**Soni & another v Shah & another (Civil Application E222 of 2023)**
**[2024] KECA 115 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 115 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPLICATION E222 OF 2023**

**SG KAIRU, F TUIYOTT & JW LESSIT, JJA**

**FEBRUARY 9, 2024**

**BETWEEN**

**MANJULA DHIRAJLAL SONI ..... 1ST APPLICANT**

**KETAN KUMAR DHIRAJLAL SONI ..... 2ND APPLICANT**

**AND**

**PRADEEP KHARAMSHI SHAH ..... 1ST RESPONDENT**

**JAYANT RACH ..... 2ND RESPONDENT**

**RULING**

1. In their application dated 24th May 2023, the applicants Manjula Dhirajlal Soni and Ketan Kumar Dhirajlal Soni seek "a temporary order of injunction and stay of execution of the orders of ELC Court case 308 of 2013 granted by Hon. Justice Angote dated 23rd March 2023 pending the hearing and determination of the appeal." In its ruling delivered on 23rd March 2023, the subject of the intended appeal, the ELC dismissed, with costs, the applicants' application dated 27th September 2013 to set aside interlocutory judgment and final decree for an amount of Kshs. 23,158,880 and interest entered in favour of the respondents in default of appearance.

2. The application is strenuously opposed by the respondents.

   In his lengthy replying affidavit sworn in opposition to the application, Jayant Rach, the 2nd respondent deposes that the affidavit sworn in support of the application by the 1st applicant "is incorrect and mistaken if not false fabricated and filled with lies and half truth,"; that the applicants have not come to court with clean hands and are not entitled to the remedy they seek, because, among other reasons, they hastily sold "their River Road Property" during the pendency of the respondents' application for prohibitory orders in respect thereof to remove it from the jurisdiction of the court.

3. It is deposed further in the affidavit of Jayant Rach that contrary to the claims by the applicants, service of summons was duly effected and acknowledged; that the debt in question is acknowledged and admitted; that there is no basis for faulting the learned Judge of the ELC for declining to set aside the interlocutory judgment in favour of the respondents; and that should this Court be inclined to grant the orders sought it should do so on terms that the applicants deposit the amount stated by the applicants as outstanding which is Kshs. 276,000,000.00.

4. Based on the material before us, the background in brief is that the applicants, who are mother and son, took a loan or loans, from the respondents. The amount advanced is in contention. There is reference in the impugned ruling to an amount of Kshs. 18,400,000 having been advanced which should have been re-paid by 31st January 2013 "together with interest of 7 % per month" (84% p.a?) or "compounded interest at 10% per month" (100% p. a?).

5. Upon default in repayment of the loan, the respondents filed suit against the applicants on 28th February 2013 and served summons on 14th March 2013 and thereafter applied and obtained interlocutory judgment in default of appearance on 8th May 2013. A decree followed on 12th July 2013, and thereafter the respondents applied for and obtained a prohibitory order on 19th August 2013 with a view to selling the property in execution.

6. On 27th September 2013, the applicants applied for orders: to set aside the interlocutory judgment and the final decree in favour of the respondents; to stay execution of the decree; to lift the prohibitory order issued on 19th August 2013; and for leave to file a defence out of time. The applicants claimed that service of summons was irregular; that the applicants had been coerced into signing documents which they never read only to discover later what they had signed were debt acknowledgments and that the amount claimed by the respondents was never advanced.

7. That application was eventually disposed of in the impugned ruling delivered on 23rd March 2023. It is not clear from the record why it took about 10 years to dispose of that application. However, in dismissing it, the learned Judge found that service of summons to enter appearance on the applicants was regular and that the applicants had

> "signed numerous acknowledgment slips" and were aware that their property, the title of which they had given to the respondents as security, could be sold to realize the loan. The Judge expressed that the applicants defence does not raise any triable issues to enable the court to exercise its discretion in their favour.

8. Aggrieved, the applicants filed a notice of appeal dated 28th March 2023 on which the present application is hinged. We heard the application on 29th January 2024. The parties were represented by learned counsel. Mr. Kibe Mungai appeared with Miss. Wairimu and Mr. Moriasi for the applicants. Mr. Sevany appeared for the respondents.

9. We have considered the same and the affidavit in support and in opposition as well as the written and oral submissions by counsel. In an application of this nature, an applicant is required to demonstrate that the intended appeal is arguable. Secondly, the appellant should demonstrate that if the orders sought are not granted, the intended appeal, if successful, will be rendered nugatory.

   See *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR.

10. Referring to the draft memorandum of appeal, Mr. Kibe submitted that the intended appeal is arguable; that the interlocutory judgment was entered on the basis that an amount of Kshs. 18,400,000 was allegedly admitted; that the loan granted was Kshs. 3,040,000 and there is therefore a fundamental

question as to the amount allegedly advanced; that beyond the contested letters of acknowledgment which the applicants assert were obtained by coercion, there is no evidence of the alleged loans. Furthermore, counsel argued, the judge erred in concluding that service of summons was regular and the interlocutory judgment is therefore impeachable.

11. Counsel submitted further that unless the orders sought are granted, the appeal will be rendered nugatory; that the property sought to be sold, the subject of the prohibitory order, is family home where the 1st applicant who is in her 90's and her son, who is disabled, reside and there is threat of their eviction which will lead to injustice which cannot be undone should the appeal succeed.

12. Apart from taking issue with the supporting affidavit as not being that of the 2nd applicant as stated on the face of the application, Mr. Sevany submitted that the applicants are not entitled to a discretionary remedy having approached the court without clean hands; that contrary to claims by the applicants that the property is held in trust, it is in fact owned by the 1st applicant absolutely; that on the face of the written admissions of debt by the applicants the intended appeal is not arguable; that the claims of duress, which requires proof of violence or threats of violence, as pronounced in the case of *John Mburu vs Consolidated Bank of Kenya* [2018] eKLR, are unfounded.

13. Counsel submitted that the intended appeal will not be rendered nugatory; that there is no basis for claiming the property is trust property; that if the property is sold and the appeal eventually succeeds, the respondents can pay back the value of the property as the 2nd respondent is a man of means.

14. We observe that to the extent that the impugned ruling dismissed the applicants' application, it is a negative order not capable of being stayed. However, despite the lack of refinement in the prayers sought in the application, what emerges from the grounds in support of the application and from the affidavit in support is that the applicants are seeking an order of temporary injunction, pending the determination of their intended appeal, to prevent the sale of the property known as LR No. 34/524. In that regard, in ground 13.1 of the application, the applicants aver that they "are apprehensive that the respondent will sell the property LR No. 34/524 located at Wambugu Road, Parklands Nairobi unless an order of injunction or stay pending appeal is granted restraining them from selling the same...".

15. The applicants are effectively challenging the exercise of judicial discretion by the learned Judge when he dismissed their application to the extent that they claim that there was no evidence to support the judgment in favour of the respondents in so far as the acknowledgments of the debt are contested. We understand the applicants to claim that the decision of the learned Judge is wrong for failure to consider that the debt is contested and for failure to properly consider claims of alleged duress. Bearing in mind that an arguable appeal is not one that will necessarily succeed, we are not persuaded that the intended appeal is frivolous.

16. On the nugatory aspect, it was asserted that the 1st applicant, said to be a senior citizen in her 90s, and her son the 2nd applicant, said to be disabled, reside on the property as their home, and that they would be rendered homeless in the event the property is sold and they get evicted from the property. We are in the circumstances inclined to grant, which we hereby do, a temporary order of injunction restraining the respondents from selling the property known as LR No. 34/524 located at Wambugu Road, Parklands Nairobi pending the hearing and determination of the appeal.

17. If the respondents have not already done so, they should file and serve their memorandum and record of appeal within 30 days from the date of delivery of this ruling failing which the orders granted herein will automatically lapse without further ado.

18. We make no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2024**

**S. GATEMBU KAIRU, FCIArb**

**.....**

**JUDGE OF APPEAL**

**F. TUIYOTT**

**.....**

**JUDGE OF APPEAL**

**J. LESIIT**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**Deputy Registrar**