



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 420 OF 2016

EQUIP AGENCIES LIMITEDPLAINTIFF/APPLICANT

VERSUS

I&M BANK LIMITEDDEFENDANT/RESPONDENT

RULING

1. This Ruling relates to a Notice of Motion Application dated 7th November 2017 and orally amended on 9th November 2017 to include the suit property known as LR No. 209/4535. It is brought under the provisions of Section 1A, IB, 3A 75(1) of the Civil Procedure Act, Order 42 Rule 6 and Order 50 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling Provisions of the Law and supported by the grounds thereto and an Affidavit sworn by Divyesh Indubhai Patel dated 7th March 2017.

2. The Applicant is seeking for orders that; the Court be pleased to grant a temporary order of injunction restraining the Defendant/Respondent whether by itself, its employees, servants, agents or auctioneers from doing any of the following acts; that is to say; evicting, advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyancing or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise, howsoever interfering with the ownership or quiet possession over land known as LR No. Mainland North/VI/3075 and LR No. 209/4535 pending the hearing of an intended application for Appeal, in the Court of Appeal under Rules 5(2) of the Civil Appeal Rules and pending lodging, hearing and determination of the suit. The Applicant also seeks for the costs of the Application.

3. The background facts of this matter are that, the Applicant filed a Notice of Motion Application dated 25th August 2016, amended on 10th November 2016, seeking for an injunction order, to restrain the Respondents from selling and/or dealing with the two above referred to suit properties in a manner prejudicial to its rights of ownership therein. Subsequently, the Application was heard inter parties and dismissed with costs to the Respondent on 1st November 2017.

4. The Applicant aver that, it is aggrieved with the decision of the Court and has preferred an Appeal against it, by lodging a Notice of Appeal and applying for typed proceedings. That the intended Appeal is not frivolous as shown in the drawn memorandum of Appeal annexed to the Supporting Affidavit. Unfortunately, it is apprehensive that if the Respondents commence the action to realize its security, and remove the suit properties out of the jurisdiction of the Court, the Appeal will be rendered nugatory.

5. It is argued that the forty (40) days' notice has been served and expired. Therefore, the Respondents may move in to realize the properties anytime and if that so happens, the Applicant will suffer substantial loss. It is thus in the interest of justice to grant the orders sought.

6. However, the Application was opposed based on the Replying Affidavit sworn by Andrew Muchina, dated 13th November 2017. He deposed that, the debt owed is over Kshs 1.4 Billion and that the borrower completely stopped repaying it before and after filing the suit; (as indicated by the statement of accounts produced vide a Replying Affidavit filed on 19th September 2016 sworn by Gilbert Banda), as such the Respondent should not be restrained from exercising its statutory power of sale.

7. The Respondent argued that the borrower has admitted the debt, and made several promises to settle it but failed to honour them, as detailed in the Replying Affidavit (supra) sworn by Gilbert Banda in response to the motion application dated 25th August 2016 and amended on 10th November 2016.

8. Further, the Applicant has filed four (4) injunction Applications in relation to the same suit properties in the Court of Appeal at Nakuru namely Civil Appeal No. 2 of 2017, which were dismissed, as follows:-

- i. On 9th December 2016, the Notice of Motion Application Naivasha High Court Civil Case No. 9 of 2016; Equip Agencies Ltd vs I&M Bank Ltd was dismissed with costs by Hon. Lady Justice Meoli;

ii. The Applicant filed an Application for injunction pending Appeal and on 24th March 2017 Hon. Lady Justice Meoli granted stay for 7 days to allow the Applicant prosecute the stay before the Court of Appeal;

iii. The 3rd Application before Hon. Lady Justice Meoli seeking for an injunction and review was dismissed with costs on 19th April 2017;

iv. The injunction before the Court of Appeal was dismissed with costs on 27th September 2017.

9. The Respondents accused the Applicant of being guilty of serious material non-disclosure by failing to disclose that it lost these identical injunction and/or stay Application as stated above. Further that the Applicant has not demonstrated what loss or prejudice it will suffer if the orders sought are not granted and neither has the Applicant offered to pay any security as the equivalent to the market value of the charged properties to warrant the grant of the stay. As such the Application should be dismissed with costs.

