



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OUKO (P), NAMBUYE & ASIKE- MAKHANDIA, JJA

CIVIL APPLICATION NO. E371 OF 2020

BETWEEN

COLLOGNE INVESTMENTS LIMITED.....APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED.....1ST RESPONDENT

NAKUMATT HOLDINGS LIMITED

(UNDER ADMINISTRATION)..... 2ND RESPONDENT

(Being an application for injunction from the ruling and order of the High Court at Nairobi (Mabeya .J)

dated 23rd November 2020)

IN

CIVIL CASE NUMBER E269 OF 2020)

RULING OF THE COURT

The Applicant, **Collogne Investments Limited** comes before us by way of a Notice of Motion expressed to be brought under **Rule 5(2) (b)** of the Court of Appeal Rules. It seeks an order of injunction to restrain the 1st respondent whether acting by its servants, agents, or any other person acting under its authority, from causing the transfer, registration, conveyance, lease, encumbrance and or compromise any of the applicant’s interest and entitlement over all that piece or parcel of land known as L.R. No 209/11158 within Nairobi County (“the suit property”) pending the hearing and determination of the intended appeal.

The genesis of the application is that the applicant was the registered proprietor of the suit property which it used as security to obtain a loan from the 1st Respondent. Upon default in the repayment of the loan the 1st respondent issued the applicant with statutory notice in its bid to exercise the statutory power of sale. The notice prompted the applicant to file a suit against the respondents in the High Court seeking injunctive reliefs amongst other prayers. Contemporaneously with the filing of the suit the applicant took out a motion on notice under Certificate of urgency against the 1st respondent on 22nd May 2020. The application was heard ex-parte in the first instance but no ex-parte orders were issued until 12th October 2020 when Kasango J. ordered for the maintenance of the status quo then obtaining with regard to the suit property until 18th December 2020. Thereafter the 1st respondent sold the suit property to Furniture Palace International (Kenya) Limited for 1,042,600,000/= in the exercise of its statutory power of sale. This action prompted the applicant to file another application seeking orders to prevent the registration of the suit property to the purchaser aforesaid.

On the other hand, the 1st respondent on 28th October 2020 filed an application to lift and set aside the orders of status quo aforesaid. Upon hearing both applications, Mabeya. J. on 23rd November 2020 dismissed the Applicant’s application but allowed the 1st Respondent’s application but allowed the 1st Respondents motion and lifted the orders of status quo, effectively allowing the 1st respondent to finalize the sale. The applicant is keen to challenge that ruling on appeal in this Court. As evidence of its seriousness, the applicant has file a notice of appeal upon which the current application is premised.

The grounds, the supporting affidavit and submissions of the applicant argue that though the suit property has been sold through public action, the process should not be left to be finalized as it was tainted with illegality, that there disparity in the record supplied to the respondent from the High Court that was used by Mabeya J. to write the ruling as the record does not reflect comprehensively the proceedings of 22nd September, 2020 to wit, that there was an undertaking by the 1st respondent not to proceed with the sale of the suit property; in that regard the applicant will be arguing in the intended appeal; as to what is a court record, what are the consequences of a court record going missing, can a court's judgment, order and or proceedings be based on or flow from a missing record? To the applicant the above grounds make the intended appeal arguable.

On the nugatory aspect it was the applicant's case that if the suit property is disposed of, it will suffer irreparable loss and the substratum of its intended appeal will immediately dissipate. The suit property is of remarkable value, serves as offices of the applicant and its tenants and is charged to other banks as co-chargors with the 1st respondent. If transferred or registered in the name of purchaser, the applicant will find it insurmountably difficult to recover the suit property or be adequately compensated thereby rendering the intended appeal nugatory.

From the Respondents' replying affidavit and submissions opposing the application it is stated that there was no arguable case presented by the Applicant nor would the intended Appeal, if any be rendered nugatory if the orders sought are not granted. That the debt is not denied or disputed by the Applicant, the memorandum of appeal is only meant to mislead the court with regard to the proceedings in the High Court and further that the suit property had already been sold to the purchaser who is not party to these proceedings. There was no undertaking whatsoever given by 1st respondent and if indeed there was such an undertaking, it was in respect of a different suit involving different parties being HCCC No. 385 of 2020.

That the 1st Respondent is a reputable Bank and incase there is no injunction, it would be able to compensate the applicant incase the appeal succeeded hence the intended appeal would not be rendered nugatory.. Further that the suit property having been sold to the purchaser, an injunction should not issue that will affect the property rights of the said purchaser without being accorded a hearing. On that basis we were asked to disallow the application in its entirety.

We have considered the application, the rival affidavits, the respective submissions, the authorities cited and the law. Our jurisdiction under Rule 5(2) (b) is discretionary and fairly wide. In the judicious exercise of this discretion however the court must be satisfied on the twin principles for granting relief under the said Rule firstly, determination that the intended appeal is not frivolous but arguable and secondly, that if the orders sought are not granted, the success of the intended appeal will be rendered nugatory. These principles were restated and amplified by this in the case of **Multi-Media University and Another Vs. Professor Gitile N. Naituli 2014 eKLR** as follows:-

“When one prays for orders of stay of execution as we have found that those are what the applicant are actually praying for, the principles on which this court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied”. See also Stanley Kangethe Kinyanjui Vs Tony Ketter & 5 others [2013] eKLR.

On the first limb, we have perused the draft memorandum of appeal and we are satisfied that the grounds are not arguable at all. The purported grounds were not the issues which were canvassed before the trial court. In any event the debt is not contested. The applicant's grounds in the intended appeal centers mainly on the court record upon which the trial court relied on reaching its verdict .The applicant claims that it was incomplete, distorted and omitted an undertaking given by the 1st

Respondent. These issues have risen post ruling. They were never canvassed before the trial court. In any event and as correctly submitted by the respondents the undertaking was given in a different case which the respondent was not a party to. Further it appears that the applicant will be challenging the exercise of discretion by the trial court in refusing its application. It is trite that an appellate court will rarely interfere with the discretion exercised by the trial court unless it is demonstrated that the exercise was injudicious.

Finally, is the issue of the suit property having been sold to a third party namely, Furniture Palace international (Kenya) limited which is not disputed. It is not also disputed that the said third party has not been joined in this application. It will thus be unfair and unjust to issue an injunction that will affect its proprietary rights without being accorded an opportunity to be heard. Finally the debt is not denied.

All said and done we are not satisfied that the applicant has an arguable appeal. Since it is a requirement that both limbs of arguability and nugatory aspect be demonstrated before an order can be granted under rule 5(2) (b) of this court's rules and the applicant having failed to establish the arguability of the intended appeal, we need not consider the nugatory aspect.

The upshot is that we decline to grant an injunction pending the hearing and determination of the intended appeal with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR