



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, ASIKE-MAKHANDIA & MURGOR, J.J.A.) NYR.

CIVIL APPLICATION NO. 81 OF 2019

BETWEEN

KIRU TRADERS LIMITED.....APPLICANT

AND

JAMII BORA BANK LIMITED....1ST RESPONDENT

KEYSIAN AUCTIONEERS.....2ND RESPONDENT

(Being an application for stay and injunction pending appeal from orders of the High Court of Kenya at Muranga (Kimondo, J.) dated 16th May, 2019 in Murang'a H.C.C.C. No. 12 of 2018)

RULING OF THE COURT

1. *Kiru Traders Limited* (applicant) filed suit before the High Court at Muranga being **Murang'a High Court Case No. 12 of 2018**. Pending the hearing of the suit, the applicant sought an interim order of injunction against the respondents to restrain them from exercising the statutory power of sale over land known as **Loc. 11/Maragi/5317** (suit premises). By a Ruling delivered on 16th May 2019, by **Kimondo J.**, the learned Judge dismissed the applicant's motion with costs. Aggrieved by the said order of dismissal, the applicant filed a Notice of Appeal and the motion before us dated 31st May, 2019 in which it is seeking an order of stay of execution of the aforesaid order and/ or an order of injunction to restrain the respondents from selling the suit premises until the intended appeal is heard and determined.

2. The application is supported by an affidavit sworn by **Johnson Maina Stephen** on 29th May, 2019. The applicant states that the appeal is arguable for reasons that it was fraudulently induced by the 1st respondent (the Bank) to take the loan and that the forced sale of the suit premises will be below the value. The applicant terms the exercise of sale threatened by the Bank as illegal and if allowed to proceed, it contends that its members will suffer irreparable loss. That the applicant is made up of forty (40) members mostly peasants who earn their daily livelihood from coffee farming activities derived from the suit premises. Moreover, the intended appeal will be rendered nugatory.

3. The application was opposed by the 1st and 2nd Respondents vide a replying affidavit sworn by **Jackson Kimathi** on 26th February, 2021. It is stated that the application is devoid of any merit as the applicant has not demonstrated how the appeal is arguable having received the loan proceeds and failed to repay the same as per the mortgage agreement. The Bank gave a detailed account of how the applicant was advanced a mortgage facility of Kshs.9,260,000, the suit premises were offered as security. Later, on 3rd July, 2015, the applicant requested for a top up loan of Kshs.6,043,551.00, and a further charge was registered on the suit premises in addition to personal guarantees that were executed by the directors.

4. When the applicant defaulted, the Bank allowed a restructuring of the loan facility and due to persistent default, several demands and reminders were issued to the applicant as per the correspondence annexed. Finally, the Bank was left with no alternative but to seek realization of the security after issuing the requisite statutory notices including the mandatory forty (40) days notices of sale dated 20th April, 2018. After the lapse of the notice and due to failure by the applicant to pay the mortgage, the Bank instructed the 2nd Respondent to sell the property by public auction.

5. This application was conversed by the Court considering the written submissions without appearance by counsel pursuant to the Court Practice Directions to mitigate the spread of the COVID - 19 Global Pandemic. This was done against the backdrop of established principles under **Rule 5 (2) (b)** of this Court Rules, that for the applicant to succeed, it must establish that; the appeal is arguable and not frivolous and

that if the stay order sought is not granted the appeal will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai. 157 of 2006** (unreported), the principles to bring to bear on whether or not to grant an order of stay of execution were set out thus: -

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (See also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”

6. We now wish to consider this application within the above set out principles to answer the twin issues of whether the applicant has an arguable appeal and secondly whether the appeal if successful will be rendered nugatory if an order of stay is not granted. It is common ground that the applicant took a loan which was secured by the suit premises. The learned trial Judge declined to exercise his discretion to grant the order of injunction for reasons that the applicant had not established a *prima facie* case with a probability of success. Based on the facts on record and the submissions by the applicant, no details have been given to support the allegation that it was fraudulently coerced by the bank to take the loan. Moreover, the applicant went ahead to apply for a top up and there is no evidence of payment. For us, based on these uncontested matters, we are not entirely persuaded of the arguability of the intended appeal, although this will fall within the province of the Bench that will consider the intended appeal.

7. On the nugatory aspect, there was no evidence adduced to show that if the appeal were to succeed the Bank would be unable to compensate the applicant for the value of the suit premises. It is now settled that once land is offered as security for a loan, it becomes a chattel and, in the event that it turns out that the mortgagee was wrong to exercise the power of sale, whereby the mortgagor loses the equity of redemption, the remedy lies in damages. The applicant has not demonstrated that the Bank will be unable to compensate it with damages should the appeal succeed.

8. In conclusion, we find the applicant’s motion dated 31st May, 2019 without merits and we order it dismissed with costs to the 1st respondent

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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