



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE J. MOHAMMED & KANTA, JJA]

CIVIL APPLICATION NO. 284 OF 2018

WESTEND HOTEL LIMITED.....APPLICANT

AND

BANK OF INDIA.....RESPONDENT

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

appeal from the Ruling and Order of Eboso J dated 27th September 2018)

In (Nairobi ELC Case No. 2 of 2018)

RULING OF THE COURT

Before us is a motion dated 5th October 2018, brought under the provisions of **Rules 5 (2) (b) of the Court of Appeal Rules** in which **Westend Hotel Limited** (*the applicant*) seeks the following orders:

“1. THAT the Honourable Court be pleased to issue an Order of injunction restraining the respondent, its agents, and servants from selling, disposing off, transferring, alienating or in any other manner interfering with the applicant’s title and interest in L.R No. 1870/111/499 so as to affect or defeat the applicant’s rights pending the hearing and determination of the intended appeal.

2. THAT costs of this application do abide the outcome of the intended appeal.”

The motion is supported on the grounds on the face of the motion and an affidavit sworn by **Piyush Ratilal Shah** who deponed *inter alia* that he was a Director of the applicant and that they had instructed their advocates on record to file an application for injunction before the High Court which application was dismissed by **Eboso, J** on **27th September 2018**. That, being aggrieved by the aforesaid decision, they had instructed their advocates on record to file an appeal to this Court, which appeal was without doubt arguable as it raised substantial issues of law and general public importance that need to be canvassed before this Court to wit: *inter alia* that, the learned judge did not have the jurisdiction to hear and determine the injunction application sitting as the Environment and Land Court Judge as the dispute involved a legal charge and settlement of amounts owing from the appellant to the respondent on account of a contractual relationship which falls out of the purview of the jurisdiction donated by Section 13 of the Environment and Land Court as read with Article 169 and 162 of the Constitution of Kenya.

The motion was opposed by the respondent vide a replying affidavit dated **26th October 2018**, sworn by **Debakanta Tripathy**, the Chief Manager of the respondent who deponed *inter alia* that the applicant voluntarily submitted to the jurisdiction of the Environment and Land Court and filed its suit at the said court having believed that the court had sufficient jurisdiction to adjudicate on this matter which belief cannot now be extinguished by the fact that the Environment and Land Court did not deliver the pronouncement anticipated by the applicant. He further deponed that there was no arguable case before this Court from the learned judge’s ruling delivered on **27th September, 2018** and as such the application should be dismissed.

It was submitted for the applicant that its appeal was meritorious and arguable with high chances of success and in particular ground 2 and 7 of the memorandum of appeal as the learned judge did not have the jurisdiction to hear and determine the injunction application sitting as the Environment and Land Court Judge, as the dispute involved a legal charge and settlement of amounts owing from the appellant to the respondent on account of a contractual relationship and that the learned judge erred in failing to take into account the legal principles

governing the exercise of statutory power of sale. Consequently, the applicant submitted that it had satisfied the twin principles by establishing a *prima facie* case and that there was a real danger that the suit property may be dissipated by the respondent without hope of recovery if an injunction is not granted as sought.

On the other hand, it was submitted for the respondent that from a cursory look at the grounds of appeal, it is evident that the applicant does not have an arguable case on appeal as the applicant's appeal was predicated on wrong facts, a severe, chronic and incurable lack of evidence and a misguided interpretation of the law as the applicant failed to present any evidence showing any infringement of its rights and evidently relies on deficient grounds of appeal.

As to whether the appeal will be rendered nugatory if the orders sought are not granted, it was submitted that the respondent sought to exercise its statutory power of sale by disposing of the suit property to recover the entire outstanding loan amount and that it was quite clear that the suit property is quantifiable and in the event that the same is disposed of prior to the conclusion of the appeal, then the value of the suit property together with any other awards or costs that this court would deem fit would be paid by the respondent and that further the respondent was a bank and would therefore be capable of paying up the value of the suit property if the appeal was successful. Consequently, the respondent urged the court to dismiss the injunction application with costs to the respondent.

We have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties and the authorities cited.

The applicant's motion is brought under **Rule (5) (2) (b)** of this Court's

Rules. **Rule 5 (2) (b)** of the Rules, which guides the Court in applications of this nature provides:

“(2) 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:

a. ...

b. 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 principles for our consideration in the exercise of our unfettered discretion under **Rule 5 (2) (b)** to grant an order of stay or injunction are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles were summarized by this Court in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2103] eKLR as follows:

“ i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court.

v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.

vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.

viii. An applicant must satisfy the Court on both the twin principles.

ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.

x. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.

xi. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.

xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

A cursory perusal of the pleadings herein does not show that the applicant has an arguable appeal. The issue raised by the applicant that the trial court did not have the jurisdiction to hear and determine the injunction application sitting as the Environment and Land Court as the dispute involved a legal charge and settlement of amounts owing from the appellant to the respondent on account of a contractual

relationship, which falls out of the

purview of Environment and Land Court. We note that it is the applicant who actually chose that forum and filed its case there obviously under the belief that the court had the jurisdiction to deal with the matter. The applicant cannot now be heard to say that the court where it filed its own matter did not have jurisdiction as there is no evidence that the issue was raised before the trial court and the court failed and/ or refused to deliberate on the same. It is our considered opinion that this issue is an afterthought simply because the applicant did not get the intended results. However, we shall say no more on this, lest we embarrass the bench that will be seized of the matter.

As to whether the appeal will be rendered nugatory if an order of injunction is not granted, we note that the respondent herein is a financial institution and it lent the sums it is now demanding from the applicant. It has not been demonstrated that it will be incapable of paying up the value of the suit property if the appeal is successful. Ultimately, we are not satisfied that the appeal will be rendered nugatory if an order of injunction is not granted.

In view of the above, and the applicant having not established the twin principles for consideration in an application under Rule 5(2) (b) of this Court's Rules to warrant grant of an order of injunction, the motion dated **5th October 2018** must fail.

The upshot of the foregoing is that the motion dated **5th October, 2018** is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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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