



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KOOME, M'INOTI & MURGOR, J.J.A.)

CIVIL APPLICATION NO. NYR 82 OF 2020

BETWEEN

JOHN KING'ORI KIONI.....APPLICANT

AND

SIDIAN BANK.....1ST RESPONDENT

ANTIQUA AUCTION AGENCIES.....2ND RESPONDENT

(Application for an injunction pending the hearings and determination of an intended appeal against the ruling and order of the High Court of Kenya at Nyahururu (Wendoh, J.) dated 28th May 2020

in

HCA No. 22 of 2017)

RULING OF THE COURT

The applicant, John King'ori Kioni obtained an asset finance loan of **Kshs 6,400,000** from *the 1st respondent, Sidian Bank* in March 2013 to enable him purchase a motor lorry. The loan was secured by, among others, a charge over **LR No. Nyandarua/OI Joro Orok Salient/6756 (the suit property)**. After paying a substantial part of the loan, the applicant defaulted and the parties explored various options for repayment of the loan, including restructuring the loan and sale of the lorry and the suit property by private treaty. The negotiations fell through, and when the 1st respondent attempted to repossess the lorry and realize the security through sale of the suit property, the appellant filed *Civil Suit No 142 of 2017* in the **Chief Magistrate's Court** in **Nyahururu** seeking an injunction to restrain the repossession and the sale. The subordinate court found no merit in the application and dismissed the same. The applicant subsequently filed **Civil Appeal No 22 of 2019** in the High Court at Nyahururu in which he again applied for an injunction to restrain the 1st respondent from repossessing the lorry and selling the suit property.

The High Court found that there was no dispute that the 1st respondent advanced the loan to the applicant, that the loan was secured by the lorry and the suit property, and that the appellant had indeed defaulted in repayment. The court rejected the applicant's contention that the 1st respondent had charged usurious and illegal interest rates, noting that the **Banking (Amendment) Act, 2016** which capped interest rates did not have retrospective application and that the relationship between the parties was regulated by the contract they had entered into.

The Court also noted that a dispute on the amount payable was not *per se* a basis for stopping the 1st respondent from realising the securities. Ultimately the court found no basis for granting an order of injunction against the 1st respondent.

The applicant is now before us pursuing the same injunction pending the hearing and determination of an intended appeal. He contends, both in the application and his written submissions, that the interest charged by the 1st respondent was illegal and unlawful. He adds that at the time of repossession of the lorry, it was loaded with a customer's goods valued at **Kshs 4,500,000** which were unlawfully attached and went to waste. Further the applicant argues that the 1st respondent undervalued the securities. In support of the application the applicant relied on **Wilfred Omondi Opiyo v. Mwananchi Credit Ltd [2018] eKLR** and submitted that a chargee owes a duty of care to the chargor.

The 1st respondent opposed the application vide an affidavit sworn by its legal officer, **Jacqueline Wairimu Ndun'gu**, on 1st March 2021, as well as its written submissions.

The substance of the response was that the intended appeal is not arguable because the applicant had not provided a draft memorandum of appeal to show the grounds he intended to present to the Court. It was contended that the applicant had failed to demonstrate how the learned judge erred in the exercise of her discretion when she rejected his application for injunction.

It was also the 1st respondent's argument that the applicant had not even suggested that as a banking institution, the 1st respondent would not be able to compensate him if by any chance his appeal succeeded. We were urged to find that the appeal would not be rendered nugatory. In support of its arguments, the 1st respondent relied on **George Otieno Gache & Another v. Judith Akin Boyo & 5 Others [2017] eKLR**.

To succeed in this application, the applicant is obliged to satisfy us that his intended appeal is arguable, or put differently, that it is not frivolous. (See **Northwood Development Co Ltd v. Hussein Alibhai Pirbhai & 2 Others [2015] eKLR**). An arguable appeal need not raise a multiplicity of issues and need not, in fact, succeed at the hearing; an arguable appeal is merely one that raises even one *bona fide* issue that deserves full consideration by the Court. (See **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA No. Nai. 72 of 2001**).

In addition to demonstrating that the intended appeal is arguable, the applicant must also satisfy the Court that it will be rendered nugatory if the injunction sought is not granted. For an appeal to be rendered nugatory means that its success is futile, worthless or a mere pyrrhic victory because what has happened in the intervening period cannot be reversed or adequately compensated by award of damages. (See **Hashmuklal Virchad Shah & 2 Others v. Investment and Mortgage Bank Ltd [2014] eKLR**). An applicant must satisfy these two considerations and will not be granted a relief under **rule 5(2)(b)** of the **Court of Appeal Rules** if he satisfied only one of the considerations. (See **Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31**).

While we are prepared to find that the applicant's application is arguable, we are not persuaded that it will be rendered nugatory if it succeeds without the injunction sought.

The dispute between the parties can be determined in monetary terms up to the last cent. The applicant has not alleged, let alone proved on a balance of probabilities, that the 1st respondent will be unable to compensate him for any loss that he may suffer if the appeal succeeds, absent the injunction.

This application therefore fails and is dismissed with costs to the 1st respondent. It is so ordered.

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

M. K. KOOME

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR