IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & SICHALE, JJ.A)

CIVIL APPLICATION NO. 24 OF 2017 (UR 15/2017)

BETWEEN

CANELAND LIMITED…….…….....APPLICANT

VERSUS

AFRICAN BANKING CORPORATION LTD…….....……RESPONDENT

(An application for stay of execution pending the hearing and determination of the appeal from the Ruling and Orders of the Environment and Land Court of Kenya at Kisumu (Kaniaru, J) made on 8th February, 2016

in

ELC NO. 124 OF 2013)

****

RULING OF THE COURT

Caneland Limited (the appellant), filed before this Court sitting in Kisumu the notice of motion dated 8th March, 2017seeking in the main, two orders as hereunder:-

> ***1. That there be a stay of execution of the Honourable court's ruling dated 8th February, 2016 in Kisumu ELC Case No. 124 of 2013 pending the inter partes hearing of this application; and***
>
> ***2. That there be a stay of execution of the Honourable court's ruling dated 8th February, 2016 in Kisumu ELC Case No. 124 of 2013 pending the hearing and determination of the appeal lodged in Court of Appeal Kisumu being Civil Appeal No. 25 of 2017.***

The application is premised on grounds, *inter alia*, that the applicant had filed an application before the Land and Environment Court in Kisumu seeking orders of injunction against **African Banking Corporation Ltd** (respondent) for it to be restrained from advertising for sale of the applicants securities being **Kisumu Municipality Block 7/171** and **181,** or from offering the said property for sale by public auction pending hearing and determination of the suit in question.

The application was dismissed on 8th February, 2016. The suit properties were then advertised for sale by public auction, which was scheduled to take place on 21st March, 2017 hence this application, which was

certified as urgent. The applicant avers that it has filed an appeal which is arguable, and further that it stands to suffer irreparable loss if the orders sought herein are not granted.

In his affidavit in support of the application sworn on 8th March, 2017, **SURJIT SINGH** has given the history of the matter and the circumstances preceding the filing of the suit before the Environment and Land Court. It is instructive to note that the said Surjit has not in his affidavit disclosed his relationship with the applicant, but from the record of the notice of motion, it has come out clearly that he is one of the directors of the applicant and a guarantor of the loan facility, which is the genesis of all troubles besetting the applicant, culminating with this application, and the intended appeal.

As this is an application arising from an interlocutory order of the Environment and Land Court, it will not be necessary to delve into the details of the matter as the main suit is yet to be heard in the trial court. Suffice it to say that the applicant took a loan facility from the respondent and **SURJIT SINGH** the deponent of the affidavit and another offered the properties in question as securities for the loan facility.

We do not wish to go into the figures and the question as to how much was paid and what remains outstanding. It is common ground however, that the respondent claims that there was default in repayment of the loan, and the applicant disputes the outstanding amount. The applicant prays the Court to stop the sale so that the outstanding amount can be ascertained and settled.

The respondent, through its Branch Manager at its Kisumu Branch, Mr. Douglas Okiring, has sworn a 38 paragraph affidavit in opposition to the application. In the respondent's view, this application is brought in bad faith, is vexatious and frivolous and only meant to frustrate and delay the exercise of the respondent's statutory power of sale. According to the respondent, the applicant has filed a multiplicity of applications in the same matter seeking similar orders, all which have been dismissed. Mr. Okiring has listed not less than four (4) such applications in his affidavit.

Mr. Okiring contends that the applicant has defaulted in repayment of the loan, and that other than a paltry sum of Ksh 6,540/= paid on 21st September, 2012, the last installment was made over five years ago, yet the loan which he says stands at over Ksh. 96,000,000/= continues to accrue interest and penalties. More importantly however, is his deposition that the applicant has no *locus standi* to ask for the injunctive orders as the properties, the subject of the suit are not in its name but in the names of the two guarantors.

The respondent also deposes that as the trial court only dismissed the applicant's application and did not give any positive orders; there is therefore nothing that this Court can be asked to stay. The respondent therefore entreats the Court to dismiss this application with costs.

