IN THE COURT OF APPEAL

AT ELDORET

CORAM: OUKO (P), KARANJA & KOOME, JJ.A)

CIVIL APPLICATION NO. 45 OF 2020

BETWEEN

FLORENCE KHAYANGA MUSANGA.....APPLICANT

AND

TRANSNATIONAL BANK LTD.....1ST RESPONDENT

ISSAC LANGAT T/A

KOLATO AUCTIONEERS.....2ND RESPONDENT

(Being an application for an injunction pending an intended appeal against the ruling and order of the High Court of Kenya at Eldoret (H.Omondi, J.) dated 11th December, 2019

in

Eld. H.C.A. No. 84 of 2019

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RULING OF THE COURT

[1] When the intended appeal will eventually be filed before this Court, it will be a second appeal albeit an interlocutory one as the order appealed against was an appeal against an interlocutory order made on 4th June, 2019 by the Chief Magistrate in **Eldoret CMCC No. 1211 of 2018**. The applicant had filed suit against the respondents and an interlocutory application seeking an order of injunction to restrain the respondents from advertising, selling and or transferring a parcel of land known as **Uasin Gishu/ Kimumu Scheme/1655** (the charged property) pending the hearing and determination of the suit. The applicant had challenged the 1st respondent's exercise of the chargee's power of sale of the charged property on the grounds that she was not served with a notice of variation of interest charged to her loan account; that the 1st respondent did not notify her spouse of the charge nor did it indicate the value of the land and the reserve price.

[2] Upon considering the application, and the objection thereto mounted by the 1st respondent who contended that the applicant had failed to service the loan according to the conditions set in the charge and produced documents to show the notices were issued including to the spouse, the application was dismissed for falling short of establishing that there was a *prima facie* case with a probability of success.

[3] Aggrieved, the applicant appealed before the High Court and also filed another notice of motion seeking yet another order of injunction which motion was also dismissed. In dismissing the application, this is how the learned Judge ruled in the penultimate paragraph of the impugned ruling:-

> ***"Given that the applicant has failed to prove a prima facie case or that there would be irreparable loss, the balance of convenience lies in not granting the prayers. If the applicant continues to be indebted to the applicant (sic) the decretal amount may become higher than the market value of the suit land and consequently the respondent will not be able to claim all monies owed and due to it. The applicant has not made any effort to make any payments to the respondent since being served with the notices. There has been no suggestion to deposit any amounts in court pending the APPEAL.***
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> ***In the premises I hold that the application is not merited, and is dismissed with costs to the respondent."***

[4] Unrelenting, the applicant filed a notice of appeal against the aforesaid orders and the instant motion which will be the third in her attempt to stop the sale of the charged property. The application is premised under ***Rule 5 (2) (b)*** of this Court's Rules and as aforesaid is seeking an order of injunction as she had sought in the two courts below. The appeal is said to be arguable on the grounds deposed to in the supporting affidavit by the applicant where she faults the two courts below for failing to hold that the she had established a prima facie case as set out in the cases of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] eKLR** and **Giella vs. Cassman Brown [1973] E A 358.**

[5] The applicant went on to state that the1st respondent had breached the provisions of ***Section 84 (1)*** of the **Land Act**, by failing to serve a notice of variation of interest either on reduction or increase to the applicant; that there was no compliance with the provisions of ***Section 96 (2)*** of the **Land Act** which required the 1st respondent to serve the applicant with a forty (40) days' notice to her spouse notifying him of its intention to sell the property notwithstanding the applicant was married; and that no valuation was carried out to indicate the forced sale value as required under ***Section 97 (2)*** of the **Land Act**. The above grounds were also cited as the ones forming part of the draft memorandum of appeal to be filed.

[6] The application was opposed through the replying affidavit sworn by ***Silas W. Aluku*** the legal manager of the 1st respondent. The 1st respondent contends that no appeal has been filed before the High Court as they were never served even with a notice of appeal. Responding to the application, the 1st respondent maintained its position that even if this Court were to be persuaded there was a notice of appeal, the intended appeal was not arguable as the applicant failed to satisfy the two courts below that she had a *prima facie* case; nor did she demonstrate any loss that could not be compensated with damages or how the balance of convenience tilted in her favour when she had failed to service the loan. It was stated that following consistent default by the applicant to service the loan, notices were issued informing the applicant of the intention to realize the security charged. The applicant has not denied owing the money and charging her property as security for the borrowing and as such, even if in the unlikely event the 1st respondent was to be found to have been culpable of any of the breaches complained about by the applicant, her remedy lies in damages. Counsel urged us to dismiss the application.

[7] We have considered the motion, and the authorities cited and the law, within the established principles under ***Rule 5 (2) (b)*** of this Court's Rules. It is trite law that for an applicant to succeed in an application such as the one before us, he/she needs to demonstrate that the appeal or intended appeal is arguable; and secondly that the same will be rendered nugatory in the event the appeal succeeds. See **Stanley Kengethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR.**

> **"That in dealing with Rule 5 (2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court. The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable."**

[8] That said, we also remind ourselves that the grant of an order of injunction is an exercise in discretion. The circumstances under which this Court will interfere with the exercise of discretion by the trial court are well articulated in several authorities including **Mbogo & Another vs. Shah [1968] EA 93** at **94** as follows:-

> **"I think it is well settled that this Court will not interfere with the exercise of discretion of an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."**

We also remind ourselves that this application arose from an interlocutory order, the main suit and the appeal before the High Court having not been determined, we cannot make any conclusive findings that would prejudice the pending proceedings.

[9] Did the Judge correctly exercise her discretion in refusing the order of injunction? It is obvious that the two courts below were acutely aware of the guiding principles in granting an order of injunction as they referred to the oft cited case of ***Giella vs. Cassman Brown Co. Ltd*** (supra*)* and recited the principles set out therein to wit: -

a. ***The applicant had established a prima facie case with a probability of success;***

b. ***The applicant stood to suffer irreparable loss which would not be adequately compensated by an award of damages; and***

c. ***If the court was in doubt, the application would be determined on a balance of convenience.***

The two courts were also guided by the principle of what constitutes a *prima facie* case as set out in ***Mrao Ltd vs. First Assurance Bank of Kenya*** (supra) as: -

> **"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

[10] The gist of the applicant's complaint is that the 1st respondent intends to illegally and irregularly undertake the sale of the charged property before complying with the law; that the applicant was not issued with the notices varying the interest charged on the loan; that her husband/spouse was not issued with a notice and the property was not valued so as to indicate the reserve price. The learned Judge found the said notices were issued and that the applicant did not dispute having taken the loan and failing to pay it as per the charge save for the interest

charged. This being the case, we cannot fault the two courts below for ruling that the applicant had not established a *prima facie* case.

[11] We have even gone further and subjected the facts obtaining in this matter to the second test as to whether the applicant stood to suffer irreparable harm should an order restraining the sale of the charged property not be granted. Or as said in the ordinary parlance of ***Rule 5 (2) (b)*** whether the appeal will be rendered nugatory. Having done so, we are persuaded that any loss that would be suffered by the applicant can well be recompensed by an order in damages. In this regard we adopt the sentiments in ***Nguruman Limited vs. Jan Bonde Nielsen & 2 Others*** (supra) to wit: -

> **"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury.**
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> **…**
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> **The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."**

The applicant having failed to meet the twin principles, this application fails, and it is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 18th day of December, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

……..

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR