



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KOOME & MAKHANDIA, JJA)

CIVIL APPLICATION NO. NAI. 272 OF 2017

BETWEEN

THE AIR TRAVEL & RELATED STUDIES LTD. APPLICANT

AND

EQUITY BANK (KENYA) LTD.RESPONDENT

(An application for an injunction pending the hearing and determination of the appeal against the ruling of the Environment and Land Court at Nairobi (Okong'o, J.) dated 3rd November, 2017

in

E.L.C Suit No. 208 of 2017)

RULING OF THE COURT

1. The Notice of Motion filed before this Court on 23rd November, 2017 is taken out principally under **Rule 5(2) (b)** of the **Court of Appeal Rules** (the Rules) wherein the applicant prays for –

An injunction restraining the respondent its servants, employees, nominees, agents or any other person connected with it from auctioning, selling, charging or otherwise dealing with the applicant's properties namely, LR No. 11916/18 and 11916/19 (suit properties) suited in Karen pending the determination of the appeal.

2. The salient facts are that the respondent granted the applicant a loan facility of Kshs.194,546,000 which was secured by a charge over the suit properties. Apparently, the applicant began experiencing difficulties in meeting the monthly repayments on account of the decrease in the number of students enrolling in its school. As a result, the applicant was served with demand notices to pay the instalments which were in arrears but it seems it failed to do so. Ultimately, the respondent issued a notice dated 5th September, 2016 under **Section 96** of the **Land Act, 2012** of its intention to exercise its statutory power of sale within 90 days in the event the applicant failed to pay the outstanding loan amount. A subsequent notice dated 15th December, 2016 was issued in accordance with the aforementioned section. The applicant acknowledged receiving these notices.

3. According to the applicant, it had sought the indulgence of the respondent to restructure the loan

facility due to the difficulties it was facing without success. Upon service of the statutory notice, the applicant engaged the services of Interest Rates Advisory Centre (IRAC) who advised that the respondent had overcharged interest on the loan amount to the tune of Kshs. 1,208,229.78 as at 5th March, 2017. Apprehensive that the respondent would make good its threat to sell the suit properties, the applicant filed suit on 27th March, 2017 in the Environment and Land Court (ELC) challenging the intended exercise of the statutory sale. It claimed that the amount demanded by the respondent was grossly overstated, the statutory notices were premature and the respondent had threatened to adversely list it as a defaulter in the credit reference bureau.

4. The applicant also filed an interlocutory application on even date seeking a number of orders *to wit*,

a) Pending the inter-partes hearing and determination of this suit the defendant (respondent) through themselves, their servants, employees, nominees, assigns, agents or any other person or authority connected therewith be restrained by a temporary injunction from advertising for sale, selling, disposing, leasing occupying or in any way dealing with the suit properties.

b) Pending the inter-partes hearing and determination of the suit, the court be pleased to issue an order of prohibition prohibiting the defendant from continuing to refer the plaintiff (applicant) for adverse listing with the Kenya Reference Bureau or in any way clogging the plaintiff's access to credit facilities.

c) Time within which the plaintiff ought to have repaid the current loan arrears to the defendant and/or discharged the charge be extended and/or the plaintiff be allowed to redeem the suit properties by repaying the current loan arrears and the subsequent monthly loan instalments as per the charge.

d) All action by the defendant with regards to the sale of the suit properties be stayed pending the determination of Judicial Review number 67 of 2007.

e) The court be pleased to order the defendant to immediately avail to the plaintiff a copy of the letter of offer, comprehensive account statements of the loan account and a copy of the charge.

5. The grounds in support of the application were that the applicant had continuously made payments towards servicing the loan albeit with constraint; the respondent has never responded to the applicant's request for restructuring the loan facility; additionally, the respondent has been reluctant to furnish the applicant with information regarding the actual arrears; the amount claimed as outstanding has grossly been overstated; the statutory notices were premature; the respondent's actions are calculated to clog the applicant's right to redeem the suit properties.

6. Naturally, the respondent opposed the application claiming that the applicant had neither denied its indebtedness nor service of the statutory notices. The charge over the suit properties is valid and the respondent is entitled to enforce the same. Mere disagreement of accounts by itself could not warrant the respondent being restrained from exercising its statutory right of sale which has accrued. In any event, the applicant has not demonstrated that damages would not be an adequate remedy.

7. Upon considering the rival arguments, the learned Judge (Okong'o, J.) in a ruling dated 3rd November, 2017 dismissed the application. It is against that decision that the applicant has lodged a Notice of Appeal and filed the current application before us. The application is premised on the grounds that the intended appeal is arguable and it would be rendered nugatory in the event the orders sought are not granted.

8. Charles Gitonga Gakuu, the applicant's managing director deposed that the appeal was arguable, that is, the learned Judge failed to appreciate that there was an ongoing matter touching on the suit properties; learned Judge erred in the interpretation of the ***Banking (Amendment) Act, 2016*** by holding that the provisions thereto relating to capping of interest rates did not apply retrospectively; failed to appreciate that the applicant had tendered reasonable grounds for its failure to meet the monthly instalments.

9. On the nugatory aspect, he deposed that the applicant had learnt that the respondent had advertised the sale of the suit properties on the Daily Nation Newspaper of 7th November, 2017 and re-advertised on 20th November, 2017 in the same newspaper; the sale was scheduled to take place on 30th November, 2017; the applicant also learnt that the respondent proposes to sell the suit properties at a gross undervalue. There is a real likelihood that unless the order sought is not granted the suit properties would be sold and the students already enrolled in the applicant's school would be disrupted and suffer irreparable loss. Lastly, the applicant reiterated it was willing to continue meeting the monthly loan repayments and even proposed to sell one of the suit properties to defray the entire loan amount.

10. In response, the respondent's manager for legal services, Kariuki King'ori deposed that the applicant after being served with the statutory notices promised to offset the outstanding amount and never challenged the amount claimed by the respondent. The Court was urged to note the applicant did not make an attempt to clear the arrears for a period of six months prior to the impugned ruling. Should the order sought be granted the outstanding loan amount is bound to surpass the value of the suit properties to the detriment of the respondent.

11. Miss Chepgeno, learned counsel for the applicant, in her address urged us to issue an injunction to stop the sale which was then scheduled on that very day being 30th November, 2017. On his part, Mr. Njuguna, learned counsel for the respondent, argued that the ELC had heard a similar application for injunction and dismissed the same. The appeal does not disclose any arguable point for the reason that the debt was admitted by the applicant. The application as it stands is frivolous and vexatious.

12. We have considered the application, submissions by counsel as well as the law. In determining an application under the **Rule 5(2)(b)** we have to satisfy ourselves that the applicant has demonstrated that it has an arguable appeal or an appeal that is not frivolous, and secondly, that if the orders sought are not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. See **Reliance Bank Ltd. (in liquidation) vs. Norlake Investments Ltd. [2002] 1 EA 227**. The applicant is obliged to satisfy both of those principles; it is not enough to satisfy only one of them. See **Peter Paul Mburu Ndururi vs. James Macharia Njore [2009] eKLR**.

13. It is trite that the applicant is not obliged to establish a multiplicity of arguable grounds; even a single arguable issue will suffice. This much was appreciated by this Court in **Transouth Conveyors Ltd. vs. Kenya Revenue Authority & Another - Civil Application No. 37 of 2007 (unreported)**. Nor is it required to show that the appeal would definitely succeed or that the appeal has very high chances of succeeding. It is sufficient, if it can show that it has serious questions of law or a reasonable argument, deserving of consideration by this Court. Taking caution not to make final determinations on issues subject of the intended appeal, we are not sure that the grounds raised are arguable.

14. Even if we were to find there is a single arguable point, the law as it stands is that disputes on the loan amount and interest cannot be a basis for granting an injunction restraining the exercise of power of statutory sale when it arises. It is not in dispute that the applicant has defaulted in the repayment of the loan amount. Ringera J, (as he then was) in the case of **Thathy vs. Middle East Bank (K) Ltd & another [2002] 1 KLR 595** aptly stated that: -

“Since it is settled law that a dispute as to the amount owed would not of itself be a ground for injuncting the mortgagee from exercising its statutory power of sale, whether the accounts were supplied (as sworn by the bank) or not supplied (as sworn by the plaintiff's attorney) would not have a decisive bearing on whether or not to grant an injunction as prayed.” Emphasis added

Similarly, **Halsbury's Laws of England, volume 32 (4th edition) at paragraph 725:**

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged.”

Moreover, we are not sure whether the respondent did exercise its statutory power of sale as was

scheduled on 30th November, 2017.

15. In light of the foregoing, we decline to exercise our discretion in favour of the applicant. Accordingly, the application is hereby dismissed with costs.

Dated and delivered at Nairobi this 15th day of December, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

A. MAKHANDIA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR