IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), NAMBUYE & M'INOTI JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 412 OF 2019

BETWEEN

EQUIP AGENCIES LIMITED.....APPLICANT

AND

I & M INVESTMENT BANK.....1ST RESPONDENT

GARAM INVESTMENTS AUCTIONEERS.....2ND RESPONDENT

LUCAS KIIRU NGIGI, PAUL MBUGUA & MARY WANGARI

GATHUME sued as office bearers of GILGIL TOTAL INVESTORS

SELF-HELP GROUP.....3RD RESPONDENT

(Application for injunction pending the hearing and determination of an appeal

from the ruling and order of the High Court of Kenya at Nairobi (Tuiyott, J.)

dated 26th July 2019

in

HCCC No. 87 of 2019)

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RULING OF THE COURT

This ruling determines the motion on notice taken out by ***the applicant, Equip Agencies Limited***, on 29th August 2019 for an order of injunction. As worded the prayer for injunction seeks to restrain the respondents:

> "*from advertising for sale, selling whether by public auction or private treaty, disposing or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise interfering*"

with the applicant's ownership or title to the parcel of land known as ***L.R No. Gilgil Township Block 2/20 (the suit property)*** pending the hearing and determination of ***Civil Appeal No. 412 of 2019***. That appeal, as well as the motion before us, arise from a ruling of the High Court ***(Tuiyott, J.)*** dated 26th July 2019 in which the learned judge dismissed the applicant's application for injunction. It is not clear what all the verbosity we have quoted above is intended to achieve, granted that it is common ground that on 24th January 2019, some nine months before the applicant lodged the said motion, the 1st respondent sold the suit property to the 3rd respondent in a public auction. Ultimately the applicant conceded that all it is seeking is an order of injunction to stop the 3rd respondent from further selling or transferring the suit property to a third party.

The litigation between the parties over the suit property has spawned no less than thirteen rulings and a judgment by this Court. It is therefore apposite to set out in brief the background to this application so as to appreciate the context in which the application for injunction before us

is made.

On or about 22nd April 2013, the applicant charged the suit property in favor of the ***1st respondent, I & M Investment Bank*** to secure an aggregate maximum loan of ***Kshs 324,000.000.00***. The applicant defaulted in repayment of the loan and on 13th May 2016, the 1st respondent served upon it a statutory notice evincing intention to realize the security. The applicant filed ***Civil Suit No. 9 of 2016*** in the High Court at Naivasha seeking *inter alia*, an injunction to stop the intended sale of the suit property and a mandatory induction for true account of the status of its loan. That suit was based on the assertion that the applicant had fully repaid the loan, invalidity of the statutory notice, usurious and illegal interest rates, and unlawful consolidation of the applicant's loan accounts. ***Meoli J.*** heard the applicant's application for interim relief but by a ruling dated 9th December 2016, dismissed the application in its entirety.

The applicant then applied for an injunction before the High Court to enable it proceed to this Court. By a ruling dated 24th March 2017, the High Court found no merit in the application but in the interest of justice, granted the applicant an injunction for seven days to enable it agitate its application in this Court. Next, the applicant went back to the High Court for extension of the order of injunction but the same was denied vide a ruling dated 19th April 2017.

This Court heard the applicant's appeal against the ruling of the High Court of 9th December 2016 which dismissed the application for injunction. In a judgment dated 27th September 2017 in ***Civil Appeal No 2 of 2017***, this Court dismissed the appeal, stating as follows:

> *"The appellant was not entitled to protection of an interim order of injunction and the learned judge was right to so hold. This appeal has no merit and we dismiss it with costs to the respondent."*

Undeterred, the applicant filed in this Court, ***Civil Application No. Sup. 5 of 2017,*** seeking a certificate that its intended appeal to the Supreme Court against the ruling of this Court raised matters of general public importance deserving to be heard by the Supreme Court. It also prayed that the certificate do operate as an injunction restraining the sale of the suit property. That application was dismissed vide a ruling dated 26th September 2018 after the Court found that it raised no matter of general public importance.

Earlier, on 1st February 2018 the applicant had gone back to the High Court in Naivasha, again seeking an order of injunction to restrain the sale of the suit property and a 24 month period within which to rectify its default in the loan repayment or suspension of the 1st respondent's power of sale for 24 months to enable the applicant redeem the suit property. Those orders were sought on the basis that the applicant expected payment in excess of ***Kshs 34 billion*** by the Government of Kenya, with which it intended to settle its indebtedness to the 1st respondent. Mwongo, J. heard the application and dismissed the same for lack of merit vide a ruling dated 17th May 2018.

The applicant's next stop was before this Court where it filed ***Civil Appeal No. 101 of 2018*** against the ruling of Mwongo, J. The applicant also filed in this Court ***Civil Application No. 73 of 2018*** seeking an injunction to restrain the 1st respondent from selling the suit property pending the hearing and determination of its appeal. By a ruling dated 23rd October 2018, this Court found that the applicant's appeal was not arguable and dismissed the application with costs.

In the meantime, a party known as ***Gilgil Treatment Industries Ltd.***, claiming to be a tenant of the applicant, filed a suit in the ***Environment and Land Court*** at Nakuru, seeking an order of injunction to restrain the 1st respondent from selling the suit property on the grounds that the tenant had its properties on the suit premises and had also substantially developed the suit property. An application for interim injunction by that tenant was heard and dismissed by ***Ohungo, J.*** on 25th May 2018. The suit was subsequently transferred from Nakuru to Naivasha as ***High Court Civil Case No. 6 of 2018.*** On 29th November, 2018, the same tenant made a similar application for injunction in the High Court at Naivasha and sought a further injunction pending appeal to this Court against the ruling of Ohungo, J. Not surprising the applicant did not oppose that application while the 1st respondent strenuously opposed it. On 6th December 2018, Mwongo J. dismissed the application after finding that it was *res judicata* and that in any event, an award of damages would be an adequate remedy.

On the same 29th November 2018, the applicant filed yet another application in the High Court at Naivasha, seeking an injunction to stop the sale of the suit property on the basis that the suit property had not been valued as required by law, that the intended sale included assets that did not form part of the suit property, and that the provisions of the Auctioneers Act and the Auctioneers Rules had not been complied with. Like all the previous applications, this too was dismissed by Mwongo, J. on 6th December 2018 after he found that there was a valid valuation report dated 12th April 2018 and that the failure to comply strictly with the Auctioneers Act and Rules did not justify stopping the sale by an order of injunction. Ultimately the learned judge directed as follows:

> *"a) the sale by public auction shall be conducted on the basis that the reserve price shall be the forced sale value indicated in the valuation by Dunhill Africa Surveyors Ltd of Kshs 352,500,000/= b) the reserve price shall be a condition for sale."*

The circus did not stop there, however. On 1st January 2019, the applicant filed yet another application in Naivasha HCCC No. 9 of 2016 (which had by now become ***Nairobi HCCC No. 417 of 2018)*** to among other things, stop the auction of the suit property, which was scheduled for 24th January 2019. This time round, the applicant applied for consolidation of some suits and settlement by the court, of a litany of issues touching on the relationship between the applicant and the 1st respondent. Pending the settlement of the issues, the applicant applied for an interim injunction to restrain the 1st respondent from selling the suit property. By a ruling delivered on the day of the auction, *Tuiyot, J.* dismissed the prayer for injunction, paving the way for the auction to proceed. The applicant responded by filing in this Court on 1st February 2019, ***Civil Application No. 31 of 2019*** seeking an injunction under ***rule 5(2)(b)*** worded in exactly the same words that we quoted earlier on in the application before us. That application is still pending before this Court.

The 1st respondent ultimately sold the suit property to the 3rd respondent by public auction on 24th January 2019. On 20th February, 2019 the applicant filed Nairobi ***High Court Civil Suit No. 87 of 2019***, against the 1st respondent, the auctioneer and the purchaser of the suit premises. In the suit the applicant applied, *inter alia*, for a declaration that the sale of the suit property was fraudulent, illegal null and void and an injunction to retrain the transfer of the suit property to the 3rd respondent. The applicant challenged the auction on the grounds that the 3rd respondent did not deposit Kshs 10 million before the date of the auction and 25% of the purchase price on the fall of the hammer;

that no bid numbers were issued; that no public auction actually took place; and that the suit property was undervalued. Contemporaneously with the suit, the applicant filed a notice of motion seeking an interim injunction to restrain the respondents from completing the transfer of the suit property to the 3rd respondent, or taking possession of the suit property, leasing, letting, charging, or disposing of it, or otherwise interfering with the applicant's ownership of the suit property.

The respondents resisted the application on the grounds that it was *res judicata* and an abuse of the process of the court; that the auction was conducted within the provisions of the law; that the suit property was lawfully sold to the 3rd respondent; that the applicant's equity of redemption was extinguished upon the fall of the hammer; and that the applicant had not made out a *prima facie* case with a probability of success or one where an award of damages would not be a sufficient remedy. On 26th July 2019, Tuiyot, J. dismissed the application after which the applicant filed in this Court ***Civil Appeal No 412 of 2019*** and the application for interim injunction pending the hearing and determination of that appeal. That is the application now before us.

That then is the background to this application. ***Mr. Marete***, learned counsel who held brief for ***Mr. King'ara*** for the applicant, relied on the memorandum of appeal to demonstrate that the intended appeal was arguable. He submitted that the applicant had made out a *prima facie* case that the sale of the suit property was conducted in breach of mandatory provisions of the law and was also a product of fraud and collusion. He contended that the learned judge had found that there was an inconsistency between the explanation by the auctioneer and the 3rd respondent regarding payment of the deposit before bidding. The applicant further urged that it had demonstrated that some assets which were sold were not to be included in the sale and that the learned judge erred by taking into consideration extraneous matters and making substantive findings at an interlocutory stage. Lastly the applicant submitted that for the above reasons the learned judge had erred in the exercise of his discretion to refuse an interim injunction.

On whether the appeal would be rendered nugatory, the applicant submitted that if the 3rd respondent was not retrained from transferring the suit property there was a danger that it would transfer it to a third party and thus place the suit property beyond the reach of the applicant and make a successful appeal academic. The applicant relied on the judgment of this Court in ***Ihenya Ltd v Barclays Bank & 5 Others, CA No. 3 of 1997*** where the Court granted an order of injunction following a sale whose validity was questioned.

The 1st and 2nd respondents, represented by ***Mr. Wawire,*** learned counsel, opposed the application, submitting that the applicant's intended appeal was not arguable because all the issues raised therein were *res judicata*, having been litigated and determined by courts of competent jurisdiction in the various applications that we earlier referred to between the same parties. In particular counsel submitted that all the issues that the applicant had raised before Tuiyott J. such as the validity of the valuation report and the assets that were allegedly not part of the suit property, were the very issues raised and determined by Mwongo, J.

He added that the applicant had admitted its indebtedness to the 1st respondent and was merely obstructing the 1st respondent from recovering its money. In counsel's view, the applicant's equity of redemption was extinguished on the completion of the auction and therefore there was no basis for issuing an order of injunction in the applicant's favour.

On whether the success of the appeal would be negated, the two respondents submitted that it would not because the 1st respondent was able and willing to compensate the applicant if the appeal were to succeed. Counsel emphasized that the 1st respondent had already given an undertaking to that effect on the basis of which the High Court in its various rulings found that award of damages would be an adequate remedy. He concluded by submitting that even the balance of convenience titled in favor of the 1st respondent which the applicant owed over Kshs 2 billion.

The two respondents relied on a number of rulings to support their arguments, among them ***Mbuthia v Jimba Credit Finance Corporation & Another [1998] eKLR*** and ***Kamulu Academy Ltd & Another v British American Insurance (K) Ltd & 2 Others [2018] eKLR.***

Lastly we heard ***Ms. Ngugi,*** learned counsel for the 3rd respondent, who also opposed the application. Counsel associated herself with the 1st and 2nd respondents' submissions and contended that the 3rd respondent was a *bona fide* purchaser for value without notice whose rights were protected by section 99 of the ***Land Act***. She added that the 3rd respondent had already paid the deposit and 25% of the purchase price ***(Kshs 78,375,000.00)*** from borrowed funds which it was repaying and that no irregularity had been proved as regards the auction. Counsel concluded by submitting that absent evidence of fraud, after the fall of the hammer the applicant's remedy lay only in award of damages.

Those are the positions articulated by the respective parties. To entitle the applicant to an order of injunction under rule 5(2)(b) of the Rules of this Court, it must satisfy us that its appeal is arguable and that if we do not grant the injunction, the success of the appeal will be negated. (See ***Jaribu Holdings Ltd v Kenya Commercial Bank Ltd CA No 314 of 2007).*** The applicant is obliged to satisfy both considerations. It will not be entitled to the injunction if it satisfies only one of the considerations. (See ***Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31).***

It has been stated time and again that an arguable appeal is not one that must succeed; rather it is one which is not frivolous, an appeal that raises even one *bona fide* arguable issue that deserves full consideration by the Court. (See ***Kenya Railways Corporation v. Edermann Properties Ltd, CA No. Nai. 176 of 2012).*** As regards whether or not an appeal will be rendered nugatory, that will depend on the circumstances of each case. (See ***Stanley Kangethe Kinyanjui v. Tony Keter & 5 Others, CA. No. 31 of 2012).*** The Court's primary concern however is to ensure that a successful appeal is not rendered a mere pyrrhic victory because what the applicant sought to prevent has irreversibly happened in the meantime or cannot be adequately compensated by award of damages. (See ***Kenya Airports Authority v. Mitu-Bell Welfare Society & Another, CA No. 114 of 2013 (UR 77/2013).***

On whether the appeal is arguable, we agree with the respondents that the applicant has presented a myriad suits and applications, which to say the least, is most unedifying. But it cannot be denied that in Civil Appeal No 412 of 2019 the applicant is challenging the sale of the suit property, whilst previously it had been seeking to prevent the sale, which had not taken place. Looking at the memorandum of appeal, we agree that it raises some arguable points. We must however refrain from from saying more, for it is the bench which ultimately hears the appeal that has jurisdiction to determine whether the appeal actually has merit or not. (See ***Njuguna S Ndungu v EACC & 3 Others, CA No. Nai 304 of 2014)***

Regarding whether the appeal will be rendered nugatory if it succeeds in the absence of the orders sought in this application, we have absolutely no doubt that it will not. The value of the suit property is known in precise monetary terms. The 1st respondent has already given an undertaking to compensate the applicant should the appeal end up in its favor. The applicant has not even remotely suggested that the 1st respondent has no means or ability to satisfy that undertaking. The applicant has also not demonstrated that the 3rd respondent intends to sell and transfer the suit property once it is registered in its name. The position taken by the applicant on this limb of the application is purely speculative and conjectural. The evidence on record, which includes the 3rd respondent having borrowed money to purchase the suit property, which money it is repaying, points to the contrary.

As we stated earlier, the applicant must satisfy us on both scores. In ***Republic v. Kenya Anti-Corruption Commission & 2 Others*** (supra), the Court explained that:

> ***"In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb".***

In the instant application the applicant has presented only an arguable appeal, but has not satisfied us that the appeal will be rendered nugatory if it succeeds. For that reason, we find that the applicant's motion taken out on 29th August 2019 is bereft of merit and is hereby dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Nairobi this 6th day of December 2019

W. OUKO (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR