



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NUMBER 49 OF 2016**

**SAMUEL KONGO KARANJA. .... APPELLANT**

**VERSUS**

**FIRST CAPITAL (K) LIMITED. .... RESPONDENT**

**RULING**

1. What is before the court for determination is the application dated the 16<sup>th</sup> February, 2016 by way of Notice of Motion. It is expressed to be brought under Order 42 Rule 6(6) of the Civil Procedure Rules and Section 1A, 1B, 3A, 78(2) and 79(e) of the Civil Procedure Act Cap 21 Laws of Kenya.
2. The applicant has sought the following orders: -

1. Spent
2. That an interim injunction do issue restraining the Respondent, its servants, agents, auctioneers, or anybody claiming under it from attaching, selling transferring or otherwise alienating the Appellant's household goods and tools of trade pursuant to a proclamation by Hariki Auctioneers dated 3<sup>rd</sup> October, 2015 or any other proclamation thereof pending the hearing of this application inter partes.
3. That a temporary injunction do issue restraining the Respondent, its servants, agents, auctioneers, or anybody claiming under it from attaching, selling, transferring or otherwise alienating the Appellant's household goods and tools of trade pursuant to a proclamation by Hariki Auctioneers dated 3<sup>rd</sup> October, 2015 or any other proclamation thereof pending the hearing of this Appeal.
4. That the costs of this application be provided.

It is supported by the affidavit of Samuel Kongo Karanja (The Appellant and is premised on the grounds listed on the body of the same.

3. The gist of the Applicant's application is that the Appellant who is the Plaintiff in CMCC No. 6319 of 2015 had filed an application for injunction against the Respondent which was dismissed on the 15<sup>th</sup> February, 2016 and being dissatisfied with that finding, he has filed the appeal herein. His advocate is in the process of applying for certified copies of the proceedings and order to facilitate prosecution of the appeal.
4. In the application before the lower court, the Appellant had sought orders to restrain the Respondent or its agents from attaching or selling his household goods and tools of trade for alleged default of a loan that he had taken from the Respondent which the Respondent claimed was secured by a Chattels mortgage over the said goods and tools. He urges the court to grant an injunction pending the appeal. He depones that he has an arguable appeal with a high likelihood of success in that the chattels mortgage that the Respondent had relied on to proclaim against him are void in that they were not registered at the time they were invoked and were thereafter registered

- more than 21 days after their alleged execution contrary to Section 6 of the Chattels Transfer Act. He further avers that he is a commercial farmer and if the Respondent sells his tools of trade as threatened, he will suffer monumental loss that cannot be compensated by way of damages
5. The Respondent has opposed the application by way of a replying affidavit sworn by John Mulinga Musyoka on the 26<sup>th</sup> February, 2016. The deponent who is a director with the Respondent depones that the Appellant was a customer of the Respondent who had been advanced several facilities totaling to the principal sum of Ksh.467,000/- a breakdown of which he has given in paragraph 5 of the replying affidavit. The facility was secured by way of several chattels to secure the Respondent's interests and that paragraph 7 of the agreement between the Appellant and the Respondent provides that the Respondent can attach and sell the security in case of default.
  6. The Respondent further depones that according to the agreement any breach of the terms of repayment meant that any amount outstanding would attract interest as set out in the agreement and the latest of the facilities, ought to have been paid by 9<sup>th</sup> September, 2015. That the Applicant had breached the terms of the repayment which were very specific and the consequence thereof is that the account has fallen into arrears in that out of Ksh.471,000/- advanced as principal he only paid a paltry sum of Ksh.60,000/- and that in an attempt to pay the amount still owing, he issued cheques that were dishonoured.
  7. That the Appellant having breached the terms of the agreement has come to court with unclean hands and is not entitled to a grant of an order of injunction. It is further deponed that failure by the Appellant to repay the loan has exposed the Respondent to great losses as the Respondent is not a big financial institution. According to the Respondent, the Appellant has not established any basis for injunction in that he has not denied being indebted to the Respondent and that he has not demonstrated any loss that he stands to suffer by the Respondent enforcing the terms of the agreement between the parties.
  8. The application was canvassed by way of written submissions which the parties duly filed. In his submissions the Appellant submits that this court has discretion to grant an injunction pending appeal provided that the procedure for instituting an appeal from a subordinate court has been complied with. It was further submitted that the Appellant has satisfied the conditions for an injunction pending appeal and in so submitting he relied on the case of **Julius Musili Kyunga Vs Kenya Commercial Bank & Another [2012] eKLR**, on the principles of deciding applications for injunctions pending appeal wherein the court observed that the object of the injunction pending appeal is to preserve the subject matter to ensure that the appeal, if successful will not be rendered nugatory.
  9. He submitted that the appeal raises serious questions for investigations and it's only fair that an injunction is granted so that the court can make a finding on these critical questions.
  10. On its part, the Respondent has submitted that the Appellant has not satisfied the conditions for granting of injunction and has relied on the celebrated case of **Giella Vs Cassman Brown & Company Limited (1973) E. A. 358** which are that; the Applicant must show a prima facie case with a probability of success; secondly, that he stands to suffer irreparable harm which cannot be compensated in damages and lastly, if in doubt, the court must assess the balance of convenience.
  11. The Respondent further submitted that the Appellant's application is unmeritorious and an abuse of the court process based on the fact that the Appellant is seeking to run away from his obligations even after benefitting from the facility advanced to him. That the Respondent has the right to recover its out levy by exercising the powers of attachment as set out in the Chattels Mortgage. In its submissions the Respondent avers that the Appellant has neither disputed the validity of the loan agreement nor the fact that money was advanced to him and that he issued cheques that were dishonoured.
  12. The Respondent concluded by submitting that the Appellant has come to court with unclean hands after breaching the agreement that had been entered into between the parties and after failing to pay the money advanced to him. He only paid a sum of Ksh.60,000/- and according to the Respondent, the Appellant has not established a prima facie case to warrant the granting of the orders sought herein.
  13. I have carefully considered the materials before me both in support of and in opposition to the application. The application dated 16<sup>th</sup> February, 2016 seeks for a temporary injunction pending the hearing and determination of the appeal. As submitted by the counsel for the Appellant, the

objective of injunction pending appeal is to preserve the subject matter to ensure that the appeal if successful will not be rendered nugatory.

14. The discretion of the court to grant an injunction pending appeal must be exercised judicially and carefully in the light of the circumstances of each particular case. As Meggery, J in Erinford Properties noted, there will be cases where it will be wrong to grant an injunction pending appeal **“as where any appeal would be frivolous or to grant the injunction would inflict greater hardship than it would avoid, and so on”** and when damages would be a suitable alternative.

15. The principles for granting an injunction pending appeal are different from those that apply in granting an injunction pending hearing and determination of a suit. With regard to the principles for granting injunction pending appeal, the Court of Appeal has developed the following tests: -

- a. The Appeal must not be frivolous or the Appellant must show that he has an arguable appeal.
- b. And that the Appeal if successful, should not be rendered nugatory. See **Madhupaper Vs Paddy Kerr** and **Githunguri Vs Jimba Credit**.

16. The issues surrounding the cause of action and the application herein relate to unsecured loan that was advanced to the Appellant by the Respondent which the Respondent was supposed to repay in 4 equal instalments at a rate of interests which was agreed upon by the parties. The terms and conditions are set out in the loan agreements dated 9<sup>th</sup> June, 2015 and 14<sup>th</sup> July, 2015. The Respondent breached the terms of the agreement by failing to repay the loan as agreed in the said loan agreements.

17. It is not in dispute that the loan was advanced to the Respondent and that the terms of payment are as set out in the loan agreements aforesaid. However, the Appellant has raised a very fundamental legal issue regarding the legality of the proclamation of his goods by the Auctioneer M/s Hariki Auctioneers. The Respondent in paragraph 6 of his replying affidavit depones that the facility was secured by way of several chattels. The Appellant has taken issue with the validity of the said chattels mortgage and has averred that the same were void in that they were not registered as required by the law contrary to Section 6 of the Chattels Transfer Act and in fact, that is one of the grounds of appeal in the memorandum of appeal dated 16<sup>th</sup> February, 2016.

18. Even without going into the merits of the appeal, my strong view is that the Appeal is arguable, it raises serious questions for investigation and it's only fair that the Appellant is given a chance to argue the same.

19. Accordingly and for reasons set out above, I grant the Applicant's application dated 16<sup>th</sup> February, 2016 in terms of prayer 3. The Appellant shall have the costs of the application.

Dated, signed and delivered at Nairobi this 14<sup>th</sup> day of July, 2016,

.....

**L NJUGUNA**

**JUDGE**

**In the presence of**

..... *for the appellant*

..... *for the Respondent.*