



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HIGH COURT CIVIL NO. 40 OF 2015

MOMBASA WATER PRODUCTS LTD.....PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD.....RESPONDENT/RESPONDENT

RULING

1. Before Court for determination is the application by the Plaintiff dated 18/4/2016 and expressed to be brought under Provisions of Order 42 Rule 6, section 3A & 3B Civil Procedure Act as well as Article 159 of the constitution. It seeks orders that:

- i) THAT this Application be certified as urgent and be heard ex parte in the first instance.**
- ii) THAT pending the hearing and determination of this Application, the Respondent by itself, its servants and/or agents be restrained by a temporary injunction from alienating, selling or in any other way dealing with the Appellant's properties known as LR No. MN/1/12003, Title No. CR 34752 situated in Nyali, Mombasa.**
- iii) THAT pending the hearing and determination of the Appeal filed herein, the Respondent by itself, its servants and/or agents be restrained by a temporary injunction from alienating, selling or in any other way dealing with the Appellant's properties known as LR No. MN/1/12003, Title No. CR 34752 situated in Nyali Mombasa.**
- iv) THAT costs of this Application be provided for.**

2. On 4/5/2016 the court granted to the applicant interim orders, expressed as stay of proceedings pending the hearing and determination. That development in effect determined prayers 1 & 2 of the application with the consequence that the only substantive prayer pending is the prayer for injunction pending the hearing and determination of the Appeal to the Court of Appeal (nay appeal filed herein) and the Prayer for costs.

3. The application is grounded on the facts that the court having dismissed an application pending hearing of the suit the plaintiff fears that the defendant will proceed with the sale pursuant to the statutory power of sale a development which will render the intended appeal nugatory. That once the sale takes place and the property is transferred to a third party the Applicant will suffer irreparable loss incapable of compensation by an award of damages.

4. The application is supported by the affidavit of one JOSEPH MBUGUA GICHANGA who depones

that the ruling dismissing the injunction application portends drastic consequence upon the applicant in that the property would be sold by public auction and should the appeal succeed the property would not be available to the applicant. A plea was therefore made for the status quo to be preserved pending the outcome of the Appeal.

5. That application was opposed by the Defendant/Respondent who filed a Replying affidavit sworn by one KENNEDY KASAMBA, an employee of the Bank who described himself as a Senior Recovery Manager. He took the position that there is no appeal filed yet as only an expression to file an appeal in the future has been expressed by the Notice of Appeal; that the courts discretion is fettered by the need for an applicant to demonstrate an arguable appeal rather than a frivolous one; that it would be prejudicial and injudicious to ignore the Respondents Contractual rights in the charge and those vested by the decision dismissing the application for injunction; that to grant an injunction at this stage would be to absolve the plaintiff from the contractual obligation to pay the debt and lastly that all the Prerequisites of grant of an injunction were considered by the court in dismissing the application for injunction and therefore the court would be seen as sitting on appeal on its own decisions to grant the current application.

Analysis and Determination

7. The application is expressed to be grounded upon the Provisions of Order 42 Rule 6(2) of the Civil Procedure Rules Section (3A & 3B?) may be 1A & 1B of the Act as well as Article 159 of the Constitution.

8. Although the provisions of the constitution and its overriding objectives of the court are cited, the fact is however that the procedure law that govern the grant of injunction or stay pending appeal is Order 42 Rule 6 that provision is worded as follows:-

“Notwithstanding anything contained in subrule (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”.

9. In my interpretation of that provision the jurisdiction of the court is only invoked when the court exercises appellate jurisdiction and not while exercising original jurisdiction. To this court that provision is the equivalent of Rule 5(2)b of the Court of Appeal Rules. The file before me is indeed a suit and therefore the court can only exercise its original jurisdiction and not the appellate one. I therefore do not hesitate to say and hold that the invocation of Order 42 Rule 6(6) was not well founded but of no assistance to the Applicant. That however is not to say that I would turn a blind eye to the plaintiff’s plea for orders seeking to protect a party’s rights pending an appeal when the matters pleaded disclose a deserving case. Far from it, I would as appropriate grant such orders if the justice of the case demand.

10. Having decided the application dated 30/2/2015 by the ruling of 15/4/2016, the plaintiffs remedy before me were limited to stay of such orders pursuant to the provisions of order 42 Rule 6(1). The applicant ought to be seeking stay of execution of the orders of 15/4/2016 if those orders were executable.

11. To this court, the orders of 15/4/2016 merely dismissed an application for injunction. They are a negative order vesting and conferring no rights on either of the parties and are incapable of execution. To this court the true and only meaning and purpose of order 42 Rule 6 is to preserve the *status quo* of the subject of litigation as an aggrieved party approaches the appellate court. The intended status to be conserved is that as will keep the aggrieved parties dispute alive while taking note that a successful litigant is not denied a vested interest or as it were, fruits of litigation. To me such situation is best presented where there is a positive judgement vesting rights on the successful party and imposing obligations to be performed by the losing party.

12. The facts of the matter before this court is however that the orders sought to be stayed merely dismissed an application with the result that no threat at execution can reasonably be fathomed. No wonder the Applicant was shy to ask for stay pending appeal well aware that there is nothing capable of being executed. More importantly this court has found by its ruling of 15/4/2016 that there is no prima facie case disclosed and that the property whose sale is feared has been valued and assigned a known value. It would then matter to ask whether the principles applicable in grant of injunction pending appeal are any different for those of grant of injunction pending the hearing of the suit. My view is that they are the same and therefore the applicant still needed to meet the prerequisites of grant of temporary injunction. The onus would be different had the applicant sought stay.

13. The court of Appeal in *Butt vs Rent Restriction Tribunal [1982]KLR 417* said of injunction pending appeal:-

“.....there is no inconsistency in granting such an injunction after dismissing the motion, for its purpose of the order is to prevent the court of appeals decision being rendered nugatory should that court reverse the judge’s decision.

The court will grant stay where special circumstances of the case so require. The special circumstances in this case are that there is a large amount of rent in dispute between the parties and the appellant has an undoubted regard to appeal.”

14. That decision persuades me that I could as well grant the orders sought but then only if properly sought like in that case the court was exercising its appellate jurisdiction.

15. For this court, the matter invokes original jurisdiction and therefore to grant injunction when I have already pronounced myself that the threshold have not been achieved would be to be inconsistent. I still hold that there are not proved the prerequisites of grant of temporary injunction.

16. The order that flows for the foregoing pronouncements is that the application dated 18/4/2016 is unmerited and cannot be allowed but must be dismissed. If I am wrong on this finding then the applicant still has his option very wide open before the Court of Appeal.

17. The application dated 18/4/2016 is therefore dismissed with costs to the Respondent.

Dated, signed and delivered at Mombasa this 12th day of **September 2016.**

P.J.O. OTIENO

JUDGE