



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, J. MOHAMMED & KANTAL, JJ.A)

CIVIL APPLICATION NO. E256 OF 2020

BETWEEN

RUKUNDO LIMITED.....APPLICANT

AND

JAMII BORA BANK LIMITED.....1ST RESPONDENT

ANTIQUA AUCTIONEERS AGENCIES.....2ND RESPONDENT

ROBERT WAWERU MAINA.....3RD RESPONDENT

(Being an application for stay of execution pending the Appeal against the ruling and order of the High Court of Kenya at Nairobi (Odero, J.) dated 21st July, 2020

in

HCCC No. 107 of 2018)

RULING OF THE COURT

The applicant, **Rukundo Limited** obtained a loan facility of Kshs. 20,000,000 from **Jamii Bora Bank Limited**, (the Bank) the 1st respondent. It charged L.R No. 3734/231 (Original Number 3734/5/118) (the suit property) as collateral. On 1st May 2017 one of its directors passed away and the applicant initiated the process of obtaining compensation for the loss from the insurance Company through the Bank. The applicant avers that the said amount would have satisfied a substantial sum of the loan. However, the Bank did not follow up on the compensation. Instead, it issued the applicant with a redemption notice on 22nd January 2018 and advertised the sale of the suit property by public auction by the 2nd and 3rd respondents scheduled on 21st March 2018.

In a bid to secure its rights, the applicant filed suit at the High Court seeking in the main a permanent injunction restraining the respondents, their agents or servants from disposing off or selling the suit property. Further, it filed a motion dated 13th March 2018 seeking an interlocutory injunction restraining the respondents from selling, transferring, alienating or advertising the suit property. By a ruling delivered on 4th June 2018, Ochieng', J dismissed the application.

Subsequently the applicant paid a sum of Kshs. 10,000,000 which cleared the loan arrears. It also obtained the loan account statements and subjected them to an audit by Messrs Interest Rates Advisory (IRA) which disclosed that the Bank had been levying illegal interest on the loan facility to a tune of Kshs. 2,623,552. 04 contrary to provisions of the **Banking Act**. After protracted negotiations, the Bank refunded the applicant Kshs. 2,592,908 and has an outstanding balance of Kshs. 30,644.01. The Bank continued to levy the said illegal charges and deductions for auctioneers and other costs to a tune of Kshs. 5,361,550.77 and then, on 24th June 2019, issued the applicant with a 45-day notification of sale scheduled for 28th August 2019.

This prompted the applicant to seek the protection of the High Court. It sought the review of the earlier ruling on the ground, among others, that the Bank had been levying illegal interests over the loan facility. By a ruling delivered on 21st July, 2020, Odero, J also dismissed the application.

Aggrieved by the decision, the applicant filed a notice of appeal and has now filed the motion seeking the following orders;

2) THAT this Honourable court be pleased to issue an order of injunction restraining the Respondents, their employees, agents, assigns and/or anyone claiming under them from in any manner dealing with advertising, auctioning, transferring, disposing of or in any other manner interfering with the property known as L.R No. 3734/231 (Original Number 3734/118) pending the hearing and determination of this application.

3) THAT this Honourable court be pleased to issue an order of injunction restraining the Respondents, their employees, agents, assigns and/or anyone claiming under them from in any manner dealing with advertising, auctioning, transferring, disposing of or in any other manner interfering with the property known as L.R No. 3734/231 (Original Number 3734/118) pending the hearing and determination of the intended appeal.

Even though the title of the application states that it is one for stay of execution, the prayers stated herein are for an injunction. The same is based on 15 grounds on the face of it and is supported by an affidavit sworn by **Dr. Florence Muturi Muli**, a Director for the applicant. She deposed that the intended appeal is arguable as it raises valid grounds of an illegal levy of interest rates on the loan facility which renders the statutory notices issued by the 1st respondent illegal. Following the dismissal of the review application, the respondents are at liberty to proceed with the sale of the suit property which would render the appeal nugatory.

In opposition, the respondents filed a replying affidavit sworn by **Jackson Kimathi**, the Bank's Legal Manager. He contended the learned Judge issued negative orders and the same cannot be stayed. Therefore, this application is frivolous as it failed to demonstrate that the applicant has an arguable appeal and how the same would be rendered nugatory if the stay is not granted. Further, the bank is in a position to compensate the applicant should the appeal succeed. Therefore, the application has not met the threshold required under **Rule 5(2)(b)** of this Court's Rules and ought to be dismissed be costs.

Counsel for the parties filed written submissions which we have fully considered.

For an application under **Rule 5(2)(b)** to succeed, an applicant must satisfy the Court on two limbs. First, that he has an arguable appeal and secondly, that the appeal will be rendered nugatory if its substratum is not preserved. On arguability, the applicant needs to raise at least one point that demands an answer from the respondent and is worthy of judicial consideration or interrogation on appeal. See **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS [2013] eKLR**.

On the first limb, it is trite that the points raised or any one of them need not succeed. We need only be satisfied that a single *bona fide* arguable point has been disclosed, and we are. The fact that the Bank refunded some of the overcharged amounts of money goes to show that indeed the applicant has an arguable ground on the issue of illegal interests.

On the second limb, we find that the appeal will be rendered nugatory should we not grant the injunction as on the face of it, the statutory notices ought not to be executed prior to the hearing and determination of the appeal by this Court.

For these reasons, we find that this application has merit and we therefore allow it as prayed. Costs shall be in the intended appeal.

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

P. O. KIAGE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR