



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & KANTAL, J.J.A.)

MOMBASA CIVIL APPLICATION NO. 7 OF 2020

BETWEEN

KENYA UNITED STEEL COMPANY (2006) LIMITED.....APPLICANT

AND

STANDARD CHARTERED BANK LIMITED.....RESPONDENT

(An Application for injunction under Rule 5(2)(b) of the rules of court pending an appeal from the decision of the High Court of Kenya at Mombasa (Otieno, J.) dated 16th January, 2020

in

HCCC NO. 19 OF 2017)

RULING OF THE COURT

1. **Kenya United Steel Company (2006) Limited** (the applicant) has moved this Court pursuant to Rule 5(2)(b) of the Rules of this Court seeking orders *inter alia* as follows:-

“That this Honourable Court do issue an order of injunction restraining the respondent by itself, agent or otherwise howsoever from advertising for sale, selling or disposing of (sic) by public auction or otherwise the property known as subdivision 884 Section VIMN pending hearing and disposal of the appeal intended from the order of High Court dated 16th January, 2020 or until further order (sic).”

2. The same is supported by the affidavit of Abid Mahmoud Alam sworn on 21st January, 2020. The brief circumstances surrounding this matter are that the applicant is the registered proprietor of the parcel of land known as **subdivision Number 884 Section VIMN, Mombasa** (the suit property) measuring approximately 20.5 acres; said to be valued in excess of 700,000,000.

3. The property was charged to Standard Chartered Bank Limited (the respondent) to secure several financial facilities. At some point, the applicant was unable to service the loan facility and the respondent called in the loan and threatened to realize the security. Negotiations followed. There were undertakings made to pay and several indulgences were allowed but the loan was not paid. The respondent therefore issued the usual notices of intention to realize its power of sale as chargee. Still, the money was not forthcoming and the respondent instructed Ms. Mugema Auctioneers in January, 2017 (over 3 years ago) to sell the property. The requisite Auctioneers' Notice was issued but the property was not sold.

4. The applicant went to court and challenged the notices in **Civil Suit No. 19 of 2017** at the Civil, Commercial and Admiralty Division at the High Court in Mombasa. Contemporaneously, the applicant filed an interlocutory application dated 24th February, 2011 seeking injunctive orders to stop the respondent and/or its agents from disposing of the suit property citing various grounds.

5. The application was opposed by the respondent, through the affidavit sworn by Stella Mburu, an Account Manager with the respondent, sworn on 21st March, 2017 setting out the history of the matter and annexing the charge and many other documents. After hearing the parties, the learned Judge (Otieno, P.J.J.) found that the disputed notices had been properly served on the applicant and that the notices were in compliance with **Section 96 of the Land Act**. The learned Judge went on to find that the applicant had failed to establish a *prima facie* case as required in law and dismissed the notice of motion with costs.

6. That Ruling prompted the appeal before this Court which gives anchorage to this application. It is worth noting that the main suit is still pending hearing and determination before the High Court.

7. The application is opposed through the replying affidavit sworn by Josephine Warutere, one of the respondent's senior managers. She deposes that the respondent has yet to file a defence in the matter; that the applicant has failed to make any repayment in respect of the financial facility in question, the last payment having been made on 27th March, 2013; that the outstanding interest has reached the maximum amount recoverable under **Section 44A of the Banking Act**; that the applicant does not have an arguable appeal and any money paid can be refunded in the event the appeal succeeds and the respondent is a tier I bank and is not therefore impecunious. She urged for dismissal of the application.

8. Both parties filed written submissions. The applicant filed its submissions on 22nd January while the respondent's submissions are dated 6th May, 2020. Mr. Mwakisha, learned counsel for the applicant, urged that the intended appeal is not frivolous as it raises, among other pertinent issues the question of interpretation of **Section 90 of the Lands Act**. On the nugatory aspect, counsel submitted that if the suit property is sold, the substratum of the application and the appeal will be "lost forever". He urged us to allow the application.

9. On behalf of the respondent, it was submitted that the appeal was not arguable as what the applicant was challenging is the learned Judge's finding that upon default, the lender is entitled to call or demand payment of the entire loan. The respondent reproduced clause 1.1 of the charge which expressly stated that the applicant was obligated to pay the entire amount on demand on 14th April, 2011 or "on written demand".

There was therefore compliance with **Section 90 of the Land Act 2012** and there was no arguable issue to take an appeal.

10. On the nugatory aspect, the respondent maintains that pursuant to **Section 99(4) of the Land Act** a person prejudiced by an unauthorised, improper or irregular sale shall have his remedy in damages against the person exercising the power of sale. In this case therefore, the applicant can be compensated by way of damages should its appeal succeed. The nugatory aspect has not been proved in the circumstances. Counsel urged the Court to dismiss the application.

11. We have considered the notice of motion in entirety along with the rival submissions by counsel and the law cited by both parties. It is trite that for an application under Rule 5 (2) (b) of the Court of Appeal Rules to succeed, an applicant has to demonstrate firstly that the appeal or intended appeal is arguable, or in other words, that it is not trifling or frivolous. Secondly, that unless he/she is granted a stay of execution or injunction as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory. See **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others, Civil Application No. NAI. 31/2012.**

12. It is also settled that an applicant does not need to establish a multiplicity of arguable points as indeed one point suffices, and further that an arguable appeal is not necessarily one that will eventually succeed.

13. Has the applicant satisfied these requirements? On the first limb of arguability, we note that the loan is not disputed. Indeed, the crux of the applicant's grievance is that the respondent called in the entire loan following default. The learned Judge found compliance with **Sections 90 and 96 of the Land Act**. We cannot at this point say whether the Judge's interpretation of those provisions was correct or not as that is in the domain of the Bench that will be seized of the appeal. Bearing in mind that an arguable appeal is not necessarily one that will succeed, we are inclined to find arguability in the intended appeal.

14. On the nugatory aspect however, we note that this is a money decree. The loan facility is not denied; the applicant has not attempted to service the loan for a long time; the main suit has yet to be heard; and keeping the respondent from disposing of the property is prejudicial to it as the amount owed is no longer accruing any interest. Moreover, as rightly stated by the respondent, it is a 1st tier Bank and in the event the appeal succeeds, it is in a position to refund the money found owing.

15. We are not satisfied that the nugatory aspect has been satisfied. It is also rather curious that although the parties concede that no defence has been filed yet, there has not been any attempt by the applicant to move the High Court for the relevant orders as to disposal of the suit. In sum, we find the application devoid of merit. The same is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 7th day of August, 2020.

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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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