



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA (P), MURGOR & KANTAL, JJA)

CIVIL APPLICATION NO. E 140 OF 2021

BETWEEN

KIGIO GROUP COMPANY LIMITED.....APPLICANT

AND

HOUSING FINANCE COMPANY LIMITED.....1ST RESPONDENT

J.M. GIKONYO T/A GARAM INVESTMENTS..... 2ND RESPONDENT

(An application for conservatory orders and an interim injunction against the decision of (Hon. Mary Kasango, J.) delivered on 29th April 2021 in Kiambu HCCC No. 1 of 2020)

RULING OF THE COURT

In this Notice of Motion dated 4th May, 2021, *the applicant, Kigio Group Company Limited* seeks a temporary injunction to restrain *the respondents, Housing Finance Company Limited and J.M. Gikonyo T/A Garam Investments*, their employees and agents from disposing by way of public auction or private treaty or in any way alienating the applicant's properties known as *LR No. 4953/45 and 46/IV – Thika Municipality Block 9/9 and 558 (the subject properties)* also known as the Thika Business Centre.

The motion is brought on grounds that following an advertisement of the subject properties for sale by the respondents, the applicant filed an application in the High Court seeking conservatory orders to stop the sale; that in a ruling dated 29th April, 2021, the learned judge dismissed the applicant's motion.

Aggrieved by the trial court's ruling, the applicant intends to appeal against that decision for the reason that, the learned judge failed to take into account that the monthly loan instalment due from the applicant to the 1st respondent was Kshs. 7.4 million, yet pursuant to a Deed of assignment signed with the applicant, the 1st respondent through its agent was collecting more than Kshs. 11 million per month in rental income from the subject properties which was in excess of the loan amount due; that in addition, the 1st respondent was mismanaging the subject properties. The applicant further contended that the trial court also failed to appreciate that the 1st respondent had refused to disburse the full loan amount, as a result of which, the contractor, who has not been paid in full had continued to retain three floors in the subject properties, which in turn had affected the applicant's rental income. The applicant asserted that on this basis, the appeal was arguable and had a high chance of success.

The motion was supported by the affidavit of *Stanley Njenga Ndegwa* sworn on 4th May, 2021 and submissions which reiterated the grounds, save to add that the applicant's shareholders who were above 95 years would be deprived of their life's investment if the subject properties were sold and would suffer irreparable harm and death due "to lack of medication and food", a situation that could not be compensated in damages; that in the interests of justice, this Court should grant the orders sought and stop the public auction which was imminent.

In a replying affidavit sworn by *Regina Kajuju Anyika*, the 1st respondent's legal counsel and company secretary on 24th May, 2021 and also sworn on behalf of the 2nd respondent, it was deposed that by a letter dated 3rd December, 2014, the 1st respondent agreed to grant the applicant a loan facility of Kshs. 520 million; that the facility was to be secured by a charge over the subject properties; that it was a term of the Loan agreement that disbursement of the loan proceeds would be against the progress of the construction works and upon presentation of certificates. It was also a term of the Loan agreement that the applicant was to contribute Kshs. 143,642 million towards the construction works.

The 1st respondent averred that the applicant has since fallen into arrears in the loan repayments, and despite demands, it had failed to repay the outstanding loan amounts that had resulted in the 1st respondent issuing a Statutory Notice of sale dated 24th March, 2017. After the applicant requested for time to pay, the 1st respondent withheld from proceeding with the sale. But when the applicant again failed to pay the sums demanded, the respondents issued another Statutory Notice of Sale dated 5th July, 2017, whereupon the subject properties was advertised for sale by Public Auction in the Daily Nation Newspaper to take place on 22nd November, 2017. The auction was subsequently suspended after the applicant paid the 1st respondent Kshs. 18 million; that thereafter the applicant's instituted *Kigio Group Company Limited vs Housing Finance Company Limited and J.M. Gikonyo T/A Garam Auctioneers, ELC Case No. 833 of 2017* wherein, it obtained a temporary injunction restraining the 1st respondent from disposing of the subject properties.

It was further deponed that an out of court settlement was negotiated, that resulted in withdrawal of the applicant's suit in the Environment and Land Court; that subsequently, the parties signed a Deed of assignment of Rental Income dated 15th June, 2015, wherein the applicant agreed to assign its rights to the rental income of the subject properties to the 1st respondent; that notwithstanding, the terms of the assignment, the 1st respondent averred that the applicant had instructed some tenants to pay rent to it directly, with the effect that the applicant remained in default of its repayment obligations; that this caused the 1st respondent to issue yet another Statutory Notice of Sale on 1st March, 2019 where it demanded payment of Kshs. 28,467,022.48. By this time, the term loan was Kshs. 544,992,344.05.

It was the 1st respondent's case that the applicant has failed to pay the sums demanded and instead, sought to obtain a temporary injunction against the respondents which the trial court dismissed; that the applicant does not have an arguable appeal; that the appeal will not be rendered nugatory if this Court were to decline to grant the orders sought. It was asserted that the respondents should be allowed to proceed with the sale of the subject properties, since the applicant could always be compensated by way of damages.

In so far as applications filed under **rule 5 (2) (b)** of this Court's rules are concerned, the threshold requirements to be satisfied as exemplified in the case of ***Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR***, are that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

In considering whether the intended appeal is arguable, the applicant contends that in determining whether or not to grant the injunction sought, the trial court failed to appreciate that the 1st respondent, and not the applicant was collecting rents from the subject properties, and that three floors had yet to be handed over by the contractor because the 1st respondent failed to disburse the entire loan amount or to pay the building contractor in full; that the 1st respondent's actions had severely impacted the quantum of rent collections.

In other words, what the applicants were saying is that the trial court failed to take into account matters that it ought to have taken into account and in so doing, arrived at the wrong decision. See ***Shah vs Mbogo [1968] EA, p.15***. If indeed this is the case, we consider this to be an arguable matter worthy of consideration by this Court.

On whether the appeal will be rendered nugatory in the event it were to succeed, it is clear from the replying affidavit, that the respondents are intent on selling the subject properties by public auction. They assert that the applicant can always be compensated in damages were the subject properties to be sold. We think that, there is every possibility that the appeal would be rendered nugatory, since there is the question of rental income that the 1st respondent is receiving from the subject properties that remains in contention. Disposal of the subject properties, the substratum of the appeal, from which the rental income is derived and continues to be paid to the 1st respondent would effectively place it beyond the reach of this Court, and in so doing, render the appeal nugatory were it to succeed.

Consequently, the applicant having fulfilled the twin conditions precedent for granting of an order under **rule 5(2) (b)** of this Court's rules, the application dated 4th May, 2021 succeeds and is hereby allowed.

Costs in the intended appeal.

Dated and delivered at Nairobi this 23rd day of July, 2021.

D.K. MUSINGA (P)

.....

JUDGE OF APPEAL

A.K MURGOR

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR