



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO, (P), KOOME & MAKHANDIA JJA)**

**CIVIL APPLICATION NO. NAI 187 OF 2018**

**BETWEEN**

**TRAPOS LIMITED.....1<sup>ST</sup> APPLICANT**

**EUSTACE KABURU MWARANIA.....2<sup>ND</sup> APPLICANT**

**KELLEN MUMU KABURU.....3<sup>RD</sup> APPLICANT**

**AND**

**I & M BANK LIMITED.....1<sup>ST</sup> RESPONDENT**

**J. M. GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

(An Application for an injunction pending hearing and determination of an intended

appeal from the Ruling of the High Court of Kenya at Nairobi (F. Tuiyott, J.)

dated the 19<sup>th</sup> day of June 2018 in HCCC No. 235 of 2018)

\*\*\*\*\*

**RULING OF THE COURT**

Brought pursuant to **Rule 5(2)(b)** of the Court of Appeal Rules, the application to which this ruling relates seeks an order of injunction to restrain the respondents, their servants, or agents from selling or in any other way adversely dealing with the suit property, namely L.R No. 1160/689 (I.R No. 84262) at Kwarara Road in Karen, pending the hearing and determination of the intended appeal.

This, in brief is how the dispute arose. The 1<sup>st</sup> applicant company is a signatory to an Advisory and Arranging Mandate Agreement dated 8<sup>th</sup> January 2014, between itself and CFC Stanbic Bank Ltd (CFC). Under the said agreement, CFC was to offer the 1<sup>st</sup> applicant a loan facility of USD. 250,000 to cover the cost of an initial bank feasibility study for a proposed aerial cable car passenger line that would span the Likoni Inlet in Mombasa under the operation of the 1<sup>st</sup> applicant, by concession of the Kenya Ferry Service. It was a condition under the agreement that the loan was to be secured by either an acceptable Bank Guarantee or a Standby Letter of Credit (SBLC). The applicant complied with the latter from the 1<sup>st</sup> respondent, which it has been renewing and/or extending from time to time.

To secure the loan, the suit property, registered in the 2<sup>nd</sup> applicant's name was charged. The suit property is the matrimonial home for the 2<sup>nd</sup> and 3<sup>rd</sup> applicants who also acted as the guarantors to the facility.

The SBLC was to be used as a supportive instrument and a secondary mode of payment to guarantee that the 1<sup>st</sup> applicant would perform all its obligations under the agreement. The funds held thereunder were to be paid to CFC in the event that the 1<sup>st</sup> applicant was to fail to honour its obligations.

It was the 1<sup>st</sup> applicant's case that while still honouring its obligations, in September 2017, CFC without any cause called for the draw down of the SBLC; that at the time this happened the applicant was not indebted to the 1<sup>st</sup> respondent; and that through negligence and in bad faith

the 1<sup>st</sup> respondent proceeded to pay out the sum of Kshs.25 million to CFC without satisfying itself that the applicants were in default.

In exercise of its statutory power of sale, the 1<sup>st</sup> respondent advertised the suit property to be sold by public auction on 19<sup>th</sup> June, 2018. The applicants moved the High Court by a motion to stop the said auction.

In determining the dispute, the learned Judge gave the intended auction a clean bill of health explaining that the 1<sup>st</sup> respondent had issued two statutory notices as required by the Land Act; that thereafter, the 2<sup>nd</sup> respondent had issued a notification of sale as required by the Auctioneers Rules. Applying the principles enunciated in the case of **Giella V. Cassman Brown & Co. Ltd** (1973) E.A. 358, for the grant of an interlocutory injunction, the Judge observed that, although no notification was made by the 1<sup>st</sup> respondent as required by **Article 16** of the Uniform Rules for Demand Guarantees (URDG), the omission was not fatal as the 1<sup>st</sup> applicant ought to reasonably have anticipated that a call up of the guarantee would be made by CFC since the latter had sought to terminate the agreement through an earlier notice dated 3<sup>rd</sup> October, 2017; and that, as a result thereof the 1<sup>st</sup> applicant had attempted to refer the disagreements to arbitration. In view of these factors, the Judge came to the ultimate conclusion that the applicants had not established a *prima facie* case; that the loss the applicants would suffer was not irreparable as there was no evidence that the 1<sup>st</sup> respondent would not be able to pay any damages that may be awarded to the applicant in the event of the suit succeeding; that the applicants were well aware of the consequences of their action when they charged their matrimonial property; and that the applicants were not vigilant as they had approached the court 7 months after the statutory notice was issued.

Aggrieved by this determination, the applicants have evinced their intention to appeal against the said ruling by a Notice of Appeal and a draft memorandum of appeal based on 13 grounds. In the meantime, the applicants have brought this application for injunction, as explained earlier, in which their main complaint is that 1<sup>st</sup> respondent in manifest negligence of its professional undertaking and bad faith wrongfully and unlawfully honoured an unscrupulous demand by CFC under SLBC when there was no actual default on the 1<sup>st</sup> applicant's part; and that the action of the 1<sup>st</sup> respondent was in disregard of the International Chamber of Commerce's URDGs.

We were informed that an auction conducted on 10<sup>th</sup> July, 2018 did not realize the desired price, prompting the 1<sup>st</sup> respondent to instruct the 2<sup>nd</sup> respondent to re-advertise the sale of the suit property by public auction on 10<sup>th</sup> July, 2018.

To satisfy the first requirement for the grant of an order of injunction under **rule 5(2)(b)** aforesaid, the applicants through Mr. Atonga, learned counsel contended that since it was not indebted to the 1<sup>st</sup> respondent and because the statutory notice was issued due to the negligence of the 1<sup>st</sup> respondent, the intended appeal was arguable.

On the second requirement, the applicants have contended that there would be substantial injustice occasioned to them if the suit property is sold and yet there is no debt; that in the interest of justice, the respondents be restrained from carrying out the intended sale scheduled for 10<sup>th</sup> July, 2018 or on any other subsequent date in order to preserve the applicants' constitutional right to property; and that the 1<sup>st</sup> respondent has maliciously caused the names of the 1<sup>st</sup> and 2<sup>nd</sup> applicants to be published in the newspaper and other media as defaulters thereby occasioning damage to the applicants' respective image as a reputable entity and director. Finally, they stressed that the project, subject matter of the underlying agreement undertaken by the 1<sup>st</sup> applicant is of utmost public importance as it is aimed at decongesting the Likoni Ferry Crossing Channel; and that any negative publicity may scare away existing and potential investors.

Opposing the application, Mr. Mueke, learned counsel for the 1<sup>st</sup> respondent submitted that the 1<sup>st</sup> respondent was neither party nor privy to the Advisory and Arranging Mandate Agreement between the 1<sup>st</sup> applicant and CFC. That on 19<sup>th</sup> October, 2017, CFC called up the SLBC stating that the 1<sup>st</sup> applicant had not fulfilled its obligations towards them as a result of which, the 1<sup>st</sup> respondent honoured the guarantee/SLBC by releasing the sum of USD 250,000 as directed by CFC. He maintained that the 1<sup>st</sup> applicant was lawfully indebted to the 1<sup>st</sup> respondent for the sum of Kshs. 25,364, 110.94 as at 14<sup>th</sup> June, 2018. Counsel clarified that the process of realization of the charge was not triggered by the call up of the SBLC; that in fact the 1<sup>st</sup> respondent's letter of demand was dated 7<sup>th</sup> September, 2017 way after the facilities had fallen in arrears. On the nugatory aspect, he submitted that the suit property was liable for sale due to default.

The only two questions before us are whether, from the draft memorandum of appeal, the intended appeal is arguable and whether it will be rendered nugatory if an order of injunction is not granted and the intended appeal were to succeed. See the case of **Reliance Bank Ltd (In Liquidation) V Norlake Investments Ltd** Civil Application. No. Nai. 93 of 2002 (UR). The appellant has proffered 13 grounds in this appeal. We entertain no doubt from those grounds that the intended appeal is arguable. The first question on appeal will be whether the 1<sup>st</sup> respondent was negligent in its professional undertakings by honouring the demand by CFC, whether there was default by the applicants and whether they had satisfied the conditions for the grant of an order of temporary injunction. Because the appeal is yet to be filed,

we cannot express ourselves conclusively on these issues save to repeat here that, in our view the issues enumerated above are not idle.

We, however, do not think the applicant has discharged the onus of demonstrating that the intended appeal will be rendered nugatory if this application fails. As has been said time without number;

**“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”**

See **Kenya Shell Limited V Kibiru & Another**, Civil Application No. NAI. 97 of 1986.

Apart from merely stating that the suit property is their matrimonial home, the applicants have not explained the nature of substantial loss they stand to suffer. It was their matrimonial home even at the point it was offered as security. The argument now advanced about their

sentimental attachment to it cannot, without more be a consideration.

In any event, no argument has been advanced that the respondents are incapable of paying any damages that may accrue on the sale of the suit property if ultimately the Court decides against them.

Having failed to satisfy the two principles, the application fails. It is accordingly dismissed. Costs will be in the appeal.

**Dated and delivered at Nairobi this 12<sup>th</sup> day of October, 2018.**

**W. OUKO, (P)**

.....

**JUDGE OF APPEAL**

**M.K. KOOME**

.....

**JUDGE OF APPEAL**

**ASIKE – MAKHANDIA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**