For the applicants, the application was canvassed before us by learned counsel, Mr. Anyumba, who reiterated the contents of the application and the affidavit and urged us to grant the orders sought. According to learned counsel, the applicant has an arguable appeal which is not frivolous; arguable because according to him, the statutory notice issued by the respondent was defective; that the respondent had given different figures as the amounts owed, giving Ksh. 22,041,491/= in one statement, 42 million in another statement, and 46 plus million in yet another. He submitted that that was against **Section 90 of the Land Act** which requires that a chargee must indicate the exact amount owed. He also contended that the statutory notices were served on the wrong persons i.e the guarantors as opposed to the loanee (this notwithstanding the fact that the guarantors are the registered owners of the properties in question). It is also contended that there is violation of **Section 44 of the Banking Act.**

On the twin principle of nugatory aspect, learned counsel submitted that if the properties in question are sold, the business goodwill the applicant has built over the years will be lost and it will consequently suffer irreparable prejudice which cannot be remedied by way of payment of damages.

He urged the Court to allow the application.

On her part, Ms. Kamunya, learned counsel appearing for the respondent opposed the application. She

accused the applicant of nondisclosure of material facts, saying that it has not come to Court with clean hands. Among the facts not disclosed, according to Ms. Kamunya is the filing of multiple applications seeking similar orders before the trial court all which have been dismissed. She submitted that the applicant has no arguable appeal at all as the respondent supplied it with statements showing the exact amounts, which vary only depending on when the statements were issued on account of the accrued interest and penalties. Furthermore according to learned counsel, the guarantors had severally admitted the indebtedness in writing as deposed in the replying affidavit. She submitted that the respondent has not violated the Banking Act and there was absolutely nothing arguable about the appeal.

On the nugatory aspect, learned counsel submitted that 'goodwill' is not attached to a building but to the business and the owner. Even if the building is sold and the applicants relocate elsewhere, if they have any goodwill, it will go with them. Also, if the trial court later finds that the property was erroneously sold, the respondent, being a reputable, financially sound banking institution can always refund the money.

Lastly, according to learned counsel, the applicant is seeking stay of a negative order, which this Court has stated often times, is not possible. In support of this proposition, she called in aid this Court's decision in **Venture Capital and Credit**

Limited vs Consolidated Bank of Kenya limited [2004] 1 EA. She also relied on the same case for the proposition that the suit property does not belong to the applicant, and it does not stand to lose any proprietary rights even if the same is sold.

We have considered the application before us, the grounds on its face, the rival affidavits, submissions of counsel and the applicable law. The law in this area is well settled. The principles applicable for the determination of applications under **Rule 5(2) of this Court**'s **Rules** such the one under consideration have been succinctly pronounced by this Court in several decisions. For instance, this Court in **Civil Application No. Nai. 157 of 2006** in **Ishmael Kagunyi Thande v. Housing Finance of Kenya Ltd** (unreported) pronounced itself as follows:-

> ***"The Jurisdiction of the Court under rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will 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) KLR***

As clearly stated above therefore, it is not sufficient for an applicant to establish only one of the principles. She/he must establish both as they are conjunctive and not disjunctive.

On the issue of arguability, as we stated earlier on, we are reluctant to delve into any substantive issues which are yet to be determined by the trial court. For instance, the issue as to whether service of the statutory notice was served on the proper party or not is one we cannot be called upon to determine in this application; nor can we determine whether there is any violation of the Banking Act by the respondent. We say so because the appeal arises out of an interlocutory ruling on an application for injunctive orders.

Orders of injunction are at the discretion of the court.

What we ought to be asking ourselves is whether the Judge exercised his discretion judicially or not in declining to grant the injunctive orders sought. Did the learned Judge consider extraneous matters before arriving at the said decision? Did he fail to consider relevant matters and in so doing arrived at the wrong decision. It is within that context that we must consider this application.

Looking at the learned Judge's ruling, it is clear that the Judge was very conscious of the fact that the issues raised before him had yet to be canvassed in the main suit. He therefore eschewed, and rightly so in

our view, making any determination on issues as to how much money was owed; whether the interest charged was unconscionable; and even the issue of *locus standi*.

As this Court has held in many decisions, a court exercising its appellate jurisdiction must be circumspect and slow to interfere with a trial Judge's exercise of discretion. Before doing so it must consider the following principles as set out in the *locus classicus* case of **Mbogo & Another v Shah (1968) EA 93**

> ***"A Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice."***

These principles have been reiterated subsequently in several other decisions of this Court e.g **Milka Nyambura Wanderi & Another v Principal Magistrate's Court Murang'a & 4 others [2014] eKLR (supra)** and **Hezekiah Kamau & Another v Kamau Mukuna [2015] eKLR**.

Applying the said principles to the matter before us, we are satisfied that learned counsel has failed to demonstrate to the Court any grounds that would allow us to interfere with the learned Judge's discretion. We find no misdirection on the part of the learned Judge. He applied the law correctly after considering the law and the material placed before him by learned counsel, before declining to give injunctive orders in this matter. He did not consider any irrelevant or extraneous matters, nor did he fail to consider any relevant matters that would have tilted the ruling in favour of the applicant. Even if we were to assume that the learned Judge was wrong, (which we don't do), would we say that the applicant has met the threshold required for an application under **Rule 5**

> **2. (b)** of this Court's Rules to succeed?

On the first principle, we remind ourselves that an arguable appeal is not necessarily one that will succeed. As this Court held in **Kenya Medical Lab Technicians & Technologists Boards v. Prime Communications Limited [2014] eKLR:-**

> ***"In considering whether an arguable appeal has been made out, it is not a requirement that the appeal will necessarily succeed. It is sufficient that the appeal appears one that will be fully argued before the Court…And besides, an appeal is considered arguable even if it raises a single bonafide point only…."***

We do not see what is arguable about the learned Judge failing to consider the substantive issues he had been invited to consider at an interlocutory stage; we see no arguability in the issue of the applicant being guilty of non-disclosure which also influenced the learned Judge to deny the injunctive orders sought. The learned Judge also found that there was no dispute that money was owed; and further that the applicant had stopped servicing the loan. That too is not in dispute before us.

Even if *arguendo*, we assume that the appeal is not frivolous, and is arguable, what about the other principle of nugatory aspect?

Has the applicant established that if the orders sought are not granted, its appeal will be rendered nugatory? We are far from satisfied in that regard. An appeal is rendered nugatory when it succeeds and it is not possible to reverse the intervening situation so as to reflect the outcome of the appeal. In **Ahmed Musa Ismael VS Kumba Ole Ntamorua**

- **4 Others (Civil Application No. 256 of 2013),** this Court expressed the purpose of the requirement that a successful appeal should not be rendered nugatory to be:

> ***"to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm***

or destruction that turns the appeal into a mere academic ritual."

What may render a successful appeal nugatory must be considered within the circumstances of each particular case. (**Reliance Bank Ltd vs Norlake Investments Ltd (2002) 1 EA 227**, **Silverstein Vs Chesoni (supra)** and **Kenya Commercial Bank Ltd vs Benjo Amalgamated Ltd & Another**, **Civil Application No. Nai 50 of 2001)**.

According to the applicant, the irreparable damage it is likely to suffer is losing its goodwill in business. We agree with counsel for the respondent that goodwill does not attach to a building but to person or business. We further find that if the appeal succeeds, and the property will have been sold, the respondent, which is a reputable bank, will be in a position to compensate the applicant.

The other issue raised was that there is nothing to stay as the order sought to be stayed was a negative order. On this issue we refer to the **Venture Capital case (supra)** where the Court held that the prayer for stay of execution was misconceived since the superior court had not made any positive order capable of execution.

See also **Western College of Arts and Applied Sciences (Weco) -vs- Oranga (1976) KLR 63.**

Lastly, and in our view very disconcerting is the fact that even as counsel for the applicant prosecuted this application, in the midst of claims of non-disclosure and coming to court with unclean hands, he kept to himself the fact that an order whose validity appeared quite suspect had been issued by the Deputy Registrar of the High Court in Kisumu giving orders of stay of the Judge's order in favour of one of the guarantors of the applicant. In effect, the Deputy Registrar, a magistrate, had overturned the orders of a Judge declining to issue injunctive orders.

We think this is an issue the Resident Judge Kisumu should look into, but we shall leave it at that. What this tells us however, is that the applicant's hands are still grossly tainted, and just like the learned Judge stated in his impugned ruling, the applicant is undeserving of the favourable exercise of this Court's discretion. We think we have said enough to show that the application before us is for dismissal. Accordingly, the same stands dismissed with costs to the respondent.

Dated and delivered at Nairobi this 7th day of April, 2017.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

……...……..

JUDGE OF APPEAL

F. SICHALE

…….……..……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR