IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, AZANGALALA & M'INOTI, JJ.A.

CIVIL APPLICATION NO. NAI 36 OF 2015 (UR 34/2015)

BETWEEN

DR. JOSEPH N. K. ARAP NGOK……...……..…….……1ST APPLICANT

LIVINGSTONE KIPNG'ETICH RONOH……2ND APPLICANT

AND

EABS BANK LIMITED.…….....1ST RESPONDENT

(Application for injunction pending the hearing and determination of an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ochieng,J.) dated 1st December 2014

in

HCCC NO. 297 OF 2008)

****

RULING OF THE COURT

By a Motion on Notice dated 12th February 2015 and taken out under ***rule 5(2)(b)*** of the ***Court of Appeal Rules***, the applicant, ***Dr. Joseph N. K. Arap Ng'ok*** seeks an injunction to

restrain the respondent, the ***EABS Bank Ltd***, from selling ***Plot No. Nairobi/Block 97/1482***

"A"&"B", Fedha Estate, Nairobi ("the suit property")pending the hearing and determination of an intended appeal from the ruling of ***Ochieng, J.*** dated 1st December 2014. By that ruling the High Court dismissed as unmeritorious, the applicant's application for reinstatement of ***HCCC No 297 of 2008***, which had been dismissed for want of prosecution in the absence of the applicant and or his advocate.

The background to the application is as follows. In or about 1993, the applicant and

Livingstone King'etich Rono (who did not take part in the proceedings before this Court or the High Court) borrowed ***Kshs 2,340,000/=*** from the respondent. Repayment of the loan was secured by a charge over the suit property. In the fullness of time a dispute arose regarding

repayment of the loan and on 3rd June 2008 the applicant filed in the High Court ***HCCC No 297 of 2008*** accusing the respondent of various breaches of the loan agreement, including failure to disburse the loan facility in full or at all; variation of the interest rate without notification; and charging of usurious and higher rates of interest than those agreed upon. The applicant further contended that the charge instrument was null and void for alleged breaches of various statutes.

Accordingly the applicant prayed for, among other reliefs, a permanent injunction to restrain the respondent from selling, disposing of or otherwise interfering with the suit property and an order for discharge and delivery to him, free from all encumbrances, of the documents of title to the suit property.

In its defence dated 4th July 2008, the respondent averred that the applicant had chronically defaulted in payment of the agreed installments on due dates and that it had charged interest strictly in accordance with the loan agreement and the charge document and only after due notification to the applicant of any variation. Otherwise all the averments in the plaint were denied.

In a subsequent interlocutory application for a temporary injunction pending the hearing and determination of the suit, the late ***Khaminwa, J***.,in a ruling dated 31st July 2009, granted the same noting that the applicant had paid some ***Kshs 8 million*** to the respondent. The learned judge expressed herself thus:

> ***"The plaintiff swears that he has paid 3 times the loan he took and interest charged amounts to 2,541,783.14. This amount is even higher than the amount lent. If the plaintiff has paid in full the amount borrowed and lawful interest then his property should not be sold. At this stage it is not possible to make final findings but from what the plaintiff states I am convinced that he has demonstrated a prima facie case. He is entitled to an injunction as prayed pending the trial to enable the parties to present their evidence before court."***

Matters took a rather drastic turn when, on 29th November 2013, ***Havelock, J***. dismissed the applicant's High Court suit for want of prosecution. On the date that the suit was dismissed,

neither the applicant nor his advocate was present in court. The learned judge however first satisfied himself that the applicant's advocate had been duly served with a hearing notice.

On 20th February 2014 the applicant applied to the High Court for unconditional reinstatement of the suit. ***Ochieng, J***. heard the application, and in a considered ruling dated 1st

December 2014, found the same lacking in merit and dismissed it with costs. Specifically the learned judge found that the applicant's advocate, ***Mr. Cheryl Omindo***, had been duly served with the application requiring the applicant to show cause on 29th November 2013 why his suit should not be dismissed for want of prosecution and that he had acknowledged service by affixing his stamp and signature on a copy of the application that was retained by the process server. The judge was particularly unimpressed by the advocate's lack of candor in denying service in a sworn affidavit, and attempting to mislead the court regarding the location of his offices, where he had been served.

Aggrieved by the ruling, the applicant lodged a notice of appeal on 15th December 2014 and followed it up with the application now before us for an order of injunction to restrain the sale of the suit property pending the hearing and determination of the intended appeal.

The grounds upon which the application is based are that the applicant stands to suffer irreparable loss and damages if an injunction is not granted to preserve the suit property pending the hearing of the appeal; that Khaminwa, J. had found that *prima facie* the applicant had fully repaid the loan and therefore he ought to be given an opportunity to be heard; that the balance of convenience tilted in his favour; that the intended appeal was not frivolous and that unless the injunction sought was granted, the intended appeal would be rendered nugatory.

At the hearing of the application, the applicant who appeared in *propria persona*, adopted the above grounds as set out in the Motion, his supporting affidavit and the annextures thereto

and the draft memorandum of appeal. He urged us to grant the injunction sought so as to preserve the suit property until his appeal was heard and determined.

Mr. Kimani, learned counsel, for the respondent opposed the application on the basis of a replying affidavit sworn on 17th February 2015 by ***Jack Kimathi,*** Eco Bank's (respondent's predecessor) Legal Officer, Early Warning and Remedial Management. Mr. Kimani submitted that the applicant had not demonstrated any arguable appeal because there was overwhelming evidence that his advocate had been served,but failed to appear in court on 29th November 2013 without any reason. In counsel's view, the ruling of Khaminwa, J. did not conclusively find that the applicant had fully repaid the loan. The views of the learned judge, it was contended, were on first impression but subject to proof at the hearing of the suit.

Counsel further argued that the applicant's intended appeal could not, in any event, be rendered nugatory because the respondent was a financially reputable institution which could adequately compensate the applicant, should his intended appeal prove successful. The ruling of this Court in ***YUSUF KIFUMA CHANZU V EQUITY BANK LTD & ANOTHER, CA NO NAI 251 OF 2013 (UR 181/2013)*** was relied upon to argue that the court will not prohibit the exercise of statutory power of sale merely because of disputes regarding the amount of money due under a charge.

We have carefully considered the application, the supporting affidavit and the annextures thereto, the replying affidavit, the submissions of the applicant as well as those of counsel for the respondent, the ruling by Ochieng, J., the authorities cited and the law. It is axiomatic that to be entitled to the injunction that he craves, the applicant must establish what have over time been called the twin principles of rule 5(2)(b) of the Court of Appeal Rules. The Applicant must demonstrate that he has an arguable appeal or an appeal that is not frivolous. In addition, the applicant must satisfy us that if he has an arguable appeal, the same stands to be rendered

nugatory if an injunction is not granted and the appeal ultimately succeeds. See ***GITHUNGURI***

VS. JIMBA CREDIT CORPORATION LIMITED CA No. 161 of 1988 and ***REPUBLIC V. KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS [2009] KLR 31.***

The applicant will not have discharged the onus on him, and therefore will not be entitled to the orders sought, if he establishes only one of the principles. To obtain a remedy under rule 5(2)(b) is not an issue of "either or" as regards the two principles. To succeed the applicant has to establish both principles. See ***PETER MBURU NDURURI V JAMES MACHARIA NJORE CA Civil No. 29 OF 2009 (UR 14/2009).***

As far as an arguable appeal is concerned, the draft memorandum of appeal principally challenges the exercise of discretion by the High Court in declining to set aside the order of 29th

November 2013 dismissing the applicant's suit. The record indicates that *prima facie*, the applicant's advocate was duly served and notified of the court hearing scheduled for 29th

November 2013. He confirmed due service by endorsinga copy of the application with his stamp and signature. The Learned judge found that rather than candidly owning up to his own mistake and blunder, the applicant's advocate added insult to injury by swearing an affidavit denying service of the relevant application upon him and attempting to mislead the court on the location of his offices, to bolster the claim that he could not possibly have been served to appear in court on 29th November 2013.

Having carefully considered the ruling of Ochieng, J. and the draft memorandum of appeal, it is not apparent that discretion was wrongly exercised. It is worthy remembering that on appeal, this Court will not normally interfere with the exercise of discretion by a judge of the High Court, save in exceptional

circumstances. The principle was articulated as follows by ***Madan J.A.*** (as he then was) in ***UNITED INDIA INSURANCE CO. LTD V EAST AFRICAN UNDERWRITERS (KENYA) LTD [1985] E.A 898, at p. 908: -***

> ***"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: first, 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."***

We have said enough to indicate that we are not convinced that an arguable appeal has been demonstrated.

Assuming that the applicant's intended appeal was somehow to succeed, will the same be rendered nugatory? In ***AHMED MUSA ISMAEL V KUMBA OLE NTAMORUA & 4 OTHERS (CA NO. 256 OF 2013)*** this Court explained that the reasoning for considering whether an intended appeal will be rendered nugatory is:

> ***"to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual."***

And in ***STANLEY KANGETHE KINYANJUI V TONY KETTER & 5 OTHERS, CA NO 31 0F 2012*** the Court stated as follows regarding what may render a successful appeal nugatory:

> ***"Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved."***

The applicant has neither alleged nor placed any material before us from which it can be surmised that the respondent will not be able to compensate him, should the intended appeal finally succeed. We agree with the respondent that the approach of this Court has been that it will not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute on the amount due under the mortgage. See

PRISCILLAH KROBOUGHT V KENYA COMMERCIAL FINANCE CO LTD & OTHERS, CA No. 227 of 1995 and ***ROBERT KIBAGENDI OTACHI & ANOTHER V HOUSING FINANCE COMPANY OF KENYA LTD & OTHERS, CA No. 251 of 1996.***

Ultimately we are not satisfied that the applicant's intended appeal, should it ever succeed, will be rendered nugatory. Accordingly, this application has no merit, and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 6th day of March, 2015.

E. M. GITHINJI

JUDGE OF APPEAL

F. AZANGALALA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR