



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & OUKO, JJ.A.)

CIVIL APPLICATION NO. NAI 101 OF 2017

BETWEEN

COSMAS KYALO MUTHEMBA.....APPLICANT

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....1ST RESPONDENT

PARK PLACE HOTEL TRAINING CENTRE LIMITED..2ND RESPONDENT

(An application for injunction pending filing, hearing and determination

of an intended appeal against the entire ruling and order of the

High Court of Kenya at Nairobi (G.L. Nzioka, J.) delivered

on 4th February 2017 and 12th April, 2017

in

H.C.C.C. No. 110 of 2016)

RULING OF THE COURT

1. This is an application brought under **rule 5(2) (b)** of the **Court of Appeal Rules**. The applicant seeks an order of injunction pending appeal, to restrain the 1st respondent from advertising for sale or selling by public auction or private treaty, leasing, letting or otherwise howsoever interfering with title to and interest in all that parcel of land known as **L.R. No. 12661/58, Karen (the suit property)**.

2. According to his deposition in the affidavit filed in support of the application, by a letter of offer dated 8th September, 2011, the 1st respondent offered to advance the 2nd respondent a sum of **Kshs.22,000,000/=** for purposes of construction and offsetting an outstanding loan by Equity Bank that was secured by a charge over the title to the suit property, which is registered in the applicant's name. The title to the suit property was to be charged to the 1st respondent to secure the aforesaid sum.

3. Subsequently, the 1st and the 2nd respondents agreed to restructure the facility and varied the amount from Kshs.22,000,000/= to Kshs.19,155,962.54.
4. The 2nd respondent defaulted in the repayment of the agreed instalments and the 1st respondent issued statutory notices to the applicant as well as the 2nd respondent. As a result, the applicant filed **Civil Suit No. 110 of 2016** at the Commercial and Admiralty Division of the High Court at Nairobi. The applicant also filed an application seeking a temporary injunction to restrain the 1st respondent from selling the suit property, pending hearing and determination of the suit.
5. In his application before the High Court, the applicant contended, *inter alia*, that the 1st respondent's statutory power of sale had neither arisen nor become exercisable since the charge document was defective; and that despite being a guarantor of the loan facility, the 1st respondent was wrongly pursuing him to repay the loan.
6. The 1st respondent opposed the application. It argued that its statutory power of sale had properly accrued; that the applicant and the 2nd respondent had not denied that the latter owed the 1st respondent the amount of money stated in the statutory notice; and that consequently the applicant had not made a prima facie case for the grant of the orders sought.
7. In its ruling delivered on 12th April, 2017, the High Court granted the applicant a temporary injunction in terms of his application, but on condition that he deposits a sum of **Kshs.8,000,000/=** into the 2nd respondent's bank account with the 1st respondent within thirty (30) days from 12th April, 2017 and continues to service the monthly instalments as and when they fell due. In the event of default to pay the sums as ordered, the order of injunction would stand vacated and the 1st respondent would be at liberty to exercise its statutory power of sale.
8. The applicant was dissatisfied with the aforesaid ruling and has preferred an appeal to this Court. In his application before this Court, the applicant through his learned counsel, **Mr. Kariuki**, submitted that he has an arguable appeal; and that the intended appeal would be rendered nugatory unless the orders sought are granted.
9. Referring to the draft memorandum of appeal, Mr. Kariuki submitted that the learned judge erred in law in failing to make a finding on the issues raised by the applicant; in failing to find that the applicant had made out a prima facie case with a probability of success; in failing to find that damages would not be adequate compensation if the suit property was sold and the applicant succeeded in his suit; and in ordering that the applicant pays an initial amount of Kshs.8,000,000/= and thereafter makes monthly payments of the agreed instalments when he was not the principal borrower.
10. Regarding the nugatory aspect of the intended appeal, the applicant's learned counsel submitted that the suit property is the applicant's matrimonial home and if the orders sought are not granted it would be sold, in which event the applicant would suffer substantial loss.
11. The 1st respondent opposed the application. In her replying affidavit, **Zippora Wachuka**, the 1st respondent's Recoveries Manager, stated that the banking facility that was granted to the 2nd respondent was for a sum of Kshs.22,000,000/= to be repaid over a period of 84 months from the date of disbursement; that the term loan was secured by a charge over the suit property, that at the request of the 2nd respondent the loan facility was rescheduled and restructured to a term loan of Kshs.19,155,962.54 to be repaid in 120 monthly consecutive instalments of approximately Kshs.165,137; that the 2nd respondent breached the terms of the loan repayment and as at 13th April, 2015 the 2nd respondent's account was in arrears of Kshs.2,409,336.85; and that in view of the said default the 1st respondent issued statutory notices and commenced the process of realising its security.
12. The 1st respondent further stated that the intended appeal is frivolous because there was no dispute

that the applicant and the 2nd respondent had refused and/or failed to deposit the sum of Kshs.8,000,000/= as ordered by the High Court; that the intended appeal and the suit in the High Court will not be rendered nugatory if the application for injunction is not granted as the bank is capable of compensating the applicant in the event that the intended appeal succeeds.

13. **Mr. Kenneth Wilson**, the 1st respondent's learned counsel, reiterated his client's averments and added that the applicant's argument that the suit property is a matrimonial property is untrue because in the process of executing the charge documents, the applicant had sworn an affidavit stating that he was not married and the requirements as to spousal consent were inapplicable to him; but even if the suit property was indeed matrimonial property, it had been lawfully charged to secure the aforesaid loan; that the applicant had admitted that the 2nd respondent had defaulted in repayment of the loan; and that a dispute as to the amount payable by a party or its guarantor cannot be a ground for grant of an interlocutory injunction.

14. We have carefully considered the application before us, the submissions by counsel and the authorities submitted in support thereof. It is trite law that this Court can only grant an injunction pending appeal under **rule 5(2) (b)** of this **Court's Rules** if it is demonstrated that the appeal or intended appeal is arguable and that unless an order for injunction in terms sought is granted the appeal or intended appeal would be rendered nugatory. The two tests must be satisfied. See **SILVERGATE ACADEMY LIMITED v NATIONAL BANK OF KENYA LIMITED [2016] eKLR**.

15. Has the applicant demonstrated that his intended appeal is arguable? In determining this issue, we hasten to point out that the 2nd respondent, though properly served by the applicant with the application for injunction, did not file any response, either in the High Court matter or in the application before this Court.

In the circumstances, it must be inferred that it has not disputed its indebtedness to the 1st respondent, which stood at Kshs.18,972,369.69 as at 16th February, 2017; as per finding by the High Court. The applicant is the 2nd respondent's Managing Director, who agreed to guarantee the 2nd respondent's loan facility by the 1st respondent and thereby charged the suit property to secure the said borrowing. The applicant is therefore the prime mover in the 2nd respondent's business transaction with the 1st respondent.

16. The 2nd respondent defaulted in repayment of the term loan, forcing the applicant to issue statutory notices to the applicant and the 2nd respondent, regarding its intention to sell the suit property by public auction to recover the outstanding sum. The applicant then moved the High Court for an injunction to restrain the 1st respondent from disposing of the suit property, pending hearing and determination of the suit. The High Court granted a conditional order of injunction as prayed, requiring the applicant, *inter alia*, to deposit Kshs.8,000,000/= into the 2nd respondent's bank account within 30 days from 12th April, 2017, which he failed to do.

17. In making the aforesaid order, the learned High Court judge exercised her discretion. The circumstances under which an appellate Court may interfere with the exercise of discretion by a trial Court are well known. In **UNITED INDIA ASSURANCE CO. LTD v EAST AFRICAN UNDERWRITERS (KENYA) LTD [1985] E.A. 898, Madan, J.A.** stated as follows:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: firstly, that the judge misdirected himself in-law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account; or fifthly, that his decision albeit a discretionary one, is plainly wrong.”

18. Having perused the learned judge’s impugned ruling, and having considered the applicant’s affidavit in support of the application before us, we are unable to find that the learned judge exercised her discretion in an improper manner. The applicant has therefore failed to satisfy this Court that the intended appeal is arguable. We may add that the applicant did not explain why he was unable to deposit the sum of Kshs.8,000,000/= as ordered, if indeed he wanted to safeguard his property against disposal by the 1st respondent.

19. Regarding the nugatory aspect of the intended appeal, the applicant did not demonstrate that unless the order of injunction is granted as prayed the intended appeal would be rendered nugatory. Whether or not an appeal would be rendered nugatory, if successful, would ultimately depend on the peculiar circumstances of each case. See **RELIANCE BANK LIMITED v NORLAKE INVESTMENTS LIMITED [2002] 1 E.A. 227.**

20. In his affidavit in support of the application before this Court, the applicant stated that unless the orders sought are granted, the intended appeal, if successful, would be rendered nugatory because if the suit property is sold, he cannot be compensated by an award of damages **“in view of the peculiarity of the suit property, acreage, location and improvements thereon.”**

21. By offering the suit property as a collateral to enable the 2nd respondent acquire the term loan from the 1st respondent, the applicant was well aware of all the attendant consequences that were likely to ensue in the event of default in the repayment by the borrower, including exercise of the lender’s statutory right of sale of the suit property, irrespective of whether or not it was a matrimonial property.

We have said enough, we believe, to show that this application is without merit and is for dismissal, which we hereby do. The applicant shall bear the 1st respondent’s costs of the application.

Dated and delivered at Nairobi this 24th day of November, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR