



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OUKO, (P), KARANJA & KOOME, JJA)

CIVIL APPEAL (APPLICATION) NO. 245 OF 2019

BETWEEN

**BIO CORN PRODUCTS (EPZ) LTD.....APPLICANT**

AND

**DIAMOND TRUST BANK KENYA LTD..... RESPONDENT**

*(Being an application for injunction pending the hearing and determination of the appeal against the Ruling of the High Court at Eldoret (H.A. Omondi, J) dated 24<sup>th</sup> September, 2019)*

*in*

*Eldoret Civil Case No. 19 of 2019)*

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**RULING OF THE COURT**

The applicant is the registered owner of **Eldoret Municipality/Block 1034**, the suit property, which it offered as security in respect of a loan facility extended by the respondent to its sister company (Equip Agencies Limited). Upon default by that company and in the exercise of its statutory power of sale, the respondent served the applicant with a statutory notice of sale. This provoked an application for an order of injunction to the High Court aimed at restraining the respondent from selling the suit property pending the hearing and determination of the suit it had filed.

After the High Court (Omondi, J.) rejected that application for not disclosing a *prima facie* case with a probability of success, the appellant aggrieved by that outcome has challenged that decision by lodging an appeal in this Court. In the meantime, it has taken out a motion for an order of injunction under **Rule 5(2) (b)** of this Court's Rules to restrain the respondent from taking any steps that may interfere with the applicant's ownership of the suit property, including evicting the applicant from the property, advertising it for sale or offering it for sale.

To satisfy the requirements of Rule 5(2)(b), the applicant has submitted that it has an arguable appeal as demonstrated in its memorandum of appeal where the respondent is accused of irregularly consolidating securities and of wrongfully tacking subsequent loans under existing security in order to charge exorbitant interest rates in contravention of the Banking (Amendment) Act 2016 and for threatening to sell the suit property without first issuing the mandatory statutory notices.

On the second ingredient, the applicant has submitted that, even as the appeal and the main action in the High Court are pending determination, the respondent has instructed a firm of auctioneers to sell the suit property without, first issuing new statutory notices; and that if this is not stayed, the substratum of the

appeal will dissipate.

Finally, the applicant has argued that the respondent is not likely to suffer any prejudice should orders sought in this application be granted to preserve the suit property since the respondent is in possession of the title documents; and that should this appeal fail, the respondent will be at liberty to deal with the suit property as it had commenced.

The respondent, in both the replying affidavit and submissions, has urged us to dismiss the application because, in its opinion, it lacks merit; that a dispute as to the amount sought to be recovered and the question whether service of a statutory notice was effected are not matters for consideration to determine if the appeal is arguable; that the applicant truly owes the respondent the money sought to be recovered; that the principal borrower has, as a matter of fact, admitted its indebtedness to the respondent; that the applicant, having put forth the suit property as security is itself an acknowledgement that it has a value from which compensation to the applicant can be computed; and that it became a commodity for sale the moment the applicant defaulted. For these reasons, we have been asked to find that the appeal, if successful, will not be rendered nugatory.

Pursuant to the two principles enunciated by this Court under **Rule 5(2)(b)** of our rules and summarized in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others** (2013) eKLR, it is evident that as at 2nd February, 2018, the applicant was indebted to the respondent to the tune of Kshs.30,619,761.13 and obviously the loan continues to attract interest. All the applicant is contesting is the exercise of discretion by the learned Judge in dismissing its application for injunction. We have not been shown how the learned Judge improperly exercised her discretion. At this stage, we can only say that it is doubtful to us that the appeal will be arguable.

On the nugatory aspect, no allegation was made that the respondent would not be able to compensate the applicant in the event the appeal were to succeed. Considering the amount alleged to be outstanding, it is the respondent that, in our view stands to suffer loss and prejudice by an order of stay.

The applicant has, for the reasons above, failed to demonstrate both limbs for the grant of any of the orders under **Rule 5(2)(b)**. The upshot is that this application lacks merit and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 4<sup>th</sup> 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

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JUDGE OF APPEAL

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

Signed

**DEPUTY REGISTRAR**