10. The parties agreed to dispose of the Application by filing submissions and subsequently highlighted the same on 15th November 2017. The Applicant pleaded with the Court to grant a stay order, on the ground that, it has a judgment against the Government in the sum of Kshs 34,290,484,628.07 and the matter is in the Judicial Review Division to enforce payment. That once paid, the claim herein will be settled in full. That, the Respondents was invited to register its claim in the Judicial Review matter but declined.

11. The Applicant further submitted that the properties herein are worth Kshs 2.5 Billion thus the debt is over secured. The suit properties have been acquired over three “generations” by the family. Reference was made to the case of; Ahmed Musa Ismael vs Kumba Ole Ntamorua & 4 Others (2014) eKLR, in which the Court stated that, the purpose of the stay is to protect the Appeal so that, it is not rendered nugatory. Further reference was made to the case of; Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others (2013) eKLR.

12. In relation to the matter at Nakuru, the Applicant submitted that, it has preferred an Appeal against that decision of the Court of Appeal even then that Court gave a stay and this Court should similarly grant a stay.

13. It was further submitted that the Application herein was filed on 7th November 2017 following the dismissal of the injunction order on 1st November 2017 and therefore there is no undue delay.

14. On the issue of substantial loss, the Applicant submitted that the properties herein are unique and of sentimental value to the Applicants and cannot be compensated by way of damages. Equally, the Applicant is one of the leading equipment importers in the country and if the stay order is not granted, its outstanding business will be injured irreparably and cannot be compensated by damages.

15. In further submissions, the Applicant stated that, it has given an undertaking in damages which is sufficient security in line with the decision of; Githunguri vs Jimba Credit (1988) KLR 837 and Julius Musili Kyunga vs Kenya Commercial Bank Ltd & Another (2012) eKLR.

16. The Court was invited to consider that, the intended Appeal is arguable based on the ground in the draft Memorandum of Appeal.

17. However, in response submissions, the Respondents reiterated the averments in the Replying Affidavit sworn by Mr. Muchina and submitted that, the Applicant is a dubious debtor who cries wolf and does not pay the debt and is merely hiding under the judgment debt of Kshs 34 Billion. The Respondents argued that, a charged property has no sentimental value and therefore the Applicant will not suffer any loss and more so as it stands to gain Kshs 34 Billion.

18. The Respondents maintained that, the Applicant has filed several Applications seeking to restrain it from selling the suit properties, and all have been dismissed. This being the 5th such Application involving the same debt and circumstances, it should also be dismissed with costs.

19. In response, however, the Applicant submitted that the matter in Nakuru is different from this matter, in that, the debt herein was paid fully.

20. I have considered the subject Application and I find that, the issue to consider is whether the Applicants have met the threshold of the provisions of, Order 42 Rule 6 of the Civil Procedure Rules that govern the grant of a stay order pending Appeal.

21. The said provisions provides that:

6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but; the court appealed from may for sufficient cause order stay of execution of such decree or order.

2. No order of stay of execution shall be made under Sub Rule (1) unless –

a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that

b. The application has been made without unreasonable delay; and

c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

22. The purpose of the grant of an order for stay pending appeal was considered in the case of; *Absalom Dova vs. Tarbo Transporters [2013] eKLR* where the Court stated that; it is for the purpose of administering justice and observed that;-

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination”. (emphasis mine).

23. Similarly, the Court of appeal in the case of; *Butt vs Rent Restriction Tribunal Civil App No. NAI 6 of 1979*, (Madan, Miller and Porter JJA) held that, the power of the Court to grant or refuse an application for a stay of execution, is a discretionary power and the discretion should be exercised in such a way as not to prevent an appeal being rendered nugatory should the Court of Appeal reverse the judge’s discretion.

24. It was further held that the court in exercising its discretion as to whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements and a Judge should not refuse a stay, if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicant at the end of the proceedings.

25. It has also been held that the three requirements under Order 42 Rule 6 of the Civil Procedure Rules, the proof of substantial loss is to be of great importance. This was stated in the case of; *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018* by the Court of Appeal which stated that:

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdiction for granting stay”

26. In the case of; *Equity Bank Limited V Taiga Adams Company Limited Civil Appeal No. 722 of 2006*, the court stated as follows:-

“In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent – that is execution is carried out – in the event the appeal succeeds, the Respondent would not be in a position to pay – reimburse – as he/it is a person of no means. Here, no such allegation is made, much less established, by the Appellant/Applicant.”(emphasis mine).

27. In deciding prove of loss, it was held in *Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005* that :-

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...”

28. Having considered the legal principles that guide grant of an order of stay pending appeal enumerated, in the cases cited above,, and applying these principles to the facts herein, I find that on the issue of substantial loss, the Applicant avers that the property is unique and of sentimental value to them. That it houses their different premises. Further the Company has maintained good will and reputation running the business of equipment sales and failure to grant the orders will injure the business irreparably.

29. However, as stated in the earlier Ruling I delivered and referred to herein, the Applicants are indeed in arrears of the credit facility granted to it by the Respondents. It is cardinal rule that justice must be done and be seen to be done. The Respondent submitted that it is owed an amount in the sum of Kshs 1.4Billion and that the Applicant has completely stopped repaying the debt. The question that arises is: Who between the parties herein is prejudiced most?

30. The answer in my opinion is the Respondent which are not receiving the repayment of the money they advanced to the Applicants. Therefore in regard to the issue of substantial loss the scale tilts in favour of the Respondents.

31. Be that as it may, it is indeed the duty of the Applicants to establish prove the kind of loss it will suffer. I find that such prove is lacking herein. The Applicant offered the suit properties as security, and at the point ceased having a personal sentimental value thereto. It was converted into a commercial commodity for sale. Even then, there is no evidence or even any allegation that if the sum pursued is paid, the Respondent will not refund it, if the Appeal succeeds.

32. On the issue as to whether the Application was brought expeditiously, I find that the Application was filed on 7th November, 2017 after the Ruling was delivered on 1st November 2017. Taking into account the duration in between, I find that there was no undue delay in filing this Application.

33. On the issue of security, the Applicants have given an undertaking in damages, and submitted that it is sufficient security in line with the decision of; *Githunguri Kyungavs Kenya Commercial Bank Limited & Another (supra)* where the Court held that;-

“the Applicant will as a condition for the grant of the injunction pending appeal, within 7 days hereof, give his undertaking in

damages for any loss that may become due and payable by him in respect to the Court order for injunction pending appeal.”

34. In addition, it has demonstrated its efforts to enforce a decree in excess of Kshs 34 Billion against the Government. However, the Respondents have opposed the security offered by the Applicant casting doubt as to whether it can suffice taking into account the conduct of Defendants of default and non-payment of the loan facility.

35. In my considered opinion, based on the history of this matter, and taking into account the fact the initial application for an injunction order was dismissed, to allow a stay of execution pending Appeal on the basis on the proposed security, will amount to granting the very order which the court declined to grant in the previous Application. It will in no way help the Respondents recover the sum it is claiming and in the given circumstance I do not find the security offered suitable and/or sufficient to warrant the grant of the orders sought.

36. Finally, the Applicant submitted that it has an arguable appeal, and as supported by the submissions made, in support of the Application dated 25th August and Amended 10th November 2016. However, in response, the Respondents argued that, the Applicants have not demonstrated that they have an arguable appeal, in that all the grounds stated in the draft memorandum of appeal and exhibited are the same as those cited in the Court of Appeal in Nakuru Court of Appeal Case No. 2 of 2017 and in which the Court of Appeal therein found to have no merit.

37. In my considered opinion, whether the Appeal is arguable or not, is not a matter available to this Court for consideration. It is an issue that will be considered on merit before the Court of Appeal.

38. The Applicants reiterated that the refusal to grant injunction for stay will render the Appeal nugatory, in that the suit properties which is the substratum of the Appeal will be lost if sold and cannot be adequately quantified in monetary terms. Reliance was placed on the case of; **Ahmed Musa Ismael vs Kumba Ole Ntamorua & 4 Others (supra)**, where the Court stated as follows:

“to preserve the integrity of the appellate process so as to render any eventual success, a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual.”

39. In the case of; **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others, CA No. 31 of 2012**, was also cited where the Court stated;-

“whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

40. The Applicant argued that allowing the statutory power of sale, where the Chargee is acting illegally, does not avail the chargee an opportunity to be heard to say that he is in a position to compensate the Plaintiff for injury that might have been occasioned. The Appeal will thus be rendered a mere academic ritual. However, the Respondents argued that refusal to grant the injunction stay will not render the Appeal nugatory as the Appeal is not arguable in the first place.

41. In response to the issues of admission of the debt and non disclosure of material facts, the Applicants submitted that Respondents are confusing the Applicants and the Principal Borrower. That, even if there was admission and non disclosure, the same are issues arguable on Appeal.

42. However, the Respondents submitted heavily on the issue of admission of the debt, and reiterated their earlier submissions in the Application dated 25th August 2016. It was argued that the Applicants cannot be granted an injunction for stay because they have deliberately refused to disclose all the material facts.

43. The Respondents submitted that it is now settled law that, if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, as is the case herein, it must be discharged and/or vacated. They cited the case of; **Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Limited (1989) KLR, 1** where it was stated that:

“now that rule giving a day to the Commissioner to show cause was obtained upon an ex-parte application; and it has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an ex-parte statement he should make a full and fair disclosure of all the material facts- facts, not law. He must not misstate the law if he can help it- the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement.”

44. Further reliance was placed on the cases of; **Orion East Africa Ltd. vs Ecobank Kenya Limited (2015) eKLR** and the case of; **Republic vs Principal Registrar of Government Lands & 3 Others Ex-parte John Nguigi Gathumbi (2014) eKLR**

45. In conclusion, I find that the upshot of these cases is that in an application of this nature the Court must aim at allowing the aggrieved party an opportunity to prosecute the Appeal but at the same time protect the other party who under normal circumstance has a right to enforce its right. In the case **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) of 2002, KLR 63** it was held that:-

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending

appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

46. Similarly, in the case of; Venture Capital Case (Venture Capital and Credit Ltd vs Consolidated Bank of Kenya Ltd Civil Application No. 349 of 2003 (UR)), 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 a whimsical or arbitrary fashion.”

47. Finally, in the case of; Global Tours and Travels Ltd vs Five Continents Travel Limited (2015) eKLR, it was held that:-

“.....Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.” (emphasis mine)

48. I think I have said enough on this matter. In conclusion I find that proof of substantial loss and proof that the appeal will be rendered nugatory have not been established herein. As was held in Hassan Guyo Wakalo vs Straman EA Ltd (2013)eKLR that:-

“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”. (emphasis mine).

49. Be that as it may be, I also note from the Court record that, that after the Court delivered its Ruling, the Applicants made an oral Application to be granted six (6) months injunction period to enable them file an Appeal against the Ruling. The same was objected to by the Respondents who sought that a formal Application be filed. However the parties agreed to maintain status quo until 6th November 2017. This Application was then filed on 7th November 2017.

50. On 9th November 2017 when the matter came to Court for hearing, the Court gave directions as to how the Application herein would be disposed of and extended the status quo to the 27th November 2017. On that date, the Application was orally canvassed and the ruling date set for 29th November 2017. Unfortunately the Court was engaged in the hearing of the Election Petition No. 2 of 2017, and rescheduled the matter to Ruling on 18th December 2017, which unfortunately was within the Court vacation period necessitating the ruling to be deferred to 26th January 2018. On that date, the Judges in the Commercial Division were on training and the ruling was rescheduled. I have laid this background to indicate that since the ruling was delivered to date, it has been about three (3) months, the Appeal should have progressed. Be that as it were, as aforesaid, the grant of orders sought for herein will be akin to grant of the orders that were rejected in the Ruling of 1st November 2017.

51. However, it has been to the knowledge of this Court that a similar Application as herein was heard, in the HCCC No. 9 of 2016 at Naivasha, whereupon the Court granted the Applicant a stay of seven (7) days to allow them prosecute the Application for stay before the Court or Appeal. In the interest of consistence and justice, I am inclined to consider similar orders herein.

52. In that regard, the Notice of Motion Application dated 7th November 2017 and orally amended on 9th November 2017 is allowed in the following terms: that the Respondent is restrained from dealing with the subject suit properties in a manner inconsistent and/or prejudicial to the rights of the Applicant, for a period of **seven (7) days** from the date of this order.

53. The costs of the Application are awarded to the Respondents.

54. Those then are the orders of the Court.

Dated, delivered and signed in an open Court this 5th day of February 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. King'ara for the Applicants

Mr. Wawire for the Respondents

Lang'at.....court Assistant