IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & MURGOR, JJ.A)

CIVIL APPLICATION NO. 78 OF 2017 (UR 59/2017)

IN THE MATTER OF THE INTENDED APPEAL

BETWEEN

CHAMGAA COMPANY LIMITED.....1ST APPLICANT

TESHA (K) LIMITED.....2ND APPLICANT

AND

TWICTOR INVESTMENTS LIMITED.....1ST RESPONDENT

EURO BANK LIMITED (*In Receivership*).....2ND RESPONDENT

*(Being an application for stay of execution pending the hearing and determination of an intended appeal from the Judgment and Order of the High Court of Kenya at Nairobi (**A. Mabeya, J**.) dated the 2nd of March, 2017*

in

H.C. C.C. No. 932 of 2002)

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RULING OF THE COURT

The events leading to the application, the subject of this ruling has to do with a property known as LR 209/1350/2 "*the suit property*" situate in Industrial Area, Nairobi, then belonging to the 1st respondent. It was alleged in the suit filed in the High Court by the 1st respondent that the 2nd respondent advanced a loan facility amounting to Kshs. 1 million to **Mirema Drive Estate Limited** "the borrower" in November 1997. As security for the facility, the 1st respondent executed a guarantee to the borrower and the suit property was in effect charged in favour of 2nd respondent. Upon alleged default by the borrower to repay the loan amount, the 2nd respondent advertised the suit property for sale in the exercise of the statutory power of sale. Following the advertisement, the 1st respondent filed **HCCC 1971 of 2000** against the 2nd respondent disputing, *inter alia* that a statutory notice had been served upon it in accordance with the mandatory provisions of the **Indian Transfer of Property Act, "ITPA**" (repealed) and that as the guarantor, it had not been notified of any default in repayments. It was further averred that while the suit

in the High Court was pending determination, the 2nd respondent sold and transferred the suit property to the 1st applicant allegedly for Kshs. 8 million sometime in June 2002 by private treaty. The suit property was soon thereafter transferred to the 2nd applicant upon purported payment of Kshs. 8,200,000/-as consideration to the 1st applicant.

After the said transfers, the 2nd respondent was placed under receivership by the Central Bank of Kenya. The 1st respondent thereafter instituted the suit the subject of these proceedings vide a plaint dated 20th November 2003 and successfully sought and obtained a permanent injunction against the applicants and the 2nd respondent from evicting it or its representatives from the suit property; a declaration that the purported transfers of the suit property were null and void and the same be set aside, an order cancelling the certificate of title issued initially to the 1st applicant and subsequently to the 2nd respondent as well as rectification of the register. The High Court further ordered that the 1st respondent be given vacant possession of the suit property within 60 days of delivery of the judgment. The applicants being aggrieved by the said judgment and decree intend to appeal to this Court as evidenced by the notice of appeal dated 7th March 2017.

Subsequently by a motion on notice expressed to be brought pursuant to **sections 3, 3A** and **3B** of **the Appellate Jurisdiction Act**, **rules 5(2)(b)**and **47** of the Court of Appeal rules, the judicature Act and all other enabling provisions of the law, the applicants sought one substantive prayer; that this Court grants an order of stay of execution of the judgment and decree of High Court aforesaid. The application was premised on grounds that the applicants have an arguable appeal with high chances of success as it raises serious issues of great public interest in so far as it relates to settling the law in respect of the exercise of the statutory power of sale as envisaged in the Land Act, 2012 vis-a-viz the 'ITPA' and the effect and applicability of the doctrine of *lis pendens*. The applicants contend that the intended appeal will affect the entire populace not only in the banking sector in Kenya, but also the conveyance of property brought under the exercise of the aforesaid power. The applicants further allege that they stand to suffer irreparable loss and the intended appeal will further be rendered nugatory if this Court declines to grant the stay of execution. The applicants also allege that they are willing to abide by any conditions and terms that this Court may deem fit to impose and are also apprehensive that the 1st respondent might execute the decree in its favour anytime.

One, **Pamela Chepkemoi Bii**, a director of both applicants, swore an affidavit in support of the application. She deponed that the intended appeal raises arguable points with very high chances of success. To prove the same, she exhibited a draft memorandum of appeal containing eleven grounds upon which they intend to rely on to impeach the findings of the trial court. She has also deponed that the judgment if executed would expose the 2nd applicant to huge losses and irreparable loss as there had been additional investments through construction of buildings, stock and machinery on the suit property by the applicants which would expose them to financial ruin. Further, that any interference with the 2nd applicant's ownership of the suit property would expose it to a myriad of suits from the numerous tenants on the suit property '*on account of circumstances which are clearly not of*' its making. It was also deponed that the applicants' advocates had advised them that the trial court's judgment deviates from other decisions involving a chargor's statutory power of sale and in that sense, the intended appeal raised serious matters of public interest as its determination will go a long way in settling the law in regard to the exercise of the said powers viz-a-vis the rights of a 3rd party purchaser for value. The applicants deponed further that the stay orders were necessary to protect the substratum of the appeal and the intended appeal from being rendered nugatory if the stay order sought was not granted.

The application was opposed. A replying affidavit dated 2nd May 2017 sworn by one **Anne Kajuju,** a director of the 1st respondent was to the effect that the 1st applicant was not in possession of the suit property and therefore stood to suffer no prejudice. Further, that the 1st respondent had suffered huge losses since the purported sales and transfers for a period of about 15 years and would continue to lose rental income it estimates to be Kshs. 2,000,000/- per month in the meantime before determination of the appeal which it argued was likely to be dismissed. The 1st respondent also deponed that since the suit

property's tenure was leasehold that stood to expire in May 2018, the same ought to be registered in its name so that it applies for extension of the lease at least before one year which would have been in May 2017. That without extension of the lease, the suit property would revert back to the Government and all parties including it stood to suffer.

It argued that the intended grounds of appeal were too generalized; unsupported by law; flimsy and fanciful only intended to create a false impression that they were worthy of consideration by this Court when in fact they were not.

During the hearing, **Mr. Katwa Kigen** and **S. K. Opiyo** appeared for the applicants. They submitted that the principles which they had to satisfy before being granted the order sought were that the intended appeal was arguable and that it would be rendered nugatory unless the stay orders were granted. They submitted that the applicants were innocent purchasers for value without notice and maintained that a valid statutory notice had been issued to the borrower. They further argued that under **section 99 (3)** of the Land Act, 2012, which was in effect when the judgment was crafted and delivered, the applicants did not need to satisfy themselves that a statutory notice had been issued or was served which provision was not considered by the trial judge. According to counsel, all that was required of the applicants was good faith. Counsel denied that the doctrine of *lis pendens* was applicable in this case and challenged the order of eviction on the ground that the same had not been prayed for and the trial court had overreached by issuing the same. Counsel submitted that the suit property had been developed to the tune of Kshs. 90,000,000/- in plants and machinery and the appeal stood to be rendered nugatory if the orders sought were not granted. Finally he submitted that, in view of the looming lease expiration, the applicants were ready to abide with any conditional orders to ensure parties' rights were secured.

Wanjiku Ithondeka, learned counsel appeared for the 1st respondent and opposed the application. She submitted that the typed proceedings from the trial court were ready but the applicants had failed to collect them. Further, that the 1st respondent had been kept out of the suit property for 15 years occasioning rental income loss. That it was unfair for the applicants to bring this application after 43 days yet the trial judge had granted 60 days within which vacant possession of the suit property ought to revert to 1st respondent. Counsel also submitted that the 1st respondent stood to be prejudiced if the lease was not renewed by 1st May 2018. Counsel prayed that the application be dismissed. However, in the event that the Court was inclined to allow the application, counsel urged us to consider the special circumstances the 1st respondent found itself in.

O. P. Abidha, learned counsel for the 2nd respondent supported the application. He submitted that the 2nd respondent was aggrieved by the trial court's findings and had in fact filed a notice of appeal in respect of the same. Counsel submitted that the borrower was indebted to the 2nd respondent and that issue was never addressed by the learned Judge.

After taking into consideration the application, the affidavits in support and opposition to the application, the rival submissions and the law, the only issue for determination is whether the applicants have satisfied the requirements necessary before stay of execution they seek can be granted. This Court is being called upon to exercise the discretionary powers granted to it by dint of **rule 5 (2) (b)** of the Court of Appeal Rules. The Court's discretion under that rule has been held to be original, wide and unfettered - (See **Coastal Bottlers Ltd v George Karanja, Civil Application No. 25 of 2014 (Msa) (UR)**). The factors upon which the Court will exercise that discretion is predicated on two considerations; that there is intended an arguable appeal and further that such appeal will be rendered nugatory if the stay orders sought are refused. The two limbs have been applied consistently over time and are now accepted guidelines. (See **Cecilia Kadzo Emmanuel v Miriam Chea Mungai [2014] eKLR**). An arguable appeal is not necessarily one which must succeed but it has been held that it should not be frivolous (See **Nelson Ongera Migiro v Geoffrey Nyauma Osindi & another (2014) eKLR**). For an applicant to succeed under this limb, it only needs to prove one ground. That was succinctly put in **Cecilia Kadzo Emmanuel v Miriam Chea Mungai** (supra) as follows;

"In other words, the applicant need not establish a multiplicity or a plethora of arguable issues

in the intended appeal before he can bring himself within the ambit of this requirement."

In the instant application, the applicant's draft memorandum contains eleven grounds, major ones being that a party having derived a benefit from a contractual relationship, with an intention to be bound, cannot turn around and allege default or noncompliance with a particular requirement; granting orders not prayed for in the plaint; failing to appreciate that under powers vested upon him by statute, cancellation of the 2nd respondent's title to the suit property was only available in instances where there was fraud, illegality and or irregular exercise of the 2nd respondent's statutory power of sale with proof being tabled; that the applicants were in cahoots or party to the said allegations of fraud; that the judge erred in failing to appreciate that parties are bound by their pleadings; that section 52 of the ITPA did not apply to a suit for redemption brought by the mortgagor who has given to the mortgagee under the mortgage express power of sale; that the learned judge erred in law and in fact by failing to recognize that the enactment of section 99 of the Land Act, 2012 insulated the 2nd respondent from the claims asserted by the 1st respondent; and finally the applicability of the doctrine of *lis pendens.* No doubt the above intended grounds of appeal are not frivolous. They are certainly arguable. Accordingly, we are satisfied that the first limb for the grant of an order of stay has been satisfied.

We must now examine whether the intended appeal would otherwise be rendered nugatory if stay is not granted. The onus of proof was on the applicants.

The applicants have deposed that the net effect of enforcing the judgment would expose the 2nd applicant to losses running in excess of Kshs. 90,000,000/-on account of demolition and reconstruction of the buildings on the suit property, additional investments, stock and machinery which is by any description a colossal loss. That loss will naturally and definitely expose the 2nd applicant to immediate ruin. They further deponed that there are numerous tenants on the suit property whose abrupt alteration of the terms of their tenancy will expose them to a myriad of law suits on account of circumstances which are clearly not of the 2nd applicant's making.

It is instructive that these depositions have not been disputed or countered by the 1st respondent. Indeed, even in its replying affidavit as well as oral submissions in opposition to the application, the 1st respondent did not at all address the issue. It is also not in dispute that after acquiring the suit property, the 2nd applicant embarked on developing and improving it. According to the valuation report prepared by Centenary Valuers annexed to the application and which is unchallenged, the suit property consists of three buildings presumably put up by the 2nd applicant. The first consist of four floors, the second, two floors and the third, two floors as well. According the valuation report, the open market value of the property is Kshs. 90,000,000/-. This is the amount the 2nd respondent stands to lose in the event of the execution of the decree. This is a substantial amount. There is no indication that the 1st respondent would be in a position to refund it in the event that the appeal succeeds. Further, there is uncontroverted evidence that there are several tenants housed in the suit property. In fact the valuation report puts them at 37 tenants. The fears by the 2nd applicant that it will be exposed to ruin if the tenants were forced out on the execution of the decree as well as being forced to pull down the buildings and thereafter reconstruct, in the event of the appeal succeeding are certainly well founded. Can it then be denied that the intended appeal will not be rendered nugatory?

We reiterate that, for an applicant to succeed in obtaining stay, the applicant must satisfy both limbs. Failure to do so renders the application untenable (See **Civicon Ltd v Kivuwatt Ltd, Msa Civil Applic. No. 37 of 2014**). In the circumstances of this case, we are satisfied that the applicants have discharged the burden.

Further, each case must ultimately be decided on its own peculiar circumstances and facts. (See **David Morton Silverstein v Atsango Chesoni, Nai Civil Application No. 189 of 2001**). The peculiar circumstance of this case is that the lease over the suit property expires on 1st May 2018. To prevent the appeal from being wasted if the suit property was to revert to the Government, the head lessor, it would be prudent if the current registered owner, the 2nd applicant undertakes the renewal of the lease forthwith.

This is especially so since the renewal of the lease is a matter of urgency and the only party in a position to legally pursue the same, as matters stand currently, is the 2nd applicant as it is still the registered proprietor. It would present a messy situation if the stay sought was denied, allowing the property to revert back to the 1st respondent and then the appeal succeeds.

Accordingly, we allow the application. There shall therefore be an order of stay of the judgment and decree dated 2nd March, 2017. The costs of this application shall abide the outcome of the intended appeal. We further direct that the 2nd applicant to forthwith commence the process of renewal and extension of the lease to the suit property and certainly within the next fourteen (14) days from the date of this ruling.

Dated and delivered at Nairobi this 14th day of July, 2017.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR