



IN THE COURT OF APPEAL

AT NYERI

(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJA)

CIVIL APPLICATION NO. 7 OF 2017 (UR No. 6/017)

BETWEEN

EQUIP AGENCIES LIMITED.....APPLICANT

AND

I & M BANK LIMITED.....RESPONDENT

(Being an application for injunction pending the hearing and determination of the appeal against the entire Ruling and Order of the High Court of Kenya at Naivasha, (Meoli, J.) dated 9th December, 2016

in

H. C. C. No. 82 of 2016)

RULING OF THE COURT

The applicant, **Equip Agencies Limited**, admittedly borrowed money from the respondent, **I & M Bank Limited**, in the year 2011. The sum borrowed is said to be in the sum of Kshs 324,000,000/- and was to facilitate acquisition of a property known as **L.R. NO. GILGIL/TOWNSHIP BLOCK 2/210** (the suit property). The loan was secured on the suit property and was to be repaid with interest. The applicant alleges that the amount borrowed was fully amortized in March 2015 by which period the total sum paid was Kshs 464,115,641. Ostensibly, due to the applicant's default in payment of money advanced in another loan account, the respondent gave the applicant statutory notice in May 2016 demanding payment of the combined debt advanced in the two accounts, that is to say, Kshs 555,393,923.46 in account [particulars withheld] and Kshs 677,283,313.00 in account [particulars withheld].

According to the applicant, having repaid the first loan in full and there being "no further charge or endorsement of any memorandum in the said charge to warrant exercise of statutory power of sale," the respondent's statutory notice was misplaced. Accordingly, by a plaint dated 25th August 2016, the applicant sued the respondent in Civil Suit No. 82 of 2016 in the High Court at Nakuru seeking an injunction and orders to stop the realization of the suit property. The suit was transferred to the High Court in Naivasha where it was registered as H. C. Civil Suit No. 9 of 2016. It was in that suit that Meoli, J. dismissed the applicant's application for injunction to stop the sale of the suit property in a ruling delivered on 9th December 2016.

Aggrieved by that decision, the applicant has filed in this Court Civil Appeal No. 2 of 2017. The applicant has also filed in this Court the Notice of Motion now before us seeking injunction orders to stop the sale of the suit property. The applicant contends that while the debt is disputed, it is not secured under the charge.

When the application by Notice of Motion dated 16th January, 2017 came up for hearing, **Mr. Kingara**, learned counsel for the applicant, urged that the applicant's appeal No. 2 of 2017 is arguable and that if stay is not granted, the appeal will be rendered nugatory if it succeeds. He placed reliance on the affidavit sworn on 16th January, 2017 by Divyesh Indubhai Patel, a director of the applicant in support of the application.

On his part, **Mr. Wawire**, the learned counsel for the respondent in opposing the application relied on the affidavit sworn on 10th February, 2017 by Gilbert Banda in reply to the application and also on the respondent's list of authorities. Mr. Wawire urged that the appeal is not arguable as the applicant had agreed on the restructuring of the loan and repayment of the same. He drew the attention of the Court to the letter of restructuring and contended that the two accounts held by the applicant were consolidated and were secured on the suit property. Moreover, he said, the instrument of charge provided for consolidation of the applicant's accounts. He submitted that the applicant continued to default in payment after the said consolidation. It was Mr. Wawire's submission that the appeal is frivolous. The debt, he said, stands in excess of Kshs 1 billion (i.e. Kshs 1,491,362,336.16). Moreover, he urged, damages would be adequate compensation and the respondent could meet the same. He emphasized that interest continues to escalate and the applicant may ultimately be unable to repay. In his view, stay, if granted, would impose hardship on the applicant on account of escalation of interest. He urged us to dismiss the application.

In reply, Mr. Kingara pointed out that restructuring was not provided for in the charge instrument and therefore the applicant's indebtedness was not within the ambit of the security of the charge.

We have perused the Notice of Motion. It is premised on Rule 5 (2) (b) of the Rules of this Court. It seeks an order of injunction to restrain the respondent from selling the suit property as particularly set out in prayer 2 of the Notice of Motion. The application shows that the applicant is indebted to the respondent. The applicant disputes the debt. But while dispute on quantum of debt may not be a basis for stoppage of sale of property charged to secure the debt, the issue for determination in this case is whether both loans are secured by a charge over the suit property. That shall be a matter for the Bench hearing the appeal to determine while reviewing the impugned judgment of Meoli, J. In our view, that is an arguable point. It does not appear to us to be frivolous. This does satisfy the first limb of the twin principle which requires that an applicant desirous of an order under Rule 5 (2) (b) of The Court of Appeal Rules must satisfy the Court that the appeal or the intended appeal is not a non-starter or frivolous but that it is arguable. This Court has pointed out often while dealing with applications under Rule 5 (2) (b) (supra) that it is not necessary that an applicant must show a multiplicity of arguable points. Even a solitary arguable point of law is sufficient to establish arguability of appeal.

Besides arguability of appeal, an applicant must also show that if stay or injunction sought is not granted, the appeal, if successful, shall be rendered nugatory or valueless.

The order sought under the Rule 5(2)(b) in the instant application is in relation to landed property. If the claimed debt is not secured on it, and if the debt secured on it is admittedly fully repaid, it will not be lawful for the respondent to purport to sell it. However, if there was restructuring and consolidation of the debt, and the charge instrument incorporates it, it may very well turn out that the respondent is lawfully entitled to sell the charged property. But that is not a matter for us to determine in this application. Our role is to exercise our discretion to determine whether grant of injunction will accord with the interest of justice and this is done by ascertaining whether the twin principle under Rule 5 (2) (b) is met.

As it is our finding that if the outstanding debt due by the applicant to the respondent is not legally secured on the suit property, it shall not be lawful for the respondent to sell the suit property regardless of the size of the debt. If the suit property were sold, the sale may not thereafter be reversible. In that event,

the appeal would be rendered nugatory.

In the result, we allow the application. We appreciate the sentiment expressed by learned counsel Mr. Wawire that escalation of interest will place a heavy burden on the applicant. For that reason, there is dire need to expedite the hearing and determination of the appeal.

Accordingly, we grant an injunction order in terms of prayer 2 of the Notice of Motion. We also direct that the appeal be set down urgently for case management and be fixed for hearing this term. The costs of the application shall abide the outcome of the appeal.

Dated and delivered at Nyeri this 10th day of May, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR