



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & OUKO, JJA)

CIVIL APPLICATION NO. NAI 228 OF 2013 (UR. 164/2013)

BETWEEN

ABDULKADIR SHARIFF ABDIRAHIM.....APPLICANT

AND

ECOBANK KENYA LIMITED.....RESPONDENT

(Being an application for injunction pending an intended appeal from the Ruling

and Order of the High Court of Kenya at Nairobi (Milimani Commercial

Court's and Tax Division(Havelock,J) Dated 28th June, 2013.

in

H. C.C. NO. 7 of 2013 (former H.C. ELC No. 1023/2013)

RULING OF THE COURT

Introduction and background.

The applicant **Abdulkadir Shariff Abdirahim** filed Nairobi High Court Milimani Commercial Division HCCC No.66 of 2012 (HCCC No. 115 of 2012), with the respondents **Eco Bank Kenya Limited and Watts Enterprises Limited** as the first and second defendants respectively. The plaintiff sought various reliefs. Simultaneously with the filing of the plaintiff the applicant filed a notice of motion seeking among others an injunctive relief to restrain the respondents from disposing of two properties namely **LR. No.209/11067/7 and LR. No.209/11067/22** (the suit property). The said notice of motion was supported by an affidavit deposed by the applicant. It was opposed by a replying affidavit deposed by **Violet Monari** on the 28th day of February, 2012. The merit disposal of that application resulted in the ruling of **Musinga, J.** (as he then was) of 20th day of April, 2012 dismissing the applicant's application.

Thereafter the applicant sued the respondent alone in Nairobi HCCC NO.ELC Civil case No.1023 of 2012. The plaintiff is dated the 18th day of December, 2012. In summary, the applicant averred *inter alia* that between the month of May, 2006 and the year 2010 the respondent had advanced both a loan and overdraft facilities to **Sasa General Investments Limited**; the applicant was the guarantor in those

transactions; the credit services were secured by **LR. No.209/11067/22** owned by the applicant.

The applicant's grievances arose from the fact that on or about 5th November, 2009, the applicant requested the respondent to have the overdraft facilities reconstructed to which the respondent allegedly agreed. The applicant was surprised to learn on 17th December, 2012 that the respondent, in breach of the agreement had proceeded to advertise the property aforesaid to recover arrears amounting to **Kshs. 40,967,895/=** notwithstanding that the respondent also held another property of the applicant namely **LR.37/262/3** Nairobi West Valued at **Kshs.72,000,000.00**. In addition to the above, the applicant also averred that the respondent had previously sold at a gross undervalue of **Kshs.19, 000,000.00** another property which had been charged to it for the same overdraft facility being **LR.No.209/11067/7** Halai Estate South C; the value of this property was thirty seven million (Kenya shillings 37,000,000.00). The respondent also failed to credit the applicant's account with the proceeds of the sale other than 25% of the purchase price, which if indeed had been credited would have substantially reduced the outstanding amount and also greatly reduced interest charged on the outstanding amount.

In consequence thereof, the applicant moved the superior court for an order for permanent injunction to issue restraining the respondent, its servants and/or agents, Auctioneers from in any way, alienating transferring and howsoever dealing with, disposing, selling and/or proceeding with the scheduled intended sale by way of public Auction of the applicant's property known as **LR.No.209/11067/22**; a declaration that the intended sale of **LR.No.209/11067/22** by the respondent was fraudulent, illegal and thus null and void and the same should be set aside; an order that the respondent does furnish before the court truthful and just accounts and an order for costs.

There was no averment in the foregoing plaint that the subject suit plot had been subject of litigation in Nairobi **HCCC. No.66/2012(115/2012)**. Simultaneously with the presentation of the plaint, the applicant also filed a notice of motion dated the same date. Substantively the application sought a temporary injunction to issue restraining the respondent, its servants employees and or agents, auctioneers from in any way alienating, transferring or howsoever dealing with or disposing , selling and or proceeding with the scheduled intended sell by way of public auction of the applicant's property known as LR. No.209/11067/22 thereof pending hearing and determination of the application in the first instance and the entire suit in the second instance; a declaration that the intended sale of **LR.No.209/11067/22** by the respondent was fraudulent and illegal thus null and void and the same be set aside; a declaration that the exercise by the respondent of its statutory power of sale are fraudulent and unlawful and the applicant's right of redemption be reinstated and or was still alive; an order for the respondent to furnish truthful and just accounts.

The application was supported by the grounds on its body and a supporting affidavit deposed by the applicant. It was opposed by the grounds of opposition dated the 31st day of December, 2012 and filed on the 2nd day of January, 2013. Simultaneously with the filing of the grounds of opposition to the applicant's application aforesaid, the respondent filed a notice of motion also dated the 31st day of December, 2012 and filed on the 2nd day of January 2013 which sought an order to strike out the applicant's notice of motion dated the 18th day of December, 2012 and then dismiss the suit as against the respondent; costs of the respondent's application and the suit to be borne by the applicant. The said respondent's application was supported by a supporting affidavit deposed by **Leah Mosoni Apale**. It was opposed by a replying affidavit of the applicant deposed and filed on the 31st day of January, 2013.

