



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR, J.J.A)

CIVIL APPLICATION NO. 26 OF 2016

BETWEEN

JOHN KIPRUGUT KURGAT

T/A JOPHIK ENTERPRISES APPLICANT

VERSUS

GUARANTY TRUST

BANK (K) LIMITED 1ST RESPONDENT

LEAKEY'S AUCTIONEERS 2ND RESPONDENT

(Application for an injunction pending the hearing and determination of an intended appeal from the ruling and order of the Environment and Land Court of Kenya at Eldoret, (Hon. A. Ombwayo, J.) dated 2nd February, 2016

in

ELDORET ELC NO. 431 OF 2013)

RULING OF THE COURT

1. In a ruling delivered on 2nd February 2016, the High Court at Eldoret in ELC No. 431 of 2013 dismissed the applicant's application for an order of interlocutory injunction against the respondents in which the applicant had sought to restrain the respondents from selling a property known as Title Number Tulwet/Tulwet Block 7(Terige)/57 that was charged to secure the applicants indebtedness to the 1st respondent.

2. Dissatisfied with that ruling, the applicant filed a notice of appeal on 16th February 2016. The applicant has now moved this Court by a notice of motion dated 7th April 2016 seeking an order that “*an injunction do issue against the respondents restraining them whether by themselves, their servants and/or agents from selling, transferring and alienating the land parcel known as TULWET/TULWET BLOCK 7 (TERIGE)/57 (the property) pending the hearing and determination of the intended appeal.*”

3. The applicant deposes in his supporting affidavit that the sale of the property is advertised in the newspapers and is scheduled to take place tomorrow, the 14th April, 2016.
4. Learned counsel for the applicant Mr. R. W. Kigamwa submitted that the conditions for the Court to exercise its discretion in favour of the applicant have been fulfilled; that the intended appeal is arguable; that the applicant will demonstrate at the hearing of the appeal that the High Court wrongly dismissed the applicant's application without considering that the applicant had demonstrated that the loan had been repaid in its entirety and no amount is outstanding; that an expert report to that effect was not countered by the 1st respondent; that the Judge erred in taking the view that the applicant did not have locus standi to present the application on the basis that the property does not belong to him; that the property sought to be sold is over 71 acres and the 1st respondent is seeking to recover Kshs. 3.3 million; that the appeal will be rendered nugatory if the property is sold and the appeal subsequently succeeds.
5. Opposing the application, Mr. D. Makori, learned counsel for the 1st respondent, submitted that there is no competent appeal before the Court as the notice of appeal dated 16th February 2016 was not served on the 1st respondent within the prescribed period under the rules of the Court; that in any event the intended appeal is not arguable; that the applicant participated in previous proceedings in the High Court which the Chargor of the property had unsuccessfully sought to restrain the respondent from exercising its power of sale; that the High Court correctly held that the applicant's application was res judicata as the applicant was making a second attempt to obtain an injunction; and that the applicant, not being the registered owner of the property, has no basis for seeking to stop its sale.
6. Counsel went on to say that even if the Court were to be persuaded that there is an arguable appeal, the applicant has not demonstrated that the same will be rendered nugatory if the application is refused; that the 1st respondent is a multinational bank that is listed in the London Stock Exchange, and there can be no suggestion that it would not be in a position to make good an award of damages. Citing the decision of this Court in **Chris Munga N. Bichage vs. Richard Nyagaki Tongi & 2 Others [2013] eKLR**, counsel urged that the conditions for the exercise of the Court's discretion under Rule 5(2)(b) of the Rules of the Court had not been fulfilled.
7. There was no appearance for the 2nd respondent although its advocates had been served with the application.
8. We have considered the application and the rival arguments. Counsel are alive to the legal principles applicable to an application of this nature. To succeed, the applicant needs to demonstrate that the intended appeal is arguable and that if we decline to grant the order sought, the intended appeal will be rendered nugatory. In **Ishmael Kagunyi Thande v HFCK Civil Application No. Nai 157 of 2006** this Court said:
- “Two principles guide the Court in the exercise of that jurisdiction [under rule 5(2)(b) of the rules of the Court.] These principles are now well settled. For an application to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”***
9. Looking at the memorandum of appeal that has been attached to the application before us we are unable to say that the intended appeal is frivolous. There is for instance the question whether the Judge was right in taking the view that the applicant, as the principal debtor, was devoid of locus standi, to seek the stoppage of the sale of a property charged to the 1st respondent to secure his debt. There is also the question whether the 1st respondents statutory power of sale is exerciseable in light of the assertion, seemingly supported by evidence, that the entire debt had been paid. We do not, of course, have a concluded view on these matters. We are however mindful that an arguable appeal is simply one that is deserving of the Court's consideration and not one that must necessarily succeed as held in **Dennis Mogambi Mong'are vs. Attorney General & others [2012] eKLR**.

10. As to whether the intended appeal will be rendered nugatory if we do not grant the orders sought, we bear in mind that the object of Rule 5(2)(b) is the ***“preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals”*** [per Githinji JA, in **Equity Bank Limited v West Link Mbo Limited Civil Application No. Nai 78 of 2011**]. Subject to the conditions we set out below, we think, in the circumstances of this case, the property should be preserved pending the hearing and determination of the appeal.

11. We accordingly allow prayer 3 of the application dated 7th April 2016 on the following conditions:

- a). The applicant shall lodge the record of appeal within 45 days from the date of delivery of this Ruling.
- b). The applicant shall within 30 days from the date of delivery of this Ruling deposit the sum of Kshs. 1,000,000.00 in a bank account in the joint names of the advocates for the applicant and the advocates for the 1st respondent pending the hearing and determination of the appeal.
- c). The applicant shall within 30 days from the date of delivery of this Ruling pay the auctioneers scale charges as well as the advertising costs incurred in connection with the aborted sale that was scheduled for 14th April 2016.
- d). In default of any one of these conditions, the application dated 7th April 2016 shall stand dismissed with costs to the 1st respondent.

Orders accordingly.

Dated and delivered at Eldoret this 13th April 2016.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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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.

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DEPUTY REGISTRAR