



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIHARA KARIUKI (PCA), GITHINJI & OTIENO-ODEK, J.J.A)**

**CIVIL APPLICATION NO. NAI. 26 OF 2013)**

**BETWEEN**

**DINESH KUMAR JETHA ..... APPLICANT**

**AND**

**FINA BANK LIMITED ..... RESPONDENT**

***(An application for injunction and or stay of execution of the judgment and decree of Justice Khaminwa dated 4<sup>th</sup> November 2011 and stay of the Ruling and Order of Justice Havelock dated 15<sup>th</sup> November 2012 in H.C.C.C. No. 643 OF 2005)***

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**RULING OF THE COURT**

1. The instant application is unique as it seeks a simultaneous stay of execution of a judgment and ruling by two different Judges delivered at different times in relation to the same dispute between the parties. The first prayer seeks stay orders against the judgment and decree of Khaminwa, J. (deceased) delivered on 4<sup>th</sup> November 2011; the second prayer seeks stay of the ruling and order of Havelock, J. delivered on 15<sup>th</sup> November 2012. The subject matter in dispute is **Nairobi LR No. 991/13** and or **Flat No. C1 Riverside Drive** situate in the City of Nairobi within **LR NO. 991/13**.
2. To understand the present application, it is necessary to give background facts to the dispute between the parties and the context of the judgment and ruling that are subject of the intended appeal.
3. At all material times in this suit, the applicant, **Mr. Dinesh Kumar Jetha** is the registered proprietor of Flat No. 1 Block C along Riverside Drive situate on LR No. 991/13 situated in the city of Nairobi. The respondent Bank advanced funds to the tune of Kshs.7 million to a company known as **Maizena Millers Limited** in which the applicant is a director. The applicant agreed to guarantee the borrowed funds and to execute a charge over Flat No. 31 on LR No. 991/13 in favour of the respondent. The respondent Bank prepared the necessary charge instrument and forwarded the same to the applicant's lawyers. The applicant refused and failed to execute the charge and the respondent bank registered a caveat over LR No. 991/13. It is noteworthy that the respondent registered the caveat over the entire LR No. 991/13 and not a caveat on Flat No. 31 situate along Riverside Drive on LR No. 991/13). The applicant sought to have the caveat

removed pursuant to which the respondent filed Nairobi HCCC No. 138 of 2005 (**Fina Bank Limited - v- Dinesh Kumr Jetha**) which suit was dismissed as the description of the property could not create a legal interest in the Flat. The Bank then filed a fresh suit HCCC No. 643 of 2005 (**Fina Bank Limited -v- Dinesh Jetha**) seeking *inter alia*, an interim injunction to restrain dealings with LR No. 991/13. An interim injunction was argued before Ransley, J. pending the determination of the suit. The matter finally came up before Khaminwa, J. who after more than three years delay finally delivered judgment referring to the suit property as LR No. 991/13 and not Flat No. 1 along Riverside drive situate on LR No. 991/13. The learned Judge directed the applicant to execute a charge in favour of the respondent Bank over LR No. 991/13 and in default, the deputy registrar to execute the charge instrument.

4. Despite the judgment by Khaminwa, J. the applicant refused to execute the charge. The respondent Bank filed a Notice of Motion dated 22<sup>nd</sup> December 2012 in the High Court seeking an order that the Deputy Registrar do execute the charge documents over LR Flat No. 1 Block C along Riverside drive situate on LR No. 991/13 Nairobi. The applicant opposed the Notice of Motion primarily on the ground that the property described in the judgment was different from Flat No. 1 Block C, along Riverside drive situate on LR No. 991/13 Nairobi. The application was argued before Havelock, J. who proceeded to dismiss the Bank's application.

Notwithstanding the foregoing, the Bank filed a fresh Notice of Motion dated September 2012 seeking that the decree dated 4<sup>th</sup> November 2011 be amended to read Flat No. 1 Block C situate along Riverside Drive on LR No. 991/13. The application was opposed but this time Havelock, J. in a ruling dated 15<sup>th</sup> November 2012 allowed the amendment.

5. The instant application seeks stay of the judgment and decree by Khaminwa, J. and stay of the ruling by Havelock, J. amending the judgment and decree of Khaminwa, J. In allowing the amendment, Havelock, J. expressed that:

***“the decree ought to be amended to reflect the true intention of the orders being sought and as to what description of the suit property that it was to refer to; that the Bank in its amendment charge had clearly indicated that the property to be charged was Flat No. 1 Block C situate on LR No. 991.13 being the correct and true description of the property of the applicant; that the court can therefore amend the decree to read and reflect the true description of the suit property which is an error arising from an accidental slip or omission and such may be corrected at any time.”***

6. From the foregoing background facts, the applicant in the present Notice of Motion dated 4<sup>th</sup> February 2013 seek the following orders:

***“a) That pending the hearing and determination of the appeal against the judgment and decree of Lady Justice Khaminwa, and appeal against the Ruling by Justice Havelock, there be stay of execution of the said decree and order respectively.***

- b. ***Alternatively, pending the hearing and determination of the appeal aforesaid, there be a temporary injunction restraining the respondent from executing and registering a charge over LR No. 991/13 or alternatively a temporary injunction staying the order of Justice Havelock amending the decree.***

- c. ***Alternatively, there be stay of all proceedings in Nairobi HCCC No. 642 of 2005.***

7. The grounds in support of the application are that the applicant has an arguable appeal; that the High Court (Khaminwa, J.) erred in delivering an irregular and unjustifiable judgment after more than three years delay; that the applicant stands to suffer irreparable loss if the respondent proceeds to sell the property pursuant to amendment of the decree; that amendment of the decree was not supported by the pleadings; that the amended decree is subject of an appeal; that the decree was amended after the trial when the trial court had become *functus officio* and that the

issue in dispute between the parties was *res judicata*.

8. At the hearing of the instant application, learned counsel Ms Wairimu holding brief for learned counsel Mr. James Singh Gitau appeared for the applicant while learned counsel Mr. Henry Omino holding brief for Mr. Karungo appeared for the respondent. Both learned counsel filed written submissions which they did not wish to highlight.
9. The applicant urged us to grant the injunctive orders submitting that the intended appeal was arguable and not frivolous; that the appeal shall be rendered nugatory if stay orders were not granted. In the draft memorandum of appeal, it is urged that the judgment by Khaminwa, J. was invalid as it was delivered more than three years after conclusion of the trial; that the delayed judgment was null and void. Counsel submitted that the main issue in the appeal is which property had been pledged as security; it was submitted that LR No. 991/13 is owned by **Lorimar Apartments Limited** as the head lessor and the applicant is the registered owner of Flat No. 1 C that cannot be charged without consent of the head lessor; that the consent of the head lessor was not obtained; that the monies borrowed from the respondent bank were disbursed before the suit property was charged; that the property sought to be charged by the respondent bank did not belong to the applicant; that the charge was for a facility of Kshs.7,000,000/= and the respondent bank alleges it advanced the sum of Kshs.24,000,000/=. As regards the ruling by Havelock, J. amending the decree, the applicant submitted that the Judge erred as the court was *functus officio*; counsel cited the case of **James Mwashori Mwakio -v- Kenya Commercial Bank Limited (1995) eKLR** in support. It was submitted that the amended decree was at odds and variant with the content of the judgment by Khaminwa, J. and the pleadings. Counsel cited **Section 25** of the **Civil Procedure Act** and **Order 21 Rule 7 (1)** to support the submission that a decree must agree with the judgment and specify the relief granted or other determination of the suit. Based on the foregoing submission, the applicant urged this Court to find that the intended appeal was arguable.
10. On nugatory aspects, the applicant submitted that Flat No. C1 was a residential flat and that the respondent Bank wishes to charge it with a view to selling the same; that should sale of the Flat take place before the appeal is heard, the intended appeal shall be rendered nugatory.
11. The applicant's counsel deposed a further affidavit dated 4th August 2015 averring that attempts to settle the dispute out of court had been undertaken on a without-prejudice basis and it was an abuse of court process for the respondent to include matters discussed on a without prejudice in the replying affidavit deposed by Ms Beatrice Ndurya dated 14<sup>th</sup> July 2015. The applicant reiterated that the dispute between the parties was exhaustively dealt with before the trial court and the same are *res judicata*.
12. The respondent bank in opposing the Motion submitted that the intended appeal was not arguable; that the appeal shall not be rendered nugatory if stay orders are not granted; that delay in delivery of judgment by Khaminwa, J. did not render the judgment as delivered to be a nullity; that it would be miscarriage of justice to nullify a judgment on the ground that there has been delay in delivery of the judgment; that since the judgment was delivered in favour of the respondent Bank, it is the respondent who has suffered delay in enjoying the fruits of the judgment.
13. On nugatory aspects, the respondent submitted that amendment of decree is a discretionary function of the court and Havelock, J. correctly exercised his discretion; that it is trite law that an appellate court will not interfere with the exercise of discretion on the part of the trial court unless it can be shown that the court erred and took into account extraneous matters. (See **Joseph N. K. Arap Ngok & Another -v- EABS Bank Limited (2015) eKLR**). Counsel submitted that the appellant has failed to demonstrate that the learned judge erred in exercising his discretion. It was conceded that the decree as initially drafted and extracted did not correctly identify the suit property only describing it as LR No. 991/13 instead of Flat No. C1 situate along Riverside Drive on LR No. 991/13; that the plaint correctly identified the suit property and the contention that the amendment of the decree to indicate the true identity of the suit property is wrong cannot stand; that the respondent Bank advanced the sum of Kshs.7,000,000/= on the applicant's instructions on

- the understanding that the applicant's property was to be charged; that it would be unjust to allow the applicant to steal a march against the respondent and have the benefit of funds without keeping his part of the bargain to charge Flat No C1 situate along Riverside Drive on LR No. 991/13; that **Article 159 (2)** of the Constitution enjoins this Court do dispense justice without undue regard to technicalities; that the amendment of the decree was correct in law to achieve the ends of justice.
14. On the issue of *res judicata* and *functus officio*; the respondent submitted that the dispute between the parties was not *res judicata*; that the issues to be determined in the various applications lodged by the respondent before the trial court were different; that the trial court was not *functus officio*; that **Section 99** of the **Civil Procedure Act** allowed the trial court to correct or amend mistakes in the judgment, decree or orders arising from accidental slip or omission and the amendments made by Havelock, J. was in accordance with Section 99 of the **Civil Procedure Act**.
15. On nugatory aspects, it was submitted that the intended appeal shall not be rendered nugatory; that what the applicant is seeking to stay is reversible and damages can be an adequate remedy for any loss or injury suffered by the applicant if stay is not granted. Counsel cited the case of **Printing Industries Limited & another -v- Bank of Baroda Kenya Limited (2014) eKLR** where this Court expressed that the test for determining whether an appeal would be rendered nugatory is: (a) whether or not what is sought to be stayed is reversible and (b) if not reversible; whether damages will reasonably compensate the party aggrieved. Counsel also cited dicta in **Collin Bett t/a C.K. Bett Traders -v- Ecobank Kenya Limited & Another (2014) eKLR** where it was expressed that:
- “Where a dispute relates to a property which has been put forth as security, the property can be valued easily and the applicant’s claim is capable of being compensated by way of damages.”**
16. We have considered the grounds in support of the instant application, the written submissions as well as the bundle of authorities cited. We have also considered the draft memorandum of appeal. This being an application under **Rule 5 (2) (b) of the rules of this Court**, we must be satisfied of the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838**; **J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088** and **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited Civil Application No. 98 of 2002 (unreported)**. In **Silverstein -v- Chesoni (2002) 1 EA 296**, this Court stated that both arguability and nugatory aspects of the intended appeal must be fulfilled in an application for stay **under rule 5 (2) (b)** of the Rules of this Court.
17. The present application raises several points of law namely whether delay in delivery of judgment renders a judgment delivered to be null and void; whether a decree can be amendment after judgment and whether the dispute between the parties in this suit is *res judicata*. On our part, we are satisfied that these are arguable points that should be heard and determined in the substantive appeal. We find that the intended appeal is arguable.
18. On the nugatory aspects, the applicant submitted that the suit property being Flat No. C1 situated along Riverside drive on LR No. 991/13 is a residential property and the respondent Bank is keen to sell the same; that sale of the Flat/property shall render the intended appeal nugatory. With regard to that line of argument, this Court in **Joseph Gitahi Gachau & another -v- Pioneer Holdings (A) Limited & 2 others (2009) eKLR (Nairobi Civil Appeal No. 124 of 2008)** this Court expressed that where a property (even a residential property) is charged to secure a loan, it is converted into a commodity for sale and where there is failure to pay the charge debt or loan, no sentimental value or attachment to the property however great would operate against the exercise of the statutory power of sale by the mortgagee.
19. The onus of satisfying us that unless stay is granted, the intended appeal would be rendered

nugatory is on the applicant. We remind ourselves that each case depends on its own facts. It is not controverted that the respondent Bank advanced the sum of Kshs.7,000,000/= on the understanding that the applicant was to charge Flat No. 1C situate along Riverside drive on LR No 991/13 as security for the sums advanced; the applicant has reneged on this understanding. We note the dicta in **Printing Industries Limited & another -v- Bank of Baroda Kenya Limited (2014) eKLR** where this Court expressed that the test for determining whether an appeal would be rendered nugatory is: (a) whether or not what is sought to be stayed is reversible and (b) if not reversible; whether damages will reasonably compensate the party aggrieved.

20.The applicant is bound to satisfy us that the indented appeal shall be rendered nugatory of stay is not granted; he has failed to discharge this onus. Even if the respondent bank were to sell the suit property, we are of the considered view that damages would be an adequate remedy to recompense the applicant in the event he succeeds in his appeal.

21.The applicant further submitted that the respondent bank advanced the sum of Kshs.7,000,000/= and yet the bank was demanding Kshs.24,000,000/=. In **Yusuf Kifuma Chanzu -v- Equity Bank Limited & Another (CA no. NAI 251 of 2013 UR 181/2013)**, it was expressed that the court will not grant stay merely because of disputes regarding the amount of money due.

22.In the instant application, we have also considered the balance of convenience and degree of prejudice to be suffered by either party if stay is not granted. The judgment and ruling of the trial court has the effect of providing security to the respondent bank for sums advanced on instructions of the applicant; the applicant and or his nominee received the benefits of the advanced monies; this Court is a court of justice and equity. Guided by the facts of this case, the applicant has not been able to convince us that we should exercise our equitable discretion in his favour.

23.We note that a further alternative prayer in the present application is for an order to stay proceedings in Nairobi HCCC No. 642 of 2005. No submission was made to support the prayer for stay of the High Court proceedings. Accordingly, we decline to grant the further alternative prayer.

24.The upshot and totality of the foregoing is we find that the Notice of Motion dated 4<sup>th</sup> February 2013 and filed on 11<sup>th</sup> February 2013 has no merit and is hereby dismissed with costs.

*Dated and delivered at Nairobi this 17<sup>th</sup> day of June, 2016*

**P. KIHARA KARIUKI, PCA**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**