Parties agreed to have the respondent's application disposed off first and if successful then there would be no need to proceed to hear the applicant's interim application. It is the merit hearing of the respondents application that resulted in the ruling of **J.B. Havelock, J.** dated the 28th day of June, 2013, striking out the applicant's entire suit as well as the interim application filed therein.

The application under Review.

The applicant was aggrieved by that decision and filed a notice of appeal dated the 2nd day of July, 2013 intending to appeal against the whole of that decision. It is on the basis of the aforesaid notice of appeal

that the applicant moved to this Court and presented the notice of motion under review, brought under Rules 5(2) (b), 41, and 75 of this Court's Rules and **section 3A and 3B** of the Appellate Jurisdiction Act cap 9 laws of Kenya.

The applicant substantively seeks for an injunction directed to the respondent either by itself or its agents or servants or otherwise howsoever from selling, disposing of, transferring or otherwise interfering with the applicants use, occupation and enjoyment of **LR.No.209/11067/22** Memon Estate South C, Nairobi pending the filing , hearing and determination of the intended appeal against the ruling and orders of **Justice Hon. J.B. Havelock** delivered on 28th June, 2013; liberty to apply for further orders and/or directions and costs.

The application is supported by the grounds in its body and a supporting affidavit of **Abdul Kadir Shariff Abdirahim**. It has been opposed by the replying affidavit of **Elizabeth Hinga** deposed on the 19th day of January, 2015 and filed herein on the 20th January, 2015.

Applicant's submissions.

On the date fixed for the hearing, learned Counsel **Mr. Hassan N. Lakicha** appeared for the applicant, while learned counsel **Mr. Dennis Muriithi** holding brief for **Mr. Luseno** appeared for the respondent. In his brief address to court **Mr. Lakicha** argued in summary that the applicant has satisfied the twin prerequisites for the granting of a relief under the provisions of law invoked. Among others they intend to argue that the learned Judge fell in to error when he struck out both the suit and interim application on account of being res judicata and yet all the applicant had sought in HCCC No. 115/2012 was an order to declare the warrants of sell invalid. They also intend to challenge the learned Judge's exercise of his discretion in striking out the suit.

On the second prerequisite, it was **Mr. Lakicha's** argument that if not restrained the respondent will dispose of the suit property and yet it hold cash payments from the applicant and has also sold other properties belonging to the applicant whose proceeds it has not accounted to the applicant. Secondly, if sold, then engaging in the disposal of the pending appeal would be an exercise in futility as the property they have moved to protect would be no more.

Respondent's submission.

It was **Mr. Muriithi's** argument that the appellants appeal is a non starter because the respondent had moved to realize two properties as security. The applicant moved to forestall that sale in **HCCC No.66/2012 (HCCC 115/2012)** arguing that the warrants of sale were invalid; **Musinga, J.** in his ruling in the said proceedings ruled that the warrants of sale were valid; there has been no appeal filed against the ruling of **Musinga, J;** that the learned trial Judge (**J.B. Havelock**) was therefore entitled to find that the proceedings giving rise to the application under review was res judicata.

It was further **Mr. Muriithi's** argument that the applicant's application is a nonstarter as it cannot possibly restrain a negative order which no party was required by the orders of **J.B. Havelock** either to do or refrain from doing something.

Turning to the second limb of the argument, it is **Mr. Muriithi's** argument that there is no way the applicant's intended (now appeal) can be rendered nugatory as the value of the property is known. This can be computed and paid for as damages. Lastly, that the prayer the applicant seeks from this court is alien to the provisions cited and it should be struck out.

Applicant's response to the respondent's submission.

In response to the respondent's submission, **Mr. Lakicha** urged that the order appealed against was not a dismissal order as it simply struck out the applicant's suit and the attendant application; the orders of **Musinga, J.** in HCCC 115/2012 should not be imported herein as these were acted upon; they are simply challenging respondent's move to use the statutory notice used earlier on for the intended sale; a statutory

notice (s) has a lifespan what the applicant is opposed to is the use of such notice(s) in perpetuity.

Applicant's Authorities

On authorities the applicant relied on the decision in the case of ***Alice Awino Okello versus Trust Bank Limited & another LLR No.625(CCK)*** cited in ***Kisumu holdings Limited and another versus Fidelity Bank Limited [2013] eKLR*** for the proposition that sale of ones property is a serious matter that deprives one of a right recognized in law and as such should not be allowed to proceed on doubtful circumstances; the decision in ***Mutuku Mutunga versus Joreth Limited & 3 others [2014] eKLR*** wherein, although the intended appeal was against a dismissal order nonetheless the court proceeded to determine the merits of the application and lastly the decision in the case of ***Milestore Engineering Limited and another versus Co-Operative Merchant Bank of Kenya Limited and another Nai CA No. 305 of 2001 1162/2001 (UR)*** for the proposition that the drastic nature of the order is one of the considerations to be taken into account when considering whether the appeal is arguable or not.

Respondent's Authorities.

The respondent on the other hand, relies on the decision of ***Mombasa Sea Port Duty Free Limited versus Kenya Ports Authority [2006] eKLR*** for the proposition that an order striking out an application is incapable of execution; (ii) where the order sought is neither an order of stay of execution or stay of proceedings or an order of injunction of the species envisaged by **Rule 5(2) (b)** of this Court's rules it cannot be granted; a non binding decision is the case of ***Elstone Mbele & 20 others versus National Housing Corporation [2014] eKLR*** for the proposition that a matter of interlocutory nature decided in one suit cannot be the subject of litigation in another similar application in the same suit; the decision in ***Shimmers Plaza Limited versus National Bank of Kenya Limited [2013] eKLR*** for the proposition that where the superior court has not ordered any of the parties to do anything or refrain from doing anything, there is no positive enforceable order made by the superior court which can be the subject matter for an injunction or stay and, lastly the decision in the case of ***Bawan Roses Limited versus Barclays Bank of Kenya Civil Application No. 178 of 2008 (UR 112/2008)*** for the proposition that an appellate court will refrain from interfering with the superior court's order refusing to grant an equitable remedy unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion resulting in an injustice; that where there are intervening circumstances which tend to interfere with the status quo after events culminating in the application under rule 5(2) (b) of this Court's Rules had crystallized the court when dealing with an application under rule 5(2) (b) has no jurisdiction to adjudicate on the legality of those events.

At the conclusion of the submission, on the date of the hearing of 22nd day of January, 2015 the court gave liberty to the applicant's learned counsel **Mr. Lakicha**, to put in a further affidavit annexing the statutory notice (s). To date he has not done so. The Court has had therefore to conclude its ruling without reference to those notice(s).

This Court's Jurisdiction.

Our jurisdiction under rule 5(2) (b) is original, independent and discretionary. (See ***Githunguri Vs. Jimba Credit Corporation Ltd No. (2) [1988] KLR 88***. It is a procedural innovation designed to empower this court to entertain interlocutory applications for preservation of the subject matter of the appeal where one has been filed or is intended.(See ***Equity Bank Ltd v. West Link NBO Civil Application No.78 of 2011 (UR)***). The jurisdiction under rule 5(2) (b) only arises where the applicant has lodged a notice of appeal. (See the ***Safaricom Ltd v. Ocean View Beach Hotel Ltd & 2 others, Civil Application No. 327 of 2009 (UR)***).

The conditions to be met before a party can obtain relief under rule 5(2)(b) have been crystallized by case law. The applicant has to demonstrate, first, that the appeal or intended appeal is arguable. By arguable, it does not mean an appeal or intended appeal which must succeed, but one which raises a bona fide issue worthy of consideration by the Court. (See ***Kenya Tea Growers Association & another v. Kenya***

Planters Agricultural Workers Union, Civil Application No. NAI 72 of 2001 (UR).

It is trite too that demonstration of the existence of even one arguable point will suffice. (See **Kenya Railways Corporation v. Edermann Properties Ltd, Civil Appeal No. NAI 176 of 2012** and **Ahmed Musa Ismael v. Kumba Ole NTAMORUA & 4 others, Civil Appeal No.NAI.256 of 2013**).

Lastly, both limbs must be demonstrated to exist before one can obtain relief under rule 5(2) (b). (See **Republic v. Kenya Anti-Corruption Commission & 2 others [2009] KLR 31**, and **Reliance Bank Ltd v. Norlake Investments Ltd. [2012] 1 EA 227** and **Githunguri v. Jimba Credit Corporation (supra)**).

We have applied the above principles to the rival arguments herein. With regard to the first pre-requisite, we have considered the grounds that the applicant intends to canvass in the intended appeal and we are satisfied that they are arguable. The pending appeal is therefore not frivolous. We have in mind issues such as whether it was in order for the learned Judge to invoke the doctrine of res judicata to terminate both the suit and the attendant interim application. Secondly, whether the learned trial Judge exercised his discretion judiciously.

As for the second limb, as was observed by this Court in **National Credit Bank Ltd. v. Aquinas Francis Wasike and another (supra)**, a legal duty is placed on the applicant to prove the allegation that its intended appeal will be rendered nugatory because the respondent will be unable to pay back the value of the subject matter of the appeal.

The respondent relies on the content of the replying affidavit in opposition to the application under review that the value of the subject matter can be computed and paid for as damages. There was no rebuttal of that assertion by the applicant by way of a further affidavit. The position in law is that the legal duty placed on the applicant to prove the allegation that its appeal will be rendered nugatory because the respondent will be unable to pay back the value of the subject matter of the appeal should the appeal succeed is not absolute. It is qualified. It means that the moment the respondent asserts his ability to make good the value of the subject matter should the applicant appeal succeed, then the burden shifts to the applicant to rebut that assertion.

See the decision in **Maima Management limited and another versus Heritage Bank Limited CA Nai 215 of 1998 (86/98 UR)** wherein an order of stay was granted to preserve the substratum of the intended appeal. Also in the decision in the case of **Vishram Rauji Halai & Valji Mulji Patel versus Thornton & Turpin [1963] limited CA Nai 15 of 1990 (UR)** wherein stay of execution was granted where the respondent was unable to demonstrate ability to make good the value of the substratum of the appeal should the intended appeal succeed.

In the absence of the applicant's rebuttal of the respondent's assertion that the substratum of the appeal can be valued and paid for as damages is demonstration enough that this is the correct position in the circumstances of this case.

It is now trite that in order for an applicant to succeed under **rule 5(2) (b)**, both limbs must be satisfied. See the decision in the case of **Magnate Ventures Limited versus Enineering. Kenya Limited [2009] KLR 538** wherein the relief was withheld because the applicant had failed to satisfy the two principles for the grant of a relief in its favour under **rule 5(2) (b)** of the Court of Appeal Rules. This position was also reiterated in the decision in **Freight in Time Limited versus Rosebell Wamboi Muthee [2014] Ekler**.

In the application before us the substantive prayers are two (2) namely prayer 2 and 3. These read:-

“Prayer 2. the application seeks for injunction directed to the respondent either by itself or its agents or servants or otherwise howsoever from selling, disposing of, transferring or otherwise interfering with the applicants use, occupation and enjoyment of LR. No.209/11067/22 Momen Estate South C, Nairobi pending the filing and determination of the intended appeal against the ruling and orders of the justice Hon. J.B. Havelock delivered on 28th June, 2013.

Prayer 3 that the applicant be at liberty to apply for further orders and/or directions as this Honourable may deem just and expeditious to grant.”

The above prayers considered in the light of the applicable principles governing the granting of reliefs under **rule 5(2) (b)** of this Court’s Rules, we find prayer 3 totally alien to the species of reliefs that fall within the category of reliefs available under the **rule 5(2) (b)** of this Court’s Rules procedures. Prayer 2 also has issues in the manner of choice of words used in its framing but it is curable under Article 159(2) (d) of the Kenya Constitution 2010. Had the applicant been successful, we would have called into play this provision to cure that defect considering that there is specific mention of the ruling intended to be appealed against and naturally an injunction would only be sought to stay any adverse effect of the ruling complained from befalling the applicant pending determination of either the intended appeal or the appeal if one is already filed.

Lastly, as to whether the striking out order is capable of being stayed, in the case of ***Shimmers Plaza Limited versus National Bank of Kenya Limited (supra)*** this Court drew inspiration from its own decision in the case of ***Stanbic Bank Kenya Limited versus Kenya Revenue Authority Nai Civil Application No. Nai 294 of 2007*** for the proposition that :

“ Under rule 5(2) (b) this Court can only make three orders, namely an order staying proceedings, an order staying execution of the superior courts’ order and lastly, an injunction order as clearly spelt out in that rule (ii) that our inherent powers revolve around these aspects only and the court cannot extend those powers to the realm of creating a prayer not sought in the notice of motion and proceed to grant it.”

On that account, the court after taking note of the fact that the order resulting from the superior courts’ decision was in fact a dismissal order drew inspiration from the decision in the case of ***Republic versus Kenya Wildlife Services & 2 others civil application No. Nai 1 2of 2007*** and stated thus:-

“This Court stated that the superior court has not therefore ordered any of the parties to do anything or refrain from doing anything.

There is therefore no positive and enforceable order made by the superior court which can be the subject matter of the application for an injunction or stay.”

Applying the above to the applicant’s plea here, in what we have before us is an order of the superior court striking out the applicant’s entire suit as well as the attendant interlocutory application, on account of the entire proceedings being res judicata. It did not thus require parties to either refrain from doing or do anything.

The upshot of the above is that we find no merit in the applicant’s application under review. It is dismissed in the first instance because it has not met the thresh hold for the granting of the relief under **rule 5(2) (b)** of this Court’s Rules. And in the second instance because it seeks to stay a negative order incapable of being stayed. The costs of the application to abide the outcome of the appeal.

Dated and delivered at Nairobi this 8th day of May,2015.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR