



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, KIAGE, & OTIENO-ODEK, JJA)

CIVIL APPLICATION No. 3 Of 2019 (UR 3/19)

BETWEEN

SON HARDWARE LIMITEDAPPLICANT

AND

DEVELOPMENT BANK OF KENYA LIMITED..... RESPONDENT

(Being an application for injunction and stay of proceedings pending the hearing and determination of an intended appeal from the Ruling and Order of Hon. Nyakundi J. delivered on 18th December 2018

in

KAJIADO HCCC NO. 44 of 2018)

RULING OF THE COURT

1. By Notice of Motion dated 7th January 2019, the applicant is seeking an injunction and stay of proceedings before the High Court in Kajiado HCCC No. 44 of 2018 pending the hearing and determination of an intended appeal.

2. On or about 25th June 2010, the applicant was offered a term loan and an overdraft facility by the respondent to the tune of Ksh. 8,200,000/=. The sum was secured by a legal charge over LR No. Ngong/Ngong/24258. On or about April 2015, the applicant applied for a further loan from the respondent and offered as security, additional property being LR No. Ngong/Ngong/33632.

3. The respondent avers that as at 11th December 2018, the indebtedness of the applicant to the respondent was in the sum of Ksh. 46,975,852.40. On or about 12th October 2018, the applicant was served with a 45 days' redemption notice and a notification of sale of the two secured properties by way of public in the exercise of the respondent's statutory power of sale.

The notice of sale indicated that the secured properties were to be sold by public auction on 18th December 2018.

4. Aggrieved by the receipt of the notification of sale of the properties, the applicant filed suit before the High Court at Kajiado contending that the respondent's statutory power of sale had not arisen. The applicant therefore sought injunctive orders to prevent the public auction aforesaid.

5. Upon hearing the parties, on 18th December 2018, the learned judge (Hon. Nyakundi J.), dismissed the application for injunctive orders but suspended the sale on condition that the applicant deposited the sum of Ksh. 10,000,000/= in a joint interest bearing account of both advocates within 30 days of the Order. The applicant failed to deposit the sum as ordered and has now moved to this Court by way of Notice of Motion dated 7th January 2019 seeking an injunctive order and stay of proceedings of the suit before the Kajiado High Court.

6. The affidavit in support of the Motion was deposed by **Mr. Peter Muinami Juma** who stated that he was a director of the applicant. He deposed that on 12th October 2018, the applicant received a 45-day redemption notice and notification of sale of the two properties. That

upon receipt of the notices, the applicant tried without success to convince the respondent that its statutory power of sale had not arisen. To this end, the applicant made effort and paid a sum of Ksh. 800,000/= towards reduction of its indebtedness to the respondent. In addition, the applicant executed a Deed of Assignment assigning the rental income arising from the secured properties to the respondent. It is deposed further that the respondent failed and or neglected to collect the rental income pursuant to the Deed of Assignment. The respondent Bank had persistently consolidated and restructured the applicant's loan and overdraft accounts in a manner that closed the applicant's equity of redemption. In the premises, it was impossible to keep track of its liability or to ascertain the true and correct indebtedness to the respondent. That although the respondent approved the applicant's loan of Ksh. 31,000,000/=, only the sum of Ksh. 10,000,000/= was disbursed yet the entire approved sum was debited to the applicant's account. For the foregoing reasons, the applicant contended that its intended appeal was arguable.

7. In opposing the instant application, the respondent filed a replying affidavit deposed by **Ms Doreen Kimori**, the Legal Manager, dated 31st January 2019. She deposed that the application was made in bad faith and was an abuse of the court process. The applicant intended to prejudice the respondent and stop it from exercising its statutory power of sale. The applicant's continued default in repaying the loan and overdraft amounts has crystallized the respondent's statutory power of sale. The applicant's contestation that it had made several deposits was false; that it was unconscionable for the applicant to allege that the respondent had mismanaged its bank account by consolidating and amalgamating the loan and overdraft accounts without its consent. That the applicant was seeking an injunction which is an equitable remedy yet the applicant was well aware of the consequences of failing to adhere to its obligations as a chargee. That the applicant has not demonstrated what irreparable injury it stood to suffer that could not be compensated by way of damages. That the applicant had not established a prima facie case with probability of success and neither has the applicant met the threshold for grant of injunctive orders.

8. At the hearing of the application, learned counsel **Mr. Mashaviru** holding brief for **Mr. Bernard Kalove** appeared for the applicant. Learned counsel **Ms Bosibori** appeared for the respondent.

9. Counsel for the applicant urged that the intended appeal was arguable and shall be rendered nugatory if the stay order sought was not granted. That the respondent's statutory power of sale had not arisen; that no notice for the exercise of the statutory power of sale was issued; that the amount of indebtedness of the applicant to the respondent bank was unknown; that reconciliation and account need to be taken to determine the level of indebtedness of the applicant to the respondent. That the respondent had failed to collect income based on a Deed of Assignment of rental income from the suit properties which was executed in its favour. The applicant finally submitted that there was danger that if the stay order sought was not granted the two secured suit properties shall be sold by public auction rendering the intended appeal nugatory.

10. The respondent's counsel in opposing the application urged that the applicant had not met the threshold for grant of an injunctive order by this Court. That the applicant in its supporting affidavit had admitted receiving the statutory notice for sale. That upon receipt of the notice, the applicant approached the respondent for restructuring of its loan. That the respondent acceded to the request. The respondent denied restructuring, amalgamating or mismanaging the applicant's loan and overdraft accounts without its consent. That despite restructuring, the applicant had neither serviced the outstanding loan amount nor demonstrated how the intended appeal shall be rendered nugatory if the stay order sought is not granted. That indeed, it is the respondent that will be prejudiced as it shall be prevented from exercising its statutory power of sale and realizing the security given for the loan amount.

ANALYSIS and DETERMINATION

11. Before us is a Notice of Motion application dated 7th January 2019 seeking an injunction and stay of the ruling and order of the High Court dated 19th December 2018. In the same application, a prayer is made for stay of proceedings of the High Court in Kajiado HCCC No. 44 of 2018.

12. The application has been brought pursuant to the provisions of **Rule 5 (2) (b)** of the Rules of this Court. In **Stanley Kang'ethe Kinyanjui - v - Tony Ketter & 5 Others, Civil Application No. NAI 31/2012**; this Court examined the manner in which it exercises its jurisdiction in relation to applications brought under **rule 5 (2) (b)** of the Rules of this Court and remarked as follows:

"[I]n 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"

13. In **Reliance Bank Ltd (In Liquidation) - v - Norlake Investments Ltd, Civil Appl. No. Nai. 93/02 (UR)**, it was again stated thus: -

"Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely: -

1. *That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal.*

2. *That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction."*

14. This being an application under **Rule 5 (2) (b)** of the rules of this Court, we must be satisfied of the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838**; **J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088** and **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported)**.

15. In the first instance, we consider if the intended appeal is arguable. On whether an intended appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. (See **Damji Pragji Mandavia – v- Sara Lee Household & Bodycare (K) Ltd, Civil Application No. NAI 345 of 2004**). Further, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; and one which is not frivolous. (See **Joseph Gitahi Gachau & Another – v- Pioneer Holdings (A) Ltd & 2 Others, Civil Application No. 124 of 2008**).

16. In the instant matter, the applicant in its oral submissions urged that the intended appeal is arguable. Conversely, the respondent submitted the intended appeal is not arguable as the applicant's indebtedness to the respondent is not in doubt.

17. In his submissions, counsel for the applicant urged that one of arguable points is that the respondent's statutory power of sale had not arisen. It was further urged that the respondent mismanaged the applicant's account by consolidating, amalgamating and restructuring of the loan without consent. That in the impugned ruling, the learned judge fell into many errors and particularly erred in failing to consider that one of the properties given as security namely Ngong/Ngong/24258 had been fully redeemed. That the learned judge ignored the fact that a Deed of Assignment of the rental income arising from the suit properties had been executed in favour of the respondent. The judge ignored that the respondent was negligent or had refused to implement the Deed of Assignment.

18. In denying that the intended appeal is arguable, the respondent submitted that the present application was an abuse of court process. That the application seeks to prevent the respondent from exercising its statutory power of sale that has arisen. That the applicant in its supporting affidavit admitted receiving the notification of sale of the secured properties by public auction. That the applicant has admitted owing monies to the respondent Bank. That the respondent will be prejudiced if the injunctive order sought is granted as it will be prevented from realizing the security given for the sums borrowed.

19. On our part, we have considered the Motion and the pleadings filed as well as the rival submissions by the parties as to whether the intended appeal is arguable. Whether or not the respondents' statutory power of sale has arisen is an arguable matter. This *per se* is an arguable point to be considered and determined in the intended appeal. We are thus satisfied that the applicant has demonstrated to our satisfaction that the intended appeal is arguable.

20. The applicant submitted that the intended appeal shall be rendered nugatory if the injunctive order sought is not granted as the two secured properties will be sold by public auction. Conversely, the respondent submitted that the intended appeal shall not be rendered nugatory if the injunctive order sought is not granted. It was urged that even if the properties were sold, the applicant has not demonstrated that any loss suffered cannot be compensated by way of damages.

21. We have considered the submissions by the applicant and respondent on the nugatory aspects. This Court in **National Industrial Credit Bank Ltd – v-Aquinans Francis Wasike, Civil Application No. 238/2005**, stated that the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory if a stay order is not granted. In this matter, the applicant's counsel in his oral submissions did not lucidly demonstrate how the intended appeal shall be rendered nugatory if the stay order sought is not granted. Mere assertion that an appeal shall be rendered nugatory does not suffice.

22. We note it was submitted in support of the Motion that the amount of indebtedness of the applicant to the respondent is unknown and that reconciliation and accounts should be undertaken. In **Bharmal Kanji Shah and Another –v- Shah Depar Devji**, it was observed that:

"...the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage..."

23. In **Halsbury's Laws of England, Vol. 32 (4th Edition) paragraph 725** it is stated:

"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagor claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

24. We remind ourselves that once a property has been given as security for a loan it becomes a commodity for sale and therefore the sentimental attachment to the property becomes inconsequential and the property then must be sold in accordance with the law. (See **Isaac Litali - v - Ambrose W. Subai & 2 others, NBI HCCC 2092 of 2000 (UR)**.)

25. In the instant matter, the applicant has not deposited any sum admitted as due and owing to the respondent. This is despite the ruling by

the learned judge that the applicant deposits the sum of Ksh. 10,000,000/= in a joint interest bearing account to be operated by both advocates of the parties. In **Mr Rao Limited – v - First American Bank of Kenya Limited & 2 Others, (2003) KLR** the court highlighted when a mortgagee may be restrained from exercising his power of sale, i.e.:

“He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive”.

26. The applicant having failed to deposit the sum of Ksh. 10,000,000/=, we are reluctant to exercise an equitable discretion and accede to an unconditional stay order.

27. Further, in this matter, the intended appeal is against the ruling and order of the High Court issued on 18th December 2018. In the order, the learned judge dismissed the applicant’s application for injunctive orders. The final ruling of the court is a dismissal order. This *per se* means that in this matter, the applicant is urging this Court to stay a negative order.

28. In **Kanwal Sarjit Singh Dhiman - v - Keshavji Juvraj Shah [2008] eKLR**, this Court while dealing with an application for stay of a negative order expressed as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).”

29. Likewise, in the persuasive case of **Raymond M. Omboga – v- Austine Pyan Maranga, Kisii HCCA No 15 of 2010** it was expressed that a negative order is one that is incapable of execution, and thus, incapable of being stayed. It was stated:

“The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order ... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”

30. Persuaded by the well-established legal principle that a negative order is incapable of being stayed, we find that the instant application to stay the impugned ruling of the court has no merit as the application seek to stay a negative order.

31. Finally, we note that the applicant is impugning the decision by the learned judge in dismissing an application for injunction. The grant of an injunctive order is at the discretion of the court. In **Francis Wambugu – v- Babu Owino, Supreme Court Petition No. 15 of 2018**, it was held that an appeal based on exercise of discretion can only be faulted if the discretion was exercised on whim or that the court did not take into account prevailing circumstances or did not consider what ought to have been considered.

32. In the final analysis, we decline to grant stay of negative orders. We further find that the applicant has not demonstrated that the intended appeal shall be rendered nugatory if the orders sought are not granted. The upshot is that the Notice of Motion dated 7th January 2019 has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 18th day of October, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

I certify that this is a true Copy of the original.

DEPUTY REGISTRAR