Mavoko Water & Sewerage Company v Edermann Property Limited & another (Civil Appeal (Application) E112 of 2024) [2024] KECA 918 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KECA 918 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E112 OF 2024

DK MUSINGA, MSA MAKHANDIA & M NGUGI, JJA

JULY 26, 2024

BETWEEN

MAVOKO WATER & SEWERAGE COMPANY ..... APPLICANT

AND

CREDIT BANK KENYA LIMITED ..... 1ST RESPONDENT

EDERMANN PROPERTY LIMITED ..... 2ND RESPONDENT

(Being an application for injunction pending appeal from the Ruling and Order of the High Court of Kenya (Mabeya, J.) dated 1st March 2024 in HC COM & Tax Division No. E419 of 2022)

RULING

1. Before us is a Notice of Motion dated 11th March 2024 filed pursuant to rules 1(2) and 5 (2) (b) of this *Court's Rules*. In the application, Mavoko Water & Sewerage Company ("the applicant"), seeks in the main that pending the hearing and determination of the intended appeal, Credit Bank Kenya Limited ("the 2nd respondent"), be restrained by an order of injunction from disposing, selling or alienating the property known as LR 12867/13 situate in Mavoko Municipality, Machakos County ("the suit property"). The grounds in support of the application, as well as the affidavit by Michael Mangeli, the applicant's Managing Director, as well as the record, speaks to the following undisputed facts: that the applicant operates and manages a sewerage plant for and on behalf of approximately 30,000 residents of Mavoko on a plot measuring 0.177HA within the suit property owned by the 1st respondent. That it had in fact offered to purchase the portion. That the 1st respondent had, however, earlier on secured a loan facility from the 2nd respondent and charged the entire suit property. The 1st respondent defaulted in the repayment of the loan, forcing the 2nd respondent to exercise its statutory power of sale. That this action led to a series of suits between the 1st and 2nd respondents for orders of injunction at the instigation of the 1st respondent. Though initially granted, the injunctions were subsequently vacated

and discharged. It was then that the applicant joined the fray by successfully applying to be joined in the above High Court suit as an interested party. This was on the grounds already stated, that is to say, that it operated a sewerage plant in a portion of the suit property and had expressed interest in purchasing it, and towards that end had already entered into a sale agreement with the 1st respondent. It was also on the footing that it was the only body mandated under the *Water Act*, 2016, to operate and manage the sewerage plant.

2. The applicant thereafter filed an application for injunction. This was after the 2nd respondent had once again advertised the suit property for sale in the exercise of its statutory power of sale. The court granted the injunction on terms which the applicant did not comply with, despite several accommodations and reviews of the said terms by the court on the applications of the applicant. Exasperated, the court eventually vacated and lifted the injunction granted. Aggrieved by that move, the applicant filed a notice of appeal. Pursuant to the said notice of appeal, the applicant has now lodged the instant application.

3. According to the applicant, if the orders sought are not granted, then it shall lose that mandate to a private individual against the law, should the suit property be auctioned as a whole. That despite the request to the 2nd respondent to excise to the applicant the portion occupied by the sewerage plant thereof and auction the remainder of the suit property, the request had been turned down. That the discharge of the initial orders of injunction granted had left the applicant exposed with regard to the portion. That in the premises, the appeal would be rendered nugatory if the suit property was not protected from any interference by the 2nd respondent until the subject portion is hived off from the main suit property. That if the orders sought are granted, they will not cause the 2nd respondent any prejudice.

4. The 1st respondent supported the motion through a replying affidavit by its Managing Director, Zeyun Yand, dated March 20, 2024. The affidavit rehashed what the applicant deposed to in its supporting affidavit to the motion. Suffice to add that, according to the 1st respondent, the applicant's grounds of intended appeal raise legitimate issues that merit this Court's consideration.

5. The application was, however, opposed by the 2nd respondent through the replying affidavit of Wainaina Francis Ngaruiya, Head of Legal Services, dated 18th March 2024. The affidavit detailed the chronology of events leading to this application to demonstrate that the applicant is undeserving of the prayers sought. In brief, he deposed that the 1st respondent had filed more than five suits and applications in various courts seeking injunctive orders against the 2nd respondent's exercise of the chargee's statutory power of sale, all of which had been dismissed. That the 1st respondent was indeed indebted to the 2nd respondent to the tune of Kshs. 817,819,352.06 as at 16th August 2023, which amount continues to accrue interest and penalties. This amount was secured by a charge registered against the title to the suit property owned by the 1st respondent. That the 1st respondent was a serial defaulter, and when demands and statutory notices are served on it by the 2nd respondent in the exercise of its statutory power of sale, it rushes to court to curtail the process. To demonstrate this assertion, the 1st respondent gave what it considers the frustrating journey it had walked with the 1st respondent in a bid to realize the securities. We shall not give the particulars of each case. Suffice to state that the record is replete with applications for injunctions filed by both the 1st respondent and the applicant. Some of the applications were granted unconditionally or conditionally. In some, the respondent and the applicant made offers on the way forward in the settlement of the loan, all of which were reluctantly accepted by the 2nd respondent. However, none of those conditions or offers came to pass, even after they had been ameliorated by the courts on the applications of either the 1st respondent or the applicant. This

ping pong game went on for too long, until the court could not hear of it anymore. Accordingly, on 1st March 2024 when the parties appeared, the court discharged the injunctive orders in place.

6. Given all the foregoing, the 2nd respondent is of the view that, by the instant application, the applicant is but a proxy and or surrogate of the 1st respondent, to further frustrate the 2nd respondent's efforts to realise the securities, and postpone the day of reckoning. That it is obvious then that considering the past conduct of both the applicant and the 1st respondent as illustrated above, the intended appeal cannot by any stretch of the imagination be arguable, nor will it be rendered nugatory if the orders sought are not issued.

7. The application was canvased by way of written submissions with limited oral highlights. Mr. Mutinda, learned counsel for the applicant, reiterated the averments and depositions in the application and we need not rehash them. Suffice to add that, according to the applicant, had the trial court considered the further affidavit and submissions by counsel for the applicant, it could not have discharged the injunctive orders in place. That the further affidavit had explained in detail why it was unable to meet the terms of conditional injunction granted to it, to wit, legal technicalities and procedures involved in having the portion hived off from the main suit property so as to pave way for the 2nd respondent to exercise its statutory power of sale. Relying on the cases of *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR and *Kenafric Matches Ltd vs. Matches Masters Ltd & Ant-Counterfeit Agency*, Civil Application No. 92 of 2021 (UR), counsel submitted that whether the applicant is the only body statutorily mandated to operate and manage the sewerage plant which must be protected were all arguable points. On the nugatory aspect, counsel submitted that it was apparent that if this Court declines to grant the orders, the suit property, including the portion occupied by the sewerage plant will be sold, thereby interfering with the applicant's statutory obligation over the same. As a corollary, members of the public will be subjected to the risk of not getting a healthy and clean environment since the applicant will not have control over the plant. On the other hand, granting the orders and allowing the 2nd respondent to give consent for the hiving off of the said portion will not be denying it its statutory powers of sale as it can proceed and auction the remainder of the suit property.

8. Supporting the application, Mr. Lusi, learned counsel for the 1st respondent, through her written submissions, equally reiterated the depositions in the replying affidavit. She, however, relied on the cases of *Kibos Sugar & Allied Industries & 3 others vs. Benson Adega & others*, CA 137 of 2018; *Trans South Conveyors Limited vs. Kenya Revenue Authority & another* [2007] eKLR) and *Suleiman vs. Amboseli Resort Limited* [2004] eKLR, to submit that the applicant's intended appeal certainly raised legitimate grounds that merited judicial determination by this Court. On the nugatory aspect, she relied on the cases of *KPA vs. William Odhiambo Ramogi* CA E12 of 2021 and *Reliance Bank Ltd (in liquidation) vs. Norlake Investments Ltd* CA 93 of 2002, to submit that the applicant, the 1st respondent and the public will be exposed to greater hardship than the converse should the application be denied.

9. For the 2nd respondent, Mr. Gakunga, learned counsel, submitted that the intended appeal was frivolous. That though the applicant alleges that by an agreement with the 1st respondent it had agreed to purchase a portion of the suit property so as to take over the sewerage plant that belongs to the 1st respondent, there was no such valid agreement. That in any event, the purported agreement, if at all, was entered into without the consent or involvement of the 2nd respondent. That according to the alleged agreement, the applicant could only take over the management of the sewerage plant from 1st respondent after the "operation period" of 10 years, which time 'was not yet'. That the application was therefore a scheme hatched by the 1st respondent with the applicant as a surrogate to frustrate the 2nd respondent's exercise of its statutory power of sale. That given the history of the dispute, the intended appeal can hardly be arguable, nor can it be rendered nugatory. The applicant had not demonstrated

that the 2nd respondent would not be able to compensate the applicant in damages should the intended appeal be successful. That the 2nd respondent was a well-established bank and will therefore be capable of compensating the applicant in the unlikely event that the intended appeal succeeds.

10. We have considered the application, the grounds, the rival affidavits, submissions, the authorities cited, and the law. The jurisdiction of this Court under rule 5 (2) (b) of this Court's Rules is discretionary and guided by the interests of justice. Traditionally, in the exercise of this discretion, the Court must be satisfied on the twin principles, which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory. Then, depending on the nature of the dispute, there is the element of public interest, a late entrant among the considerations. See *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR.

11. In the main, however, in the case of *Trust Bank Limited & Another vs. Investech Bank Limited and 3 others* [2000] eKLR, this Court delineated the jurisdiction of this Court in an application of this nature as follows:

> " The jurisdiction of the Court under rule 5 (2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly, that, unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case..."

12. In considering the principles, we are cognizant that both limbs must be demonstrated to the Court's satisfaction. On the first principle, we have to determine whether there is a single *bona fide* arguable ground that has been raised by the applicant to warrant ventilation before this Court.

13. We have carefully considered the grounds of the intended appeal set out in the motion and the main one appears to be who should manage the sewerage plant, considering the mandate of the applicant. To our minds, we doubt whether this is really an issue that should exercise this Court's mind, given that the sewerage plant is on the private property of the 1st respondent, though charged to the 2nd respondent. The applicant has yet to legally acquire the portion it claims, and even if it had, a clause in the purported agreement suggests that the applicant can only take over the management of the sewerage plant perhaps after 10 years which period has not yet elapsed. The suit property was charged to the 2nd respondent as a whole, and no part thereof belongs to the applicant. A portion thereof cannot be hived off without its consent, nor can it be forced to do so. Further, the agreement did not involve the 2nd respondent, yet it is a central actor in the whole transaction. It would appear that actually, the applicant is using the suit to force the hand of the 2nd respondent to cede the portion. The applicant has not disputed the outstanding amount which keeps accruing interest and the default by the 1st respondent. To that extent, we would agree with the 2nd respondent's submissions that the applicant is but a surrogate of the 1st respondent.

14. Given all the foregoing and the history of the dispute already set out elsewhere in this ruling, we are not satisfied that the intended appeal is arguable

15. Having found as much, and since it is required that both limbs must be satisfied, we see no need to move to the next limbs, that is the nugatory aspect and public interest. This conclusion consigns the application to the realm of dismissal.

16. The upshot is that the Motion dated 11th March 2024 is dismissed with costs to the 2nd respondent.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

MUMBI NGUGI

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR