E. Wanjala, on 20th June 2019 dismissed the appellant’s Notice of Motion dated 10th April 2019 seeking for injunction orders, restraining the respondent from dealing with the suit property, land parcel title No. Muguga/Gitaru/1929.

b) The Appellant, being aggrieved and dissatisfied with the Honourable court’s finding and has appealed against the said ruling dated 20th June 2019, being this appeal.

c) Subsequently, the respondent through its agents, M/S Janice Investment Auctioneers, has on 3rd June 2019, proceeded to advertise the suit property for sale by public auction on 18th July 2019.

d) The respondent is seeking to realize the suit property without issuing and serving the appellant/applicant with the mandatory 90 and 45 days statutory notices provided under Section 90 and 96(2) respectively of the Land Act No. 6 of 2012 therefore infringing on the appellant’s statutory right of redemption.

e) The respondent should not be allowed to trample with impunity the appellant’s statutory right of redemption.

f) The respondent has not undertaken the mandatory valuation of the suit property and there is a real risk that the charged property will be sold at a lower price which is not reflective of the current market value.

g) Both the guarantee and charge between the parties herein are null and void and of no legal effect to the extent that the appellant was never explained to and never appeared before the advocate who prepared a false certificate in terms of Section 45 of the Land Registration Act.

h) In any event, the respondent is in serious breach of the terms of the alleged guarantee contract between it and the appellant.

i) The principal borrower had given more than enough security including motor vehicles to repay the loan balance, (if any), and hence there is no cause or justification whatsoever to sell the appellant’s land before realizing the securities of the principal borrower.

j) The appeal filed herein is meritorious with high chances of success and unless the orders sought in this application are granted, the appeal will be rendered nugatory.

k) The appellant, as the registered owner of the suit property, stands to suffer immense and irreparable loss if the illegal, irregular and unlawful sale by the respondent and their agent is not stopped.

l) It is in the interest of justice that the orders sought herein be granted pending hearing and determination of this appeal.

3. The applicant filed written submissions in support of the application. At the hearing of the application, Miss Waititu, learned counsel for the applicant submitted that even though the applicant guaranteed the principle borrower in the sum of Kshs 8 million through a charge over the suit property, the respondent later advanced the said borrower a further sum of Kshs 5,723,000 through the same charge without informing him. Counsel submitted that the respondent had not shown that the principle borrower had defaulted and had refused to comply with the undertaking to undertake a valuation of the suit property. It was the applicant's case that the appeal has high chances of success.

4. The respondent opposed the application through the replying affidavit of its operations Manager, **Nancy Wanjiru Njue**, who avers that the appellant voluntarily offered his suit property to secure the loan of Kshs. 8 million obtained from the respondent by one **Francis Njenja Kabuu** (the principle borrower) which loan the borrower repaid, albeit partly, thereby leaving a balance of Kshs 5,723,000.

5. She avers that despite the fact that the appellant and the borrower acknowledged the default, they did not make any further payments but requested that the loan be rescheduled. The respondent yielded to the applicant's request to reschedule the loan for the unpaid balance but the applicant still remained in default thereby prompting the respondent to exercise its right in realizing the security provided by the borrower by issuing him with the mandatory statutory notices.

6. At the hearing of the application, the respondent's counsel submitted that the applicant was in default and had not approached the court in good faith in order to evade liability. Counsel argued that the application is a delaying tactic as the respondent had shown that the principle borrower had defaulted. It was the respondent's case that the trial court did not err in declining to grant the orders of injunction.

Determination

7. I have considered the application filed herein, the respondent's response and the submissions made by the parties respective counsel together with the authorities that they cited.

8. The main issue for determination is whether the applicant has made out a case for the granting of orders of injunction pending appeal. Order 42 Rule 6 of the Civil Procedure Rules stipulates as follows:

"(6) 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 subordinate Court or tribunal has been complied with."

9. The above sub-rule gives this court discretionary power to grant an injunction on terms that it thinks just as long as the procedure for filing an appeal from the subordinate court has been complied with. Appeals from subordinate courts have to be filed within 30 days from the date of the decision of the lower court and such appeal is filed when a memorandum of appeal has been filed. **Section 79G** of the Civil Procedure Act Provides:-

S.79G "Every appeal from a subordinate court to the High Court shall be filed within thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order."

10. In the present case, the impugned decision of the lower court was made on 20th June, 2019, and a memorandum of appeal filed on 11th July 2019, 21 days after the decision of the lower court. I therefore find that the applicant has complied with the procedure for filing an appeal before this court and that the court has the requisite jurisdiction to determine whether or not to grant the injunction sought while exercising its appellate jurisdiction.

11. In **Patricia Njeri & 3 others v National Museum of Kenya** [2004] eKLR the court held as follows when considering an application for injunction pending appeal:-

a) an order of injunction pending appeal is a discretionary one and the discretion will be exercised against an applicant whose appeal is frivolous.

b) The discretion should be refused where it would inflict greater hardship than it would avoid.

c) The applicant must show that to refuse the injunction, would render the appeal nugatory.

d) The court should also be guided by the principles in Giella v Casman Brown Ltd 1973 EA 358.

12. The principles in **Giella v Casman Brown** (supra) are well settled. The applicant must establish that he has a **prima facie** case with a probability of success, that he will suffer irreparable damage which cannot be compensated by an award of damages or that if in doubt the court should decide the case on a balance of convenience. The court should at the same time bear in mind that there is an appeal pending and therefore consider the prospects of that appeal succeeding in order to determine whether an applicant has a prima facie case. Like in all cases, the ultimate objective of the court must always be to safeguard rights of the appellant in the appeal.

13. In **Butt v The Rent Restriction Tribunal, Civil Appeal No.6 of 1979**, the court observed that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory and should therefore preserve the status quo until the appeal is heard. A similar position was taken by the Court of Appeal in the case of **Mukuma v Abuoga** [1988] KLR 645, wherein it was held that the court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard where a party is exercising his undoubted right of appeal.

14. A determination of whether or not to grant an injunction pending appeal, involves exercise of discretion. In **Mrao v First American Bank of Kenya Limited & 2 others**, 2003 KLR 125 **Bosire JA** stated as follows on the jurisdiction to grant an interim injunction:-

“The power of the court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence.”

15. In **Charter house Bank Limited v Central Bank of Kenya & others** [2007] eKLR the Court of Appeal held as follows on orders of injunction pending appeal:

“the purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory. (see also MadhuPaper International Limited v Merr [1985] KLR 840..”

16. When considering whether or not to grant an order of injunction pending appeal, the court should also ascertain if appeal is arguable, or put differently, whether the appeal raises serious questions for determination without having to go deeply into the appeal itself. The court must also bear in mind the fact that the appeal is yet to be heard and avoid making comments that may prejudice the trial of the appeal itself. In doing this, the court should only consider the grounds raised in the memorandum of appeal in forming an opinion on whether there is an arguable appeal to warrant issuance of orders to maintain the status quo.

17. Needless to say, the core business of the court is to determine disputes presented before it and this is a mandate that can only be achieved if parties are allowed to fully ventilate their cases before it. In the instant case, it is not in dispute that the lower court dismissed the applicant’s application for injunction thereby prompting the applicant to file an appeal and the present application. The applicant has challenged the respondent’s exercise of statutory power of sale on several fronts including the allegation that the respondent made further advances to the principle borrower on the strength of his guarantee without his knowledge. He has also raised the issue of the validity of the statutory notices issued to him and the borrower. Under the above circumstances, one can say that the applicant has demonstrated that his appeal raises several triable issues the merits of which can only be determined after the hearing of the appeal.

18. I therefore find that perusal of the applicant’s affidavit, without saying much at this stage, shows that he has established a prima facie case with chances of success and that the appeal may be rendered nugatory unless the orders sought herein are granted.

19. For the above reasons, I find that it will be in the interest of justice to allow the present application but on condition that the applicant shall set down the appeal for hearing within 60 days from ruling failure of which the injunctive orders shall be deemed as vacated.

Dated, signed and delivered in open court at Nairobi this 11th day of December 2019.

W. A. OKWANY

JUDGE

In the presence of

Mr. Kageha for respondent

Miss Ozara for Mahinda for the applicant

Court Assistant – Sylvia