



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KOOME & MUSINGA, J.J.A)

CIVIL APPEAL (APPLICATION) NO. E491 OF 2020

BETWEEN

OBADIAH MUTISYA KITONYI APPLICANT

AND

KENYA COMMERCIAL BANK1ST RESPONDENT

JOSEPH MUSEMBI MALA T/A

SINGLELINE CONTRACTORS2ND RESPONDENT

(An application for an injunction pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Odero, J.) dated 18th September, 2020

in H.C.C.C. No. E230 of 2019)

RULING OF THE COURT

1. The dispute between the parties herein revolves around a loan facility of Kshs.20,000,000 which was disbursed to the 2nd respondent by the 1st respondent. As per the letters of offer, the loan was secured by a charge over L.R No. 209/1354, which is registered in the applicant's name, as well as a personal guarantee and indemnity by the applicant. However, there was default in repayment of the loan causing the 1st respondent to invoke its statutory power of sale.

2. Contesting the exercise of the said statutory power of sale, the applicant filed a suit, **H.C.C.C No. E230 of 2019**, in the High Court. He averred that the same was illegal since he had been duped by the respondents into entering into the loan transaction; that he was not aware of the implication of the transaction as it was never explained to him when he executed the letters of offer; that the loan facility was disbursed to the 2nd respondent without his knowledge; that he was kept in the dark with regard to the statement of accounts of the loan facility; that the requisite statutory notice of the 1st respondent's intention to activate its statutory power of sale was never served upon him; and that all in all, the respondents had colluded to fraudulently deprive him of the suit property.

3. Contemporaneously, the applicant filed a motion in the High Court seeking *inter alia*, an injunction restraining the respondents from disposing the suit property by way of auction pending the hearing and

determination of the suit.

4. However, Odero, J. in a ruling dated 18th September, 2020 declined to issue the injunction on the grounds that the applicant had not established a *prima facie* case or demonstrated that it would suffer irreparable harm.

5. Aggrieved by that decision, the applicant intimated its intention to challenge the same by filing a notice of appeal to that effect as well as the current application before us in which the applicant is praying for an injunction restraining the respondents from selling by auction, transferring or in any way interfering with his ownership of the suit property pending the determination of the appeal.

6. As far as the applicant was concerned, the appeal was arguable and would be rendered nugatory if the injunction was not granted. It was submitted that at the time of filing the application, the suit property had been advertised for sale on 15th December, 2020 through public auction; that the issue of fraud surrounding the transaction could only be determined through evidence at the trial; that should the sale of the suit property proceed, the applicant would be condemned unheard which would be a travesty of justice; that the respondents would not suffer any prejudice if this Court were to grant the injunction sought; and that the applicant was ready and willing to offer security should the Court require him to do so.

7. Despite service of the application and the hearing notice on the respondents only the 1st respondent filed a replying affidavit and submissions opposing the same.

8. On the 1st respondent's part, the application was not only misconceived but also brought in bad faith to prevent it from exercising its statutory power of sale. Further, the applicant had not met the requisite threshold to warrant the injunction sought. According to the 1st respondent, the injunction would amount to injustice because the applicant had not disputed the existence of the charge or the loan arrears hence the bank was entitled to recover the said monies. Besides, the applicant had not made any effort to defray the loan arrears; and the 1st respondent is a reputable bank capable of compensating the applicant, in the event the appeal succeeds.

9. Our unfettered discretionary jurisdiction to issue the injunction sought is anchored on **Rule 5 (2)(b)** of this Court's Rules. However, we are required to be satisfied that the applicant has demonstrated that its appeal is not frivolous and that if the order sought is not granted, the appeal will be rendered nugatory, in the event it is successful. See **Sotik Highlands Tea Estates Limited vs. Kenya Plantation and**

Agricultural Workers Union [2017] eKLR. In addition, we would not exercise the above discretion where the injunction would cause greater hardship than it would avoid. See **Madhupaper International Ltd vs. Kerr [1985] KLR 840**.

11. In this case, the appeal is against the exercise of the learned Judge's discretion by declining to grant an injunction. It is well settled that an appellate court does not easily interfere with the exercise of discretion by a trial court except on stringent conditions; that is, where the trial court misdirected itself or acted on matters which it should not have acted upon thus arriving at a wrong conclusion which results in injustice. See **Mbogo & Another vs. Shah [1968] E.A. 93**. In our view, without making any definite finding on the merit of the appeal, we are doubtful of its success.

12. Similarly, we find that the applicant has not established the nugatory aspect.

13. Consequently, the application dated 3rd December, 2020 lacks merit and is hereby dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 18th day of June, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR