



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU, J. MOHAMMED, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 66 OF 2018

BETWEEN

COSMAS STEPHEN NABUNGOLO.....APPLICANT

VERSUS

AFRICAN BANKING CORPORATION LTD.....RESPONDENT

(Being an application for temporary injunction pending hearing and determination of an Appeal from the Ruling and orders of the (Hon. Njoroge J), delivered on 29th May, 2018

in

Kitale Environment & Land Court Case No. 105 of 2017)

RULING OF THE COURT

[1] On 29th May, 2018, the Environment and Land Court (ELC) (Njoroge J), delivered a ruling in which it dismissed a motion dated 13th June, 2017 that had been filed by **Cosmas Stephen Nabungolo**, who is now the applicant before us. In the motion, the applicant had sought temporary orders of injunction to restrain African Banking Corporation Limited (now the respondent) from advertising or selling the applicant's properties that were listed in a statutory notice dated 22nd November, 2016, pending the hearing and final determination of a suit that the applicant had filed against the respondent. In the ruling, the learned judge of ELC found that the applicant's motion had no merits and dismissed the same with costs to the respondents

[2] Being aggrieved, the applicant has filed a notice of appeal in this Court against the ruling of 29th May, 2018, and has now moved this Court seeking orders under **Rule 5(2)(b)** of the Court Rules that:

“a) Pending the hearing and determination of the intended appeal, an injunction do issue restraining the respondent either through itself or by its servants, proxies, employees or agents including Igare Auctioneers from selling, by public auction or at all, the applicant's properties advertised at page 41 of the Standard Newspaper on Tuesday 26th June, 2018.

b) Pending hearing and determination of the intended appeal an injunction be issue restraining Igare Auctioneers, their servants, proxies, employees and/all agents from selling by public auction or at all the applicant's properties advertised at page 41 of the Standard Newspaper of Tuesday 22nd June, 2018.”

[3] The application is supported by an affidavit sworn by the applicant on 26th June, 2018 to which the applicant has annexed a draft memorandum of appeal and a copy of the advertisement from the Standard Newspaper of 26th June, 2018 showing that the properties are due for sale on 16th July, 2018 and 17th July, 2018. The applicant maintains that his intended appeal would be rendered nugatory unless the injunction is granted.

[4] During the hearing of the application, **Prof. Nixon Sifuna** represented the applicant while **Mr Maganga** represented the respondent.

[5] Prof. Sifuna submitted that the applicant has an arguable appeal; that the learned judge misapplied the legal principles pertaining to injunctions; that where there is an interlocutory application for an injunction the learned judge should not dismiss the application but should

hear the case on its merits; that the parties were negotiating on the repayment of the outstanding loan amount; and that the impugned ruling was clearly wrong. Counsel urged the Court to allow the application.

[6] **Mr. Maganga** opposed the application and relied on the replying affidavit sworn by Evalyn Gachoki, the annexures thereto and list of authorities. Mr. Maganga submitted that the applicant had not satisfied the twin principles of Rule 5(2)(b); that the appeal is not arguable; that the learned judge did not consider any extraneous matter; that the applicant was found to have made material non-disclosure of his loan accounts; that the appeal will not be rendered nugatory if successful as the respondent is a reputable Bank capable of paying damages in the event the appeal succeeds.

[7] We have considered the application, the submissions made by counsel, the authorities cited and the law. It is trite law that before the Court can grant any orders sought under Rule 5(2)(b) of the Court of Appeal Rules, the applicant must satisfy the Court that the appeal is not only arguable but that should it succeed it would be rendered nugatory if the orders sought are not granted. This principle has been well summarized in **Stanley Kang’ethe Kinyanjui Vs Tony Ketter & 5 Others [2013] eKLR.**

[8] The first issue for our consideration is whether the intended appeal is arguable. This Court has stated on numerous occasions that; an arguable appeal is not one which must succeed but one which is not frivolous; and that a single arguable ground of appeal would suffice to meet the required threshold.

[9] On the issue of arguability, the applicant has set out in his draft Memorandum of Appeal several grounds, including whether the learned Judge erred in failing to correctly apply his mind to the legal principles for the grant of interlocutory injunctions and in issuing final orders at an interlocutory stage. Without predetermining the merits of these grounds, and being mindful of the fact that an arguable ground is not necessarily one which must succeed, we are satisfied that the grounds are arguable grounds.

[10] On the nugatory aspect, as this Court stated in **Reliance Bank Ltd vs Norlake Investments Ltd [2000] 1 EA 227**, the factors which could render an appeal nugatory has to be considered within the circumstances of each particular case, and in doing so, the court is bound to consider the conflicting claims of both sides. Further, as was stated in **Stanley Kang’ethe Kinyanjui vs Tony Keter** (Supra) whether or not an appeal would be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible or if it is not reversible whether damages would reasonably compensate the parties aggrieved.

[11] In the instant case, the respondent is in the process of executing its statutory power of sale. The applicant has by implication acknowledged owing the respondent, hence, the proposals for payment. It was the respondent’s contention that if the sale proceeds as a reputable Bank it will be in a position to compensate the applicant by way of damages should the appeal succeed. This has not been contradicted. Accordingly, we find that the applicant has not satisfied this Court that his appeal if successful will be rendered nugatory.

[12] From the circumstances before us, the applicant has demonstrated that the intended appeal is arguable but has failed to demonstrate that it will be rendered nugatory if the order of temporary injunction is not issued. For the application under **Rule 5(2)(b)** of this Court’s Rules to succeed, the applicant must prove both the arguability of the appeal and the nugatory aspect.

[13] The applicant having failed to establish the nugatory aspect of his application, we decline to grant the order of temporary injunction pending the hearing and determination of the intended appeal. The application is accordingly dismissed with costs.

Dated and delivered at Kisumu this 15th day of November, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR