IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & ODEK, JJA)

CIVIL APPLICATION NO. 75 OF 2019 (UR 53/2019)

BETWEEN

ELIZABETH JERONO YATOR.....APPLICANT

AND

CONSOLIDATED BANK OF KENYA LIMITED.....1ST RESPONDENT

CLEVERLINE AUCTIONEERS.....2ND RESPONDENT

*(Being an application for an injunction pending the hearing and determination of an intended appeal from the ruling order of the High Court in Eldoret (**S.M Githinji, J**) on 7th December 2016)*

in

H.C.C.C. No. 12 of 2018

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RULING OF THE COURT

By a Notice of Motion under a certificate of urgency dated 2nd July 2019, the applicant moved this Court under **Rule 5(2) (b)** of the Court of Appeal Rules seeking for an order of injunction directed at the respondents to restrain them whether by themselves, their servants and/or agents from selling, transferring and alienating the land parcel known as **ELDORET MUNICIPALITY/BLOCK 9/912** pending the hearing and determination of her intended appeal. She also prayed for costs.

The background to the application is that the applicant is the sole proprietor of land parcel known as ELDORET MUNICIPALITY/BLOCK 9/912 "*suit property*". She guaranteed a loan facility advanced to Lomson Enterprises Limited *"Lomson"* by the 1st respondent to the tune of Kshs. 18,000,000/= pursuant to an offer letter dated 7th November 2012 by the said respondent. The applicant's personal guarantee was up to the tune of Kshs. 3,500,000/= and on that basis she charged the suit to the 1st respondent. Lomson defaulted in repaying the loan which had accumulated to Kshs. 66, 673,400/= as at January, 2015. The 1st respondent then instructed Timeless Dolphine Auctioneers to sell the suit property by public auction in the exercise of its statutory power of sale.

The applicant then rushed to the Environment and land Court *"ELC"* at Eldoret and filed suit against the 1st respondent Timeless Dolphine Auctioneers and Lomson praying for a declaration that the sale by public auction of the suit property was illegal, void and without basis in law, injunction restraining the 1st respondent and Timeless Dolphine Auctioneers from purporting to exercise the statutory power of sale over the suit property and an order declaring the charge purported to be registered by the 1st respondent over the suit property illegal and void. This was **ELC No. 17 of 2015**. However, the suit was subsequently compromised in terms that the applicant would to liquidate the debt by paying Kshs. 200,000/= to the 1st respondent on or before 31st August, 2013. Thereafter the applicant was to pay Kshs. 100,000/= to the respondent monthly. Lastly, the applicant was to pay the balance outstanding thereto in equal instalments for a period of five years.

It is common ground that the applicant failed to comply with the terms of the consent order aforesaid. This forced the 1st respondent once again in the exercise of its statutory power of sale to instruct the 2nd respondent, Cleverline auctioneers to proceed to sell the suit property by public auction. Again the applicant rushed to the Environment and Land Court "*ELC*" at Eldoret and filed suit No. 370 of 2016 in which she averred that the exercise of the statutory power of sale was unlawful, irregular and improper for various reasons that were stated in the Plaint. The applicant then sought from court, among other prayers; a declaration that no lawful power of sale can arise as the charge(s), guarantee

agreement(s) and loan contract(s) were void and unenforceable having been entered into unlawfully and therefore the intended sale of the suit property was unlawful and a nullity being predicated on breach of law; the taking of accounts as between the parties to ascertain the pounds made by the applicant; a declaration that her right as a consumer had been breached under Article 46 of the Constitution coupled with the award of damages and an order of injunction against the respondent restraining them from selling, transferring, or in whatever way alienating the suit property. The applicant filed an application under certificate of urgency seeking for an order of an interim injunction against the defendants jointly and severally restraining them whether by their servants and/or agents from selling, transferring and alienating the suit property pending the hearing and determination of the suit.

The suit was subsequently transferred to the High Court of Kenya at Eldoret whereupon it became **Civil Suit No. 12 of 2018**.

On the 8th of December 2016, the Court issued an ex-parte order of injunction stopping the sale of the suit property that was scheduled for 9th of December 2016 until the interpartes hearing and determination of the motion on notice. The application was eventually canvassed interpartes and subsequently dismissed by the ruling dated 3rd April 2019 by **S.M. Githinji, J.** The basis of the dismissal was that the applicant had not satisfied the conditions for the grant of an injunction and that in any event the suit and indeed the application were *res judicata*.

The applicant then moved to this Court and filed a notice of appeal. Together with that, the applicant took out a motion on notice seeking an injunction pending the hearing and determination of her intended appeal. The grounds in support thereof were that the intended appeal was arguable and that the same would be rendered nugatory should the sale of the suit property proceed and lastly, that the application had been made without undue delay.

The affidavit in support of the application by the applicant merely reiterated and expounded on the foregoing, suffice to add that according to the applicant the intended appeal would be rendered nugatory and academic as the sale would extinguish the substratum of the intended appeal and it would result in her ejectment from the suit property.

The application was opposed through the replying affidavit sworn by **Benard Javan Osiko**, the 1st respondent's credit manager in which he deposed that the application before the Court was made up of fallacies and misrepresentation of facts deliberately crafted to mislead the Court. That the suit in the High Court giving rise to this application was *res judicata* as the parties had entered into a consent over the same subject matter in ELC No. 17 of 2015. That ELC No. 17 of 2015 having been determined by consent, the intended appeal had no basis as there was no valid suit in the High Court in the first place. It was further deposed that the applicant had never complied with the consent order and therefore not worthy of the injunctive reliefs sought before this Court. The respondent maintained that in the circumstances, the appeal had no chance of success. We were urged on that basis to dismiss the application with costs.

The application was canvassed before us on 25th July 2019 by **Mr. Mogamb**i and **Mr. Sibot Makokha**, learned counsel for the applicant and respondents respectively.

Mr. Mogambi submitted that the intended appeal raised arguable points as a perusal of the draft memorandum of appeal would demonstrate. He stated that the consent judgment entered into in ELC No. 17 of 2015 could not make the instant application *res judicata*. Further that the parties therein were not the same as those in this application. On the nugatory aspect, the applicant submitted that the intended appeal would be rendered nugatory by the sale of the suit property to a third party. That the applicant had genuine grievances over the breach of the law and her rights. In any event, such a sale would extinguish the substratum of the intended appeal and would result in her ejection from the suit property.

In opposition, Mr. Sibot submitted that the applicant had not adhered to the terms of the consent in ELC No. 17 of 2015. That the applicant had not re-paid the loan as at the time the application was brought to Court. He concluded by stating that the appeal was not arguable as the suit in the High Court was *res judicata* and urged us to dismiss the application.

The Supreme Court of Kenya in the case of **Deynes Muriithi & 4 others v Law Society of Kenya & another [2016] eKLR** explained the intent and purpose of interlocutory application under rule 5(2) (b) thus:-

> **"[35] These cases show that Rule (5) (2) (b) applications arise at an interlocutory stage, and Orders issued thereunder are for the purpose of protecting the subject-matter of the appeal. In addition, the Court of Appeal exercises its original and discretionary jurisdiction, when issuing Orders under that provision."**

Thus this Court exercises both original and discretionary jurisdiction in applications of this nature so as to preserve the subject matter of an appeal. In the very same case, the Supreme Court observed:

> **"[59] As the Court of Appeal exercises its discretion under Rule 5(2) (b) of the Court of Appeal Rules, 2010 it needs to be mindful of the parameters set by Article 164(3) of the Constitution, and to ensure that the Orders it grants do not have the effect of predetermining the substantive cause pending before the Court below it."**

The learned Judge in dismissing the application, appears to have been oblivious of the above warning. He framed the issues for determination in the application as follows:-

- ***Whether the charge was extinguished***

- ***What was the purpose of the consent order?***

- ***What was the purpose of the offer letter of 28th April 2015?***

- ***Does the 1st respondent have statutory power of sale?***

In his ruling, the learned judge gave a determination on each of the above issues. These issues were really at the core of the applicant's suit. By rendering himself on the issues, he inevitably determined the main suit at an interlocutory stage. It is trite law that a trial court should not issue interlocutory orders that are couched as final orders or even make a determination on the merits of the main suit at an interlocutory stage. The Supreme Court again in **Deynes Muriithi & 4 others** (Supra); stated thus on that question:-

> **"[68] ...Our perception is that, the impugned Order of the Court of Appeal has the effect of disposing of the substratum of the substantive matter before the High Court. It also has the effect of denying the parties a fair hearing, and this contravenes the prescriptions of the Constitution. The Appellate Court had, with respect, overstepped its mandate, and encroached on that of the High Court, by determining a matter that was not before it but rather, before the High Court. This unsatisfactory state of affairs has to be remedied by this Court."**

Obliviously, in acting as it did, the High Court overstepped its mandate in determining the suit at an interlocutory stage. At this stage, the trial court need not go into the merits of the suit. However, this is not one of the grounds raised in this application. We shall leave it at that.

We are confronted with an application for injunction under rule 5(2) (b) of the Court rules, it is trite that the applicant must satisfy two conditions under that rule; which are firstly, that the appeal is not frivolous but arguable, and secondly, that unless the injunction is granted, the appeal is likely to be rendered nugatory. See **Reliance Bank Ltd (in Liquidation) v. Norlake Investments Ltd [2002] 1 EA 227** and **Exclusive Estates v. Kenya Posts and Telecommunications Corporation and another [2005] EA.**

With regard to the arguability, we have perused the draft memorandum of appeal that was availed by the applicant. We note that the applicant has a whopping twenty seven intended grounds of appeal. However, we are aware that it is sufficient if a single arguable ground of appeal is raised. See **Kenya Tea Growers Association & another v. Kenya Planters & Agricultural Workers Union – Civil Application Nai. No. 72 of 2001**. Further, an arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the court, and is not frivolous. See **Joseph Gitahi Gachase & another v. Pioneer Holdings (A) Ltd & 2 others – Civil Application No 124 of 2008 (Ur)**. Despite numerous grounds ranging from whether the suit in the High Court was res judicata; there was chargor/charge relationship, the 1st respondent could validly exercise its statutory power of sale, the interest charged was illegal, no valid guarantee and indemnity were valid the letter dated 18th November, 2016 by the applicant to the 1st respondent was not an admission of her indebtedness, whether statutory and redemption notices were issued and in the finding that damages would have been an adequate remedy, these grounds would easily collapse if considered against the following background which is largely uncontested: the applicant offered to the 1st respondent the suit property as security for the loan advanced to Lomson. It is common ground that Lomson defaulted in the repayment schedule prompting the 1st respondent to commence foreclosure proceedings against the applicant. The applicant then rushed to court and sued the 1st respondent, Lomson and Timeless Dolphine auctioneers, in ELC No. 17 of 2015 challenging the validity of the guarantee as well as the charge and the 1st respondent's exercise of statutory power of sale. The applicant successfully obtained injunctive orders against the 1st respondent. The matter was finally resolved and or compromised by a consent order. The consent had the effect of assigning the principal debtor's debt to the applicant. The applicant unequivocally admitted the debt owing in writing by a letter dated 18th November, 2016 to the 1st respondent and even made proposals as to the repayment. She never however lived to her end of bargain. The 1st respondent then advertised for the second time the suit property for sale by public auction in its exercise of the statutory power of sale. Once again, the applicant sought the assistance of court to stop the intended sale claiming that it was unlawful, irregular and unlawful. These are the same grounds she had advanced in the earlier suit. The subsequent suit was once again filed against the 1st respondent and the auctioneers. However, this time around, the applicant cleverly left out Lomson: it is obvious then that the suit in the High Court is between the same parties, involves the same suit property and based on the same cause of action despite the applicant's submissions to the contrary. In the case of **Kenya Commercial Bank Ltd v Muiri Coffee Estate Ltd & 3 others [2013] eKLR**, it was held that:

> **"If a court of competent jurisdiction has adjudicated over a matter between parties or parties whom they claim under and determined the issues in such matters, then the same parties or others litigating through them are barred from litigating the same issues before any other court. Such termination inevitably includes any judgment or orders issued following by consent of the litigating parties…"**

Given the above set of facts, we doubt whether the applicant's intended appeal is arguable. Further, whether or not to grant an injunction is discretionary. It is also equitable. Thus the conduct of the applicant prior, during and after the proceedings come in focus. We do not think that the applicant's conduct has been above board nor does it inspire confidence going by her broken promises.

With regard to the nugatory aspect, we note that the applicant claims that the suit property was her home and if sold, it will cause her irreparable damage and further that it may end with a third party from whom she may not recover. However, the value of the suit property is known. In her own affidavit sworn in ELC No. 17 of 2015, she placed the value at 7,000,000/=. We also note that the 1st respondent instructed the 2nd respondent to value the property on 15th November, 2016. The report is on record. However, it is incomplete as the value of the property is not indicated. If in the end it is found that the suit property was sold illegally, the loss can be made good by an appropriate award of monetary compensation. In **Nahashon K. Mbatia v. Finance Company Ltd [2006] eKLR**, the court observed:-

> **"… In any event, having charged the property, the plaintiff converted it to a commercial commodity with a monetary value that can be easily ascertained. Its loss can always be made good by an appropriate award of monetary compensation. There is no allegation that the defendant will not be in a position to meet such an award…"**

The 1st respondent is a reputable bank. It has not been suggested that should the intended sale found to be wanting, it may not be able to pay

the applicant the damages that may be awarded. We reiterate that once a property has been given as security for financial accommodation, it becomes a commodity for sale and therefore the sentimental attachment to the same becomes inconsequential and must be sold in accordance with the law. See **Isaac Litali v Ambrose W. Subai & 2 others - NBI HCCC 2092 of 2000 (UR)**.

On the basis of the foregoing, we are satisfied that the intended appeal will not be rendered nugatory if the injunction sought is not granted.

The upshot is that we find no merit in the application which is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 17th day of October, 2019

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE MAKHANDIA

…….……

JUDGE OF APPEAL

OTIENO-ODEK

…….……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR