



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAL, J.J.A.)

CIVIL APPLICATION NO. EO17 OF 2020

BETWEEN

YURUB INVESTMENT LIMITED.....1ST APPLICANT

NEW NYANZA WHOLESALERS LIMITED.....2ND APPLICANT

AND

DIAMOND TRUST BANK LIMITED.....1ST RESPONDENT

DALALI TRADERS AUCTIONEERS.....2ND RESPONDENT

(Being an application for an injunction pending the hearing and determination of

an intended appeal from the Ruling of the High Court of Kenya

at Nairobi (M. Odero, J.) dated 5th June, 2020

in

H.C.C.C. No. 139 of 2018)

RULING OF THE COURT

We are asked in the Motion brought under **Article 159** of the **Constitution of Kenya, 2010** and **rule 5 (2) (b)** of the **Court of Appeal Rules** and all other enabling provisions of law in the main to issue orders restraining the respondents from attaching or transferring or advertising for sale the property known as **L.R. No. 209/1063 (the suit property)** pending hearing and determination of the application and an intended appeal. In grounds on the face of the Motion and in a supporting affidavit of **Asha Hersi Moghe**, a director of the 1st applicant (**Yurub Investment Limited**) it is said that the object of the application will be defeated if stay orders are not granted. It is said that the 1st respondent (**Diamond Trust Bank Limited**) had advertised for sale the suit property in exercise of its statutory power of sale; that statutory notices had not been served; that in a ruling delivered on 5th June, 2020 the High Court of Kenya (**Odero, J.**) had dismissed an application for injunction; the applicants had since filed a Notice of Appeal; that the respondents had indicated intention to proceed with the sale of the suit property which had been charged as security for a loan and that if the suit property is sold it would be beyond the reach of the applicants.

In a replying affidavit **Tarminder Umesh**, the **Debt Recovery Officer** of the 1st respondent it is said in material part that the applicants had filed a similar application in this Court being **Nairobi Civil Application No. E222 of 2020 Laburnam Courts Limited v Diamond Trust Bank** which had been dismissed; that this present Motion is an abuse of the court process. At paragraphs 7-9 (inclusive) of the replying affidavit the respondent avers as follows:

“7. THAT the Applicants herein filed a Notice of Motion dated 15th September 2020 NRB HCCC No. 139 of 2018 consolidated with NRB HCCC No. 451 of 2017 seeking similar orders as the present application.

8. THAT I am aware the Honourable Court heard the said Application on 23rd September 2020, and issued the following Orders:

1. The auction for 24th September 2020 be halted on the following conditions:

i. The Plaintiffs to settle the auctioneer's charges by the close of business of 24th September 2020;

ii. The Plaintiffs to furnish a Bank Guarantee for Kshs. 100 million within 30 days from today;

2. Failure to comply with either of the above conditions, the Bank shall be at liberty to auction the property without any further orders from the court;

Annexed hereto and marked as "TU3" is a copy of the said order.

9. THAT the Bank waited patiently for the Applicant to comply with the said Order of 23rd September 2020 but the Applicant failed to comply and as a result I am aware the Bank's Advocates notified the Applicant of their non-compliance through a letter dated 26th October 2020. Annexed hereto and marked as "TU4" is a copy of the said letter dated 26th October 2020."

It is further deponed that in light of non-compliance with the orders issued by the High Court the bank was at liberty to exercise its power of sale which it did; that the applicant approached the High Court with an application for review where certain orders were made inclusive of orders to pay money to the 1st respondent but that the applicants again failed to comply with Court orders. The deponent denies that the Motion has any merit and prays that it be dismissed.

Both sides filed written submissions and the respondent also filed a List of Authorities which we have carefully considered.

An applicant, to be entitled to orders sought as in this application must, firstly, demonstrate that the appeal, or intended appeal, is arguable, which is the same as saying that the same is not frivolous. Such an applicant, to succeed, must in addition, demonstrate that the appeal would be rendered nugatory absent stay – See *Stanley Kinyanjui Kangethe v Tony Ketter & Others [2013] eKLR* where the said principles were well summarized.

The intended appeal is from a ruling and orders made in an interlocutory application. As the suit at the High Court is pending the less we say here the better as we should not embarrass either the trial court or the Court on appeal.

The applicants admit that the suit property was offered as a security for a loan advanced to the applicants by the 1st respondent. The loan was not paid and the 1st respondent decided to exercise statutory power of sale donated by a charge on the suit property.

The 1st respondent says that the loan advanced to the applicants was not paid. Further, that the applicants filed applications before the High Court where conditional orders of stay were given which included conditions to pay money but which conditions the applicants did not meet. The 1st respondent also says that the applicants filed a similar application in this Court which was dismissed. All these facts have come, not from the applicants, but from the 1st respondent. As this and other courts have said before a party who seeks an equitable remedy must come to court with clean hands – See the case of *Kawaljeet Singh Zekhi v Peter Wainaina Kamau & 2 Others [2016] eKLR*. The applicants failed to disclose material facts on matters that happened in the High Court and in this Court and comes to us asking us to exercise our discretion in their favour. That we cannot do in circumstances as exist here. We cannot, in the circumstances enumerated before us, discern any arguable point in the intended appeal. Being of that view we need not consider whether the intended appeal would be rendered nugatory if we decline to stay the ruling.

The Motion fails and is dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 21st day of May, 2021.

R.N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR