



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, SICHALE & KANTAI, JJ.A.)**

**CIVIL APPLICATION NO. NAI 28 OF 2015**

**BETWEEN**

**SAMSON MWATHI NYUTU ..... APPLICANT**

**AND**

**SAVINGS & LOAN KENYA LIMITED ..... RESPONDENT**

*(Application for stay of execution of the judgment and decree of the High Court of Kenya at Nairobi (Havelock, J.) dated 9<sup>th</sup> September, 2014*

**in**

**HCCC No. 1638 of 1999)**

**\*\*\*\*\***

**RULING OF THE COURT**

The applicant **Samson Mwathi Nyutu** filed suit at the High Court of Kenya at Nairobi where he sought orders of injunction against the respondent **Savings and Loan Kenya Limited** to restrain it from selling or dealing with his property known as **Title Number Nairobi/Block 99/46** pending the hearing and determination of the suit. There were other prayers made. Havelock, J. heard the suit and in a judgment dated 14<sup>th</sup> August, 2014 but delivered on his behalf on 9<sup>th</sup> September, 2014 the learned Judge did not find merit in the suit and dismissed it. Those findings did not please the applicant who filed Civil Appeal No. 11 of 2015 lodged in this Court on 22<sup>nd</sup> January, 2015. The applicant also filed a Notice of Motion in this Court which is said to be brought under **Section 3A (1) (2)** of the **Appellate Jurisdiction Act** and **Rules 5 (2) (b), 41 and 47** of the **Rules** of this Court. The Motion is also said to be premised on **Section 1A, 1B and 3A** of the **Civil Procedure Act** and all enabling provisions of law. In so far as is material for purposes of the Motion before us it is prayed:

- “2. THAT there be stay of execution of the Judgment of Justice Havelock in HCCC No. 1638 of 1999 delivered on 9<sup>th</sup> September, 2014 pending the hearing of the Application interparties or until further orders of this Court.**
- 3. THAT there be a stay of execution of the judgment of Hon. Justice Havelock HCCC No. 1638 of 1999 delivered on 9<sup>th</sup> September 2014 pending the hearing and determination of the Appellant’s Appeal.**

4. **THAT the Honourable Court be pleased to grant an order of injunction restraining the Respondent whether by itself or its servants or Agents, or Advocates or Auctioneers or any of them or otherwise from doing the following acts or any of them, that it to say, from further advertising for sale, selling by public auction or private treaty or otherwise howsoever the Appellant's property Title Number Nairobi/Block/99/46."**

In the grounds in support of the Motion the applicant states that the suit at the High Court was dismissed; that being dissatisfied with those findings, the applicant preferred an appeal; that the respondent had since served a statutory notice upon the applicant; that the applicant's property was threatened with sale and that, if sold, the sale could not be reversed rendering the appeal nugatory; that the appeal had high chances of success and, finally, that status quo should be maintained pending hearing of the appeal.

The affidavit in support of the Motion sworn by the applicant on 3<sup>rd</sup> February, 2015 is a recapitulation of the matters set out in the grounds in support of the Motion and there are various annexures attached to the said affidavit.

**Gladys Nyambura Mwangi**, an officer in the Kenya Commercial Bank Group, of which the respondent was part swore a replying affidavit on 25<sup>th</sup> February, 2015. She deponed *inter alia* that the applicant had been granted a mortgage facility by the respondent payable over a 10 year period; that the applicant defaulted on payments and fell into arrears; that the applicant had severally admitted that debt but failed to meet payment promises; that the respondent's statutory rights had crystallized and for these reasons the Motion should fail.

**Mr. Kelvin Mogeni**, learned counsel for the applicant, in arguments before us when the application came for hearing on 15<sup>th</sup> June, 2015 submitted that the applicant's property was threatened with sale as a statutory notice had been served by the respondent and that, if such sale took place it would change the status quo as a third party would come into the scene. This, to learned counsel, would render the appeal which had already been filed nugatory. In support of the arguability principle on which such an application is predicated counsel urged that the applicant had been found to be in arrears when, in fact, according to the applicant, there were no arrears at all. Learned counsel invoked The Banking Act in support of his argument that it was arguable whether the respondent could change rate of interest without notice to the applicant and whether the respondent could recover as interest sums more than was permitted by the said Act. In any event, urged counsel, the High Court had failed to make findings on allegations of fraud made by the applicant and supported by an auditor witness. According to counsel the Memorandum of Appeal filed by the applicant showed an arguable appeal which was not frivolous.

**Mr. Geoffrey Muchiri**, learned counsel for the respondent opposed the application taking the position that the applicant was a serial defaulter who had fallen into arrears and the respondent, as mortgagee, was entitled to exercise statutory rights by selling the mortgaged property to recover arrears of the debt. Counsel submitted that since there were admissions of the debt there could not be an arguable appeal.

After having considered the Motion, the grounds thereof, the affidavit, the submissions of learned counsel and the law we take the following view of this application.

The principles that are applied on a consideration of an application under **Rule 5 (2) (b)** of this **Courts Rules** are now well settled. This Court in deciding such an application exercises unfettered powers but those powers cannot be exercised capriciously or upon the whims of a Judge. The Court has to be satisfied that the appeal, which has in this case already been filed, is arguable which is the same as saying that it is not frivolous. The Court must, in addition, be satisfied that should the appeal succeed it would be rendered nugatory should the court refuse to grant the application. These principles that guide the Court in considering such an application were well enunciated in **Republic v Kenya Anti-Corruption Commission & 2 Others [2009] KLR**

31 where the following passage appears:

**"The law as regards the principles that guide the court in such an application brought**

pursuant to Rule 5 (2) (b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb. [See also this Court's decisions in the cases of RELIANCE BANK LTD v NORLAKE INVESTMENTS LTD (2002) 1 EA 227 & GITHUNGURI v JIMBA CREDIT CORPORATION LTD & OTHERS (NO. 2) 1988; KLR 828; WARDPA HOLDINGS LTD & OTHERS v EMMANUEL WAWERU MATHAI & HFCK (CIVIL APPEAL NO. 72 OF 2011 [unreported].”

This Court in Chris Bichage v Richard Nyagaka Tongi & 2 Others [2013] eKLR held *inter alia* that on the arguability principle an applicant need not establish a number of arguable points as one arguable point will suffice to satisfy the said principle.

Applying these principles to this matter what is the position and what determination must follow?

In the judgment appealed from the learned Judge found that the allegations of fraud had not been proved at all and further found that the applicant had made various promises to pay but had not kept this promises.

According to learned counsel for the applicant the mortgaged property if sold would be beyond the reach of the applicant and this would render the appeal nugatory. But is that so?

Both sides agree that the property is a commercial one where the applicant has continued to collect rent which rent he does not use to pay what is demanded by the respondent. In Joseph Gitau Gachau & Anor v Pioneer Holdings (A) Limited & 2 Others [2009] eKLR this Court was faced with a plea by a couple who pleaded that their matrimonial property, if sold, would rob them of their matrimonial property to which they had sentimental value and they were in their sunset years. In dismissing that plea the court stated:

**“.....we recognize the argument put forward by the applicants that the suit property is a matrimonial home in which they occupy in their now sunset years. But we would like to point out that couples such as the one now before us must realize that when they charge their matrimonial property to secure a loan, they are in fact converting that property into a commodity for sale available for purchase by all and sundry, if they fail to pay the charge debts or the loans and that no sentimental value or attachment to the mortgaged property, however great, per se, would operate against the exercise of statutory power of sale by the mortgagee....”**

The principle being that, even where sentiment is attached to a mortgaged property statutory rights will prevail over sentiment.

The applicant takes as grounds in the Memorandum of Appeal that the learned Judge failed to evaluate evidence; that the respondent distorted the applicants account by overcharging the same; that the learned Judge failed to evaluate a report by auditors; that the learned Judge failed to find that the applicant was not in arrears and that there was error in finding that the appellant had not established the case on a balance of probabilities.

It has been held, and we agree, that the less we say in an application like this one the better lest we embarrass the bench that will eventually hear the appeal – Gitamayu Trading Company Limited v Nyakinyua Mugumo Kiambaa Company Limited & 6 Others [2015] eKLR which quoted with approval the decision in Damji Pragji Mandaria v Sara Lee Household & Body Care (K) Ltd, Civil Application No. 345 of 2004 (unreported) where it was stated that in considering an application under

**Rule 5 (2) (b)** of this **Courts Rules** the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.

The following passage appears in **Joseph Okoth Waudi v National Bank of Kenya [2006] eKLR**:

**“It is trite that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to it, unless, on the terms of the mortgage, the claim is excessive. See Halsbury’s Laws of England Vol. 32, 4<sup>th</sup> Edition page 725 and Lavuna & Others vs. Civil Servants Housing Co. Ltd. & Another Civil Appeal Nairobi No. 14 of 1995 (unreported). Middle East Bank (K) Ltd vs. Milligan Properties Ltd, Civil Appeal No. 194 of 1998 (unreported)”.**

It was held in the earlier case of **Mrao Limited v First American Bank of Kenya Limited [2004] KLR 125** that a dispute over the interest or sums due is not a good ground for a court to issue an injunction restraining a mortgagee from exercising a statutory right. That position also obtained in **Robert Kibagendi Otachi & Another v Housing Finance Company Of Kenya Ltd & Others Civil Application No. 251 of 1996** where it was stated that courts 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.

In the matter before us all the applicant is saying is that if the mortgaged property is sold it would introduce a third party, the purchaser, and that would disturb the status quo and make the property be beyond the reach of the applicant. That is not so at all. The applicant has not shown that compensation in damages would not be an adequate remedy in a case where the property mortgaged is a commercial one. The respondent has shown, and this is not disputed by the applicant, that it has served a statutory notice and that the applicant collects and enjoys rental collections from the property which he does not remit to the respondent. It has not been demonstrated that the respondent would be unable to compensate the applicant in damages should the appeal succeed. The respondent is a reputable financial institution which would pay if the court was to so order. The applicant thus fails on the nugatory principle of the matter.

On the authorities cited it will be seen that the applicant has not raised any arguable point on which he would be entitled to our exercise of discretion under the Rules.

In the end the Motion fails and is dismissed with costs. Having come to the above conclusion, we do not consider it necessary to delve into the issue as to whether the appeal if successful would be rendered nugatory, unless an order of stay is made.

**Dated and Delivered at Nairobi this 31<sup>st</sup> day of July, 2015.**

**H.M. OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**