IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M. KARIUKI & AZANGALALA, JJ.A)

CIVIL APPLICATION NO. NAI. 151 OF 2015

BETWEEN

SILVERGATE ACADEMY LIMITED…………………..…….APPLICANT

AND

NATIONAL BANK OF KENYA LIMITED…………..….RESPONDENT

(An application for injunction pending the lodging, hearing and determination of the intended appeal against the Ruling and Order

of the Hon. Justice E.K.O. Ogola delivered on 15th May, 2015 in

H.C.C.C. NO. 476 OF 2013)

****

RULING OF THE COURT

We have before us an application by way of a Notice of Motion dated 4th June, 2015, and filed on behalf of **Silvergate Academy** ("the applicant") under **rule 5(2)(b)** of the **Court of Appeal Rules.** It seeks an order restraining **National Bank Limited** ("the respondent") from exercising its statutory power of sale or selling, disposing and/or advertising, soliciting, offering or in any way negotiating or inviting any person or groups of persons from bidding, buying or selling either by way of public auction or private treaty of title No. **Nairobi Block 127/752** ("the suit property") or from taking possession alienating attaching or in any manner, interfering with the applicant's ownership, title, interests and/or exclusive use, development and enjoyment of the suit property pending lodgment, hearing and determination of the intended appeal.

The applicant, at all material times, was indebted to the respondent under facilities secured by a charge over the suit property. Upon default and in the exercise of its statutory power of sale, the respondent served the applicant with a statutory notice of sale. That provoked the applicant to apply to the High Court for an injunction restraining the respondent, *inter alia*, from exercising its statutory power of sale of the suit premises pending the hearing and determination of the suit it had filed together with the application.

After hearing the application, the learned Judge (**E.K.O. Ogola, J**) in a reserved ruling, found that the applicant had not demonstrated a *prima facie* case with a probability of success. He expressed himself as follows:-

> ***"…..the defendant is not entitled to demand the amount of Kshs.3,898,802/= paid by the plaintiff as land rates as the same is contested. However, this simply amounts to a dispute as to accounts and it is trite law that a dispute as to accounts cannot bar a chargor from exercising its statutory power of sale.***

33.***……..I therefore, doubt that the plaintiff's claim for undervaluation is valid. In any case, the defendant has not yet sold the property and there is still the opportunity to do a valuation of the property.***

34.***On account of the above observations, I find that the plaintiff has not established a prima facie case with a probability of success. To that extent, the plaintiff has failed to satisfy the 1st condition laid in GIELLA -V-CASSMAN BROWN & CO. LTD 1973] E.A. 358 for the grant of an interlocutory injunction.***

35.***……..It is the plaintiff's case that the defendant intends to sell the suit property on account of a speculative and grossly undervalued price and in that case, they shall suffer irreparable damage. As already established in the foregoing paragraphs, there is no proof that the intended sale of the suit property is illegal and the issue of valuation has also been addressed.***

36.***If I was in doubt, the balance of convenience would tilt in favour of not granting the injunction since it is not in dispute that the plaintiff is indebted to the defendant and the said loan continues to attract interest."***

The learned Judge then dismissed the appellant's Notice of Motion and granted it leave to amend its plaint and also granted liberty to the respondent to exercise its statutory power of sale.

The appellant being aggrieved, filed a Notice of Appeal and the present application before us seeking an injunction as aforesaid.

It is contended, on behalf of the applicant, that the learned Judge should not have given liberty to the respondent to exercise its statutory power of sale yet he had found that rates should not have been included in the statutory notice. It is the further view of the applicant that the charge is unlawful and that its loans were consolidated without its consent and that interest was varied without notice. On valuation it is contended that the respondent had commenced its exercise of power of sale without a valuation of the suit property and that if the order is not granted it will suffer irreparable loss. All these complaints were elaborated in greater details by supporting, supplementary and further supplementary affidavits filed by the applicant.

The respondent has resisted this application on the basis of matters contained in detailed replying and supplementary affidavits.

What can be gleaned from all these affidavits and contentions is that the applicant is obviously indebted to the respondent in quite a tidy sum now probably in excess of Kshs.30,000,000/=. The indebtedness is freely admitted by the applicant who has previously made settlement proposals to the respondent which proposals yielded no relief to the applicant as its indebtedness continued to escalate.

We have anxiously considered this Notice of Motion, the submissions of counsel and the authorities cited to us.

In **Samuel Naiba Kihara -v- Housing Finance Company Ltd and Others [Civil Application No. 11 of 2007](UR),** this Court stated:

> ***"This Court can only grant an injunction pending appeal under Rule 5(2)(b) of the Rules of this Court if the applicants satisfy us that both the intended appeal is arguable and further that unless the order of injunction in terms sought or a stay of execution is granted the intended appeal would be rendered nugatory (See Madhupaper International Limited - v- Kenya Commercial Bank Ltd. & Another [1987] KLR 506 and Githunguri -v- Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838"***

The first issue we have to decide is whether the intended appeal is arguable. The applicant herein appreciating that its original pleading in the High Court could not be the basis of an injunction application, sought leave to amend its plaint. It was indeed on the basis of the intended amended plaint that the learned trial Judge considered the applicant's injunction application. In his own words:

"It is obvious that the injunctive orders sought for herein are based on amended plaint and therefore the amendment of the same has to be dispensed with. Therefore, the prayer (3) seeking leave to amend the plaint is hereby allowed."

That was on 15th May, 2015. By the time this motion was canvassed before us, no amendment had been lodged. This record indeed has no copy of any such amended plaint. There is therefore no basis for the order sought.

In any event, in declining the applicant's Notice of Motion, the learned trial Judge exercised his discretion and it will not be right for this Court on appeal to interfere with the exercise of discretion unless the trial Judge went wrong in law or in all the circumstances he reached a perverse conclusion. In

United India Insurance Co. Ltd. –v- East African Underwriters (Kenya) Ltd. [1985] EA 898, Madan JA (as he then was) 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."

Having considered the ruling of the learned Judge, with respect, we have our doubts whether there was any improper exercise of discretion. The learned Judge considered all the conditions for the granting of an interlocutory injunction as set out in **Giella -v- Casman Brown & Co. Ltd. (supra)** and having done so came to the conclusion that the applicant had not demonstrated any of them. We have on our own considered the material which was placed before the learned Judge and it would be difficult to fault him. The applicant was merely concerned about the disputed payment of rates which the learned Judge considered and found that that dispute only related to a dispute over the amount due and could not be the basis for an interim injunction.

The learned Judge also considered the applicant's complaint regarding valuation of the suit property before sale and determined that as the property had not been sold, an appropriate valuation would still be made.

On balance of convenience, the learned Judge concluded that the same tilts in favour of declining the injunction since the indebtedness of the applicant to the respondent was undisputed and the interest continued to accrue.We would not with respect, fault the learned Judge on any of those findings. In **Abel Salim & Others -v- Okongo & Others [1976] KLR 42** this Court held:-

> ***"In granting or refusing to grant an interlocutory injunction, a court exercises discretion. I am of the view that the conditions for the grant of an interlocutory***

injunction are well settled and I can see no reason to depart from them. These are stated in Giella -v- Cassman Brown & Co. Ltd. [1973] EA 358 *at* ***360***

The finding by the learned Judge that none of those conditions were demonstrated by the applicant was clear and express and as we have observed, it would be difficult to fault the learned Judge. That conclusion means that we have found no arguable points in the intended appeal.

On the nugatory aspect of the application, no allegation was made that the respondent would not be able to compensate the applicant in the event its intended appeal succeeds. The second condition for the grant of an interlocutory injunction under **rule 5(2)(b)** of the **Rules of this Court** has not also been demonstrated. The applicant was enjoined to demonstrate the twin conditions to qualify for the order sought. It has not demonstrated even one. With respect the authorities relied upon by counsel for the applicant whilst enunciating the correct principles of law are distinguishable from the facts of this application where we have found no basis for the application and a failure of the applicant to demonstrate the mandatory prerequisites of **Rule 5(2)(b) of our Rules.**

In the end we have reached the conclusion that the Notice of Motion dated 4th June 2015 is without merit and it is ordered dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JANUARY,

2016.

M.K. KOOME

…………………………..

JUDGE OF APPEAL

G.B.M. KARIUKI

…………………………..

JUDGE OF APPEAL

F. AZANGALALA

………………………..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR