IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CIVIL APPLICATION NO. NAI 297 OF 2018

BETWEEN

BIMALROY CHHOTALAL SHAH..... 1ST APPLICANT

MEERA SHAH.....2ND APPLICANT

AND

I & M BANK LIMITED.....RESPONDENT

(An application for injunction pending the hearing and determination of an intended appeal from the Ruling and order of the High Court of Kenya at Nairobi (Commercial and tax Division (Lady Justice Sewe, J) delivered on 11*th May 2013* in Civil Suit No. 435 Of 2017)

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RULING OF THE COURT

This Notice of Motion dated 11th January 2019 is made under ***rules 5* (b), 20 (2), 42 and 47 (1), (2) and (4)** of the ***Court of Appeal Rules*** and seeks orders that;

> i. An injunction do issue restraining the respondent and its agents, employees and servants and/or assigns from attaching and or advertising for sale and offering for sale or auctioning or transferring, or interfering in any way with all that piece of land situate along Manyani Road, East Lavington in Nairobi County City as Land Reference No. 209/7501 (the property*) pending the hearing and* determination of this application and the final determination of the suit;
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> ii. That ALTERNATIVELY the court be at liberty to make any further orders in the interest of justice;
>
> iii. That costs of the application be provided for.

The application was brought on the grounds that the applicants had filed a Notice of Appeal, and intended to appeal against the order of the High Court; that the applicants are the owners of the property that has been their family home; that by way of a legal charge registered on 2nd February 2015, the applicants secured two loan facilities from the respondent being a first term loan for Kshs. 47,000,000 and a second term loan for Kshs. 196,000,000, the latter was for the development and construction of 6 town houses on the property. The second term loan comprised of a 1st disbursement of Kshs. 25,000,000; a 2nd disbursement which would be confirmed at the sale of two town houses, and other disbursements above Kshs. 100,000,000 would be confirmed after the sale of three town houses.

It was further contended that the proceeds from the sale of the town houses would be for settlement of the principal amount and accrued interest. The applicants claimed that in breach of the agreement, the respondent issued a Statutory Notice of Sale of the property which sale was due to take place on 9th November 2018. The applicants stated that they had an arguable appeal with a high chance of success, and that if the injunction was not granted they would suffer substantial loss and irreparable damage which would render the intended appeal nugatory.

The motion was grounded on the affidavit of ***Bimalroy Chhotalal Shah*** sworn on 16th October 2018 wherein it was deponed that the property was the applicants' family home since 1987 and it is currently where the family resides; that sometime in 2014 the applicants approached the Head of Business of the respondent with a proposal for financing the conversion of their single dwelling residential property into multi dwelling residential houses, where the loan facilities would be repaid using proceeds of sale of the dwelling houses. It was agreed between the parties that the loan facility of a maximum of Kshs. 249,000,000 would include takeover of an existing loan facility provided by

Giro Bank, and that the second term loan would finance the development of 6 town houses, with some payments going towards construction approvals.

It was deponed that unforeseeable challenges were experienced in obtaining approvals which delayed the commencement of the construction, a matter which the respondents were at all times aware; but despite this, on 16th August 2016 the deponent received a letter from the respondent advising them that it would no longer finance the development project; that soon thereafter, the respondent issued a Statutory Demand Notice claiming various sums from the applicants.

It was averred that the Notice was not directly served on the applicants, but was communicated to them by way of an email, that the notice demanded repayment of the sums due within three months from the date of service of the Notice; that despite the applicants opening only two accounts, the respondent's demand was in respect of four bank accounts. It was further averred that a Statutory Notice dated 25th September 2017 was sent to the applicants demanding repayment in respect of the four accounts. As a consequence of the respondent's actions, the applicants instituted proceedings against the respondent and simultaneously sought an injunction to restrain the respondent from selling the property.

It was further contended that the application was heard by Sewe, J, who issued an injunction to restrain the respondent from disposing of the property pending the re-issuance and service of a valid Statutory Notice pursuant to ***section 90*** and ***96*** of the ***Land Act***. The applicants contended that in making the determination, the learned judge focused on the errors in calculations of the amounts owed to the respondent and failed to appreciate that the respondent had breached the terms of the loan agreement and consequently should be restrained from exercising its statutory power of sale until the suit was determined.

Further, it was deponed that, on 24th May 2018, the respondent issued a fresh Statutory Demand Notice which was due to lapse on 24th August 2018, but Odero, J. stayed the demand on 17th August 2018 pending her ruling on an application seeking to file a Notice of Appeal which was subsequently delivered on 28th September 2018; that following delivery of that ruling, the respondent issued another Statutory Demand Notice, which was due to lapse on 9th November 2018 when the respondent intended to proceed with sale of the property; that the applicants were aggrieved by the decision of Sewe, J and intend to file an appeal in this Court; as such, this Court was urged to make such orders as would ensure the just and effective determination of the intended appeal.

In a replying affidavit sworn on 7th November 2018 by ***Musa Dumbuya,*** the respondent's Debt Recovery Manager, it was deponed that the applicants accepted the terms of the letter of offer dated 10th March 2014 and that upon execution of the letter of offer, the applicants executed a charge over the property; that, the respondent disbursed various amounts to the applicants, who had failed to repay the outstanding debt as set out in the respondent's demand letter dated 13th June 2017, and Statutory Demand Notice dated 25th September 2017 which was issued in compliance with ***section 96 (1)*** of the ***Land Act***; that the applicants have not only failed to repay the sums owed, but had refused to make any payments in settlement of the overdue accounts. It was further contended that a dispute over accounts or contention that the property was a family home is not grounds for granting the injunction sought.

It was the respondent's further averment that the applicants have not demonstrated that they have an arguable appeal, and indeed after the ruling of the court, the respondent issued fresh notices in compliance with the court's directions; that a 90 days Statutory Demand Notice was issued on 24th May 2018 which notice was sent by way registered post to the applicant's known address; that another notice of 40 days dated 1st October 2018 was again sent by registered post; that the notices notwithstanding, the respondent was yet to instruct an auctioneer or undertake a valuation of the property. It was averred that the respondent is a reputable bank in Kenya and is capable of paying any damages that may accrue to the applicant following the exercise of the respondent's statutory power of sale, and therefore the intended appeal will not be rendered nugatory.

On behalf of the applicants, ***Mr Kimathi,*** appearing with Ms. Mituga submitted that the statutory notices made reference to four bank accounts while the applicants held only two accounts with the respondent, and furthermore, that the notice also referred to an overdraft account whose existence could not be explained. It was further submitted that the High Court had concluded that the applicants would suffer irreparable damage, and despite so finding, the court merely issued an injunction limited to correction of the Statutory Notice, yet the applicants had not raised the issue of a defective notice. It was further argued that the property was matrimonial property, though approval was obtained to convert it to commercial property. This Court was urged to grant the injunction so as to stop the sale of the property, and enable the applicants secure alternative financing.

Mr. Kimani, learned counsel for the respondent, opposed the application and submitted that the appeal was not arguable; that the applicants' bank accounts were in arrears in excess of Kshs. 139 million as at 1st October 2018, and the applicants had made no efforts towards liquidating the outstanding amounts; that it was a condition of the loan facilities that the sums advanced were payable on demand, and that further payments would be withheld in the event that the applicants failed to service the interest; that to date no payments had been made towards the accrued interest; furthermore the applicants were aware of clause 13 (a) of the offer letter wherein they warranted that consents, authorizations, and approvals had been obtained. In addition, the contestation that the property was matrimonial was abandoned and was not raised in the High Court; that on the question of the four bank accounts instead of two, counsel asserted that this was not a reason to grant an injunction, and in support of this proposition cited the case of ***John Nduati Kariuki T/A Johester Merchants vs National Bank of Kenya Limited [2006] eKLR.***

On the nugatory aspect, counsel submitted that there was nothing that showed that the respondent was incapable of compensating the applicant in damages.

We have considered the pleadings and the submissions of the parties. In the case of ***Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others***, ***Civil Application No. NAI. 31/2012***, this Court stated, *inter alia:*

> **"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."

It is therefore well established that, two principles guide the Court in considering an application of this nature. Firstly, an applicant is required to demonstrate that the appeal or intended appeal is arguable, or in other words, that it is not vexatious or frivolous. Secondly, that unless he is granted a stay of execution or injunction as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory.

We would also add that in dealing with applications under ***rule 5 (2) (b),*** the Court exercises original jurisdiction which exercise does not constitute an appeal from the trial judge's discretion to this Court. See **Ruben & Others vs Nderitu & Another** ***[1989] KLR 459***.

Turning to the issue whether the appeal is arguable, in seeking to ascertain the grounds on which the appeal is intended to be premised, we were unable to locate a draft memorandum of appeal which would have disclosed the reasons for dissatisfaction with the learned judge's ruling. Needless to say, relying on the pleadings, paragraph 28 of the supporting affidavit seemed to suggest that the applicant's main complaint was that;

"…the learned Judge in making her determination focused on the error on calculations of the amount owed to the Respondent and failed to appreciate that the respondent was in blatant breach of the agreement and ought to be restrained from exercising the Statutory power of sale until the suit is determined".

In our view, this may be an arguable issue, and a matter upon which the applicants are entitled to have this Court determine upon hearing the intended appeal.

As to whether the intended appeal would be rendered nugatory if the injunction was not granted and the intended appeal were to succeed, once again, we have been through the record and besides the contention that the applicants will suffer irreparable damage, it has not been demonstrated how or in what way the appeal would be rendered nugatory if the respondent were to exercise its statutory power of sale of the property. Faced with these circumstances, we find that there is nothing to satisfy us that the intended appeal would be rendered nugatory.

Be that as it may, the respondent, for its part has indicated that it is a reputable bank in Kenya with sufficient capability to compensate the applicants in damages in the event that it were to sell the property, and the appeal were to succeed.

As such, the applicants having failed to satisfy the second conditionality, we decline to grant the injunction sought. The motion dated 11th January 2019 fails, and is dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Nairobi this 19*th* *day of July, 2019.*

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR