



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 152 OF 2020

BETWEEN

PATRICK JAMES MBOGO.....1ST APPLICANT

JOSEPHINE MUKAMI MBOGO.....2ND APPLICANT

-AND-

BANK OF AFRICA KENYA LIMITED.....RESPONDENT

(Being an application for injunction pending the hearing and determination of an intended Appeal from the Ruling and Orders of the High Court of Kenya at Milimani, Nairobi (Maureen A. Odero, J.) dated the 25th day of November 2019 in H. C. C. C. No. 341 of 2018)

RULING OF THE COURT

1. The Notice of Motion before us is dated 16th June, 2020 and is brought under the provisions of **Section 1A, 1B, 3 and 3A** of the **Civil Procedure Rules, 2010, Article 159 of the Constitution of Kenya 2010** and **Rule 5(2)(b)** of the **Court of Appeal Rules**. It is taken out by **Patrick James Mbogo** (the 1st Applicant) who moved this Court seeking, *inter alia*: -

“That this Honourable Court be pleased to issue Orders restraining the Respondent, their workers, agents or anyone acting on their behalf from attaching, transferring, alienating, advertising, selling or in any other way interfering with the properties known as KAJIADO/KITENGELA 22515, KAJIADO/KITENGELA 22516 and KAJIADO/KITENGELA 22517 or any other property of the Applicants pending the hearing and determination of the Applicant’s intended Appeal.”

2. The key issue in dispute between the parties are various loan facilities amounting to Kshs.70,000,000/= advanced to the applicants by the respondent on or about the year 2011 for construction of residential apartments on Land Title Nos. **Kajiado/Kitengela 22515, Kajiado/Kitengela 22516 and Kajiado/Kitengela 22517** (the suit properties). The applicants, having failed to service the loans and despite being issued with several demands to no avail, the respondent finally moved towards the realization of the securities by way of sale of the suit properties by public auction.

3. This prompted the applicants to institute two suits against the respondent, **Nairobi High Court Civil Case No. 346 of 2016** and also **Nairobi High Court Civil Case No. 341 of 2018**. Subsequently, the respondent filed an application seeking to strike out **HCCC NO 341 of 2018** with costs or in the alternative, the same be stayed pending the hearing and determination of **HCCC NO 346 of 2016** which had been filed earlier. The trial court vide its Ruling delivered on 25th November, 2019 found that **HCCC NO 341 OF 2018** was sub-judice as **HCCC No 346 of 2016** was a live matter and that it was nothing but a thin attempt to litigate the same cause of action twice in the same court over the same dispute between the same parties. This is what the learned Judge posited in a pertinent paragraph of the said Ruling: -

“Additionally, I find that the subject matter of the two suits is exactly the same being the loan facilities granted by the defendant Bank to the Plaintiffs sometime in the year 2011. The two suits both involve the same properties being the securities offered up by the plaintiffs for the said loan facilities.....

Similarly, the two suits involve the question of whether or not the defendant Bank is entitled to exercise its statutory power of sale with respect to the securities.”

4. Aggrieved by the said outcome, the applicant filed a Notice of Appeal evincing their intention to file an appeal. Pending the hearing and determination of the intended appeal, they filed the instant application which is supported by an affidavit that was sworn by **Patrick James Mbogo** on 16th June, 2020 in which he states that the loan facilities were secured by the suit properties all in his names, which loan he and the 2nd respondent diligently repaid until they got into financial difficulties. On 5th December, 2017 they presented a promissory note to the respondent which was acknowledged but to their utter shock, after more than fifty (50) days, the respondent purported to dishonour the promissory note. Thereafter, a dispute arose over payment of the said loans and the respondent purported to transfer ownership of the suit properties; that the dispute pertaining to the promissory note was the issue for determination in this suit which was struck out and that their intended appeal raises triable issues with a very high chance of success such that if the respondent proceeds to realize the securities the intended would be rendered nugatory.

5. The application was opposed by the respondent vide the replying affidavit sworn by **Githagui Morgan Kinyanjui, a Manager in the Debt Recovery office of the Respondent** on 16th September, 2020. He first of all indicated that the multiplicity of suits instituted by the applicants is indicative of their bad faith; abuse of the court process and their ill intentions to continue evading their obligation to repay the loans advanced, notwithstanding the residential apartments developed with the loan proceeds are accruing rental income which they are benefitting from. Secondly, that the respondent’s right to exercise its statutory power of sale has crystallized, that the applicants have failed to demonstrate how the appeal is arguable when they were out rightly abusing the court process by filing a multiplicity of suits, and also how the appeal would be rendered nugatory as the remedy for unlawful sale if the appeal is successful is a claim for damages which the respondent would be able to pay in the event the appeal was successful.

6. This application was canvassed by way of written submissions without appearance by counsel or parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Global pandemic. We have considered the motion and the replying affidavit. This application invokes the jurisdiction of this Court as provided under **Rules 5(2) (b) of the Court of Appeal Rules** that:-

“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may— in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just”

The guiding principles when exercising this jurisdiction have been set out in a long line of case law. 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.)”

7. We now wish to consider this application within the above set out principles to answer the twin issues of whether the applicants have 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 applicants were advanced a loan facility by the respondent amounting to Kshs.70,000,000/= which they failed to service; that the respondent exercised its statutory power of sale under the charge and proceeded to sell the property by way of a public auction. The applicants filed a suit over the same subject matter, involving the same parties notwithstanding the fact that **HCCC NO 346 of 2016** was still pending. The Judge considered the principle of *sub judice Rule* under **Section 6 of the Civil Procedure Act** which prohibits a court from dealing with a matter that is already directly and substantially in issue in another suit. In view of these uncontested matters, we are not persuaded the applicants have an arguable appeal.

8. Even on the nugatory aspect, should the appeal be successful, it is already an old hat that once a party offers a title as security and the mortgagee wrongfully exercises the power of sale, the remedy lies in damages. The damages in this regard can be ascertained and there is no allegation that the respondent, a banking institution, would be unable to compensate the applicants if the suit properties are wrongfully sold. It is for the aforesaid reasons that we find the applicants have not demonstrated how the appeal can be rendered nugatory as they are at liberty to proceed to litigate their cause of action vide the pending suit in **HCCC No. 346 of 2016**.

9. In conclusion, we find the Notice of Motion dated 16th June, 2020 has not satisfied the principles for granting an order of stay of execution and is hereby dismissed with costs to the respondent.

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

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR