



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR, J.J.A.)

CIVIL APPLICATION NO. NAI524 OF 2020

BETWEEN

CLESOI HOLDINGS LIMITED.....APPLICANT

AND

PRIME BANK LIMITED.....RESPONDENT

(Being an application for injunction pending the hearing and determination of an intended appeal against the judgment and decree of the High Court of Kenya at Nairobi (Commercial and Tax Division) (Nzioka, J) dated 30th July 2020

in

HCCC NN. 148 of 2011)

RULING OF THE COURT

This Notice of Motion dated 21st December 2020 filed by **the applicant, Clesoi Holdings Limited** is made under **rules 5 (2) (b), 20 (2), 42 and 47 (1), (2) and (4)** of the **Court of Appeal Rules** and seeks orders for an injunction to restrain **the respondent, Prime Bank Limited** and its agents, employees, servants or auctioneers from evicting, advertising for sale, selling whether by public auction or private treaty, disposing of, completing by conveyance or transfer of any sale or auction or private treaty, any leasing, letting, charging or interfering with the ownership or quiet possession over the property known as LR. No. 209/10839/5 (*the suit property*), pending the hearing and determination of this application and the final determination of the appeal.

The application was supported by the affidavit of **Nipti Rajesh Shah**, the applicant's director sworn on 21st December 2020, the applicant's director, the applicant's written submissions, and was brought on the grounds that the applicant is the registered owner of the suit property which was charged to the respondent for credit facilities advanced to Jay Agencies Limited and Camp North Limited. The applicant had filed a suit in the High Court and had subsequently obtained injunctive orders against the exercise by the respondent of its statutory powers of sale over the suit property. The hearing was concluded in December 2018, whereupon, judgment was delivered on 31st July 2020 dismissing the applicant's suit with costs and simultaneously with that decision, the injunctive orders were vacated.

In the motion, the applicant's contention was that the appeal was arguable because the learned judge failed to adhere to the in duplum rule, and in so doing, allowed illegal and non-contractual rates of interest to accrue against the amounts borrowed; blocked the applicant from enquiring into the fixed deposits the respondent was holding, which deposits were then off set against the borrowings; allowed the respondent to exercise its statutory power of sale.

It was further contended that after dismissing the applicant's suit the learned judge granted injunctive orders for a mere 45 days following which, the respondent caused to be advertised in the daily newspaper a public auction that was scheduled to be held on 19th January 2021; that if the suit property were to be sold it will be removed from the jurisdiction of this Court which would render the appeal nugatory in the event that it were to succeed.

The respondent filed a replying affidavit of **Alka Shahi**, an assistant General Manager – Credit of the respondent dated 12th January 2021 and Elijah Mwangi Njeru, the respondent's counsel together with the respondent's written submissions.

It was contended that the applicant is not entitled to the reliefs sought for the reasons that the financial facilities were granted to the applicant's two sister companies, pursuant to letters of offer and charge documents executed by the applicant's directors Rajesh K. Shah,

Pramod K. Shah and Nipti R. Shah on the strength of various board resolutions; that the applicant admitted to having borrowed the sums owed, and conceded to having failed to make any repayments of the sums owed. It was further contended that the debt had risen to the alarming level of Kshs. 148,118,070 caused by the prolonged delay in the exercise of the respondent's powers of sale; that were the suit property to be sold, the respondent had the capability and the capacity to repay any damages suffered by the applicant in the event the appeal were to be successful.

In so far as applications filed under **rule 5 (2) (b)** of this Court's rules are concerned, the threshold to be satisfied, as exemplified in the case of **Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR**, is that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

Upon considering the application, the affidavits and submissions, the applicant's grievances are that the learned judge's decision failed to appreciate that the applicant maintained significant amounts in fixed deposits that were unaccounted for and which were sufficient to pay off the sums borrowed; that the charge facilities were obtained without authorization from the applicant; that the judge also failed to take into consideration that the applicant was a separate legal entity from the borrowers.

In effect, and in light of the above, we consider that the issues raised may be arguable, and having regard to the circumstances of the case, they are questions that the applicant is entitled to ventilate before this Court.

As to whether the appeal would be rendered nugatory, we do not think so. The dispute pertains to a debt owed by the applicant to the respondent, and for which the respondent seeks to recover by exercising its powers of sale over the suit property that was charged to secure the outstanding sums. Should the respondent sell the suit property in order to liquidate the debt, the worst case scenario would be whether the respondent was incapable of refunding the applicant any amounts not due to it, in the event that the appeal were to succeed. But that is not the case here, the respondent has provided an assurance that should the appeal succeed, it has the capability and the capacity to refund any amounts to which it is not entitled to the applicant, and for this reason, we are satisfied that the appeal would not in any way be rendered nugatory.

As such, the applicant having failed to satisfy the second criterion, we decline to grant the injunction sought. The motion dated 21st December 2021 fails, and is dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Nairobi this 19th day of March, 2021.

R.N. NYAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR