



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 55 OF 2015

BETWEEN

JITENDRA DHOKIA.....APPLICANT

AND

BANK OF BARODA.....RESPONDENT

(An application for a stay of execution of the Ruling and order of the High Court of Kenya at Kisumu Kibunja, J.) dated 30th September, 2015 in ELC. NO. 265 of 2014)

RULING OF THE COURT

In the Notice of Motion dated 2nd November, 2015 which arises from the ruling and order of Kibunja, J. made on 30th September 2015, the applicant, **Jitendra B. Dhokia**, prays for orders that pending the hearing and determination of his intended appeal, this Court be pleased to grant an interim order and/or an order for stay of execution of the ruling and orders dated 30th September 2015 and for the costs of the application.

In the ruling, the High Court declined to grant the orders of temporary injunction against the advertising, sale, disposal or interference with the property know as Land Reference No. Kisumu/Municipality/Block/7/443 (**the charged property**) that was sought. This was for reasons that, the applicant had failed to establish a prima facie case with a probability of success as the charge document clearly allowed the respondent to consolidate all the applicant's facilities and to realize the securities offered in accordance with the law for reasons of none payment of the outstanding loan facility; and that the applicant had failed to show that it had settled the obligations due to the respondent. As such, there was no good reason to stop the respondent from realizing the security.

The grounds raised in the Notice of Motion before us were that following the order of the High Court the respondent was allowed to proceed with the sale of the charged property; that the applicant had lodged an appeal to this Court with chances of success; that the respondent's power of sale over the charged property had not arisen; that the applicant would suffer irreparable loss and damage; that the respondent had been selling the principal debtor's Dhokia Transporters Ltd's assets held under chattels mortgage but had failed to account for the sale proceeds realised, and as such it has become impossible to ascertain the actual sums due and owing; that the respondent had concealed the material facts from the court; and it would be in the interests of justice to grant the orders sought.

When the application came up for hearing, **Mr. Yogo and Mr Okero**, learned counsel for the applicant, relied on the supporting affidavit dated 2nd November 2015 sworn by **Jitendra Ashwin Dhokia**. Mr Yogo begun by submitting that the appeal was arguable as the respondent's statutory powers of sale had not arisen under **section 9 (2) (b)** of the **Land Act** as the Statutory Notice dated 29th May 2014 was defective and a nullity. The reasons advanced were that the statutory notice given was less than the period of not less than 3 months specified in the Land Act and that the redeemable amount was unspecified and this was contrary to the requirements of **section 102 (1)** of the **Land Act** which places an obligation on the respondent to specify the sums demanded. A further arguable issue was that **section 40 and 40 (a)** of the **Land Act** was not complied with as the Minister's consent to raise interest rates had not been obtained.

On whether the success of the appeal would be rendered nugatory if the stay of execution was refused, counsel submitted that the respondent continued to sell the assets of the principal debtor, Dhokia Transporters Ltd, under the chattels mortgages and debentures, and at the same time also intended to sell the charged property; that in the event the appeal is successful the appellant would have lost his residential home. Counsel cited **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR** for the contention that the applicant would stand dispossessed of his property.

Relying on the replying affidavit dated 6th November 2015 sworn by **Banambar Behera**, the respondent's Branch Manager, learned counsel for the respondent **Mr. Menezes** contended that the appeal was not arguable. Counsel submitted that the applicant had been in default since 2012 and that the amount outstanding was in excess of Kshs 185,000,000; that it was true that the applicant's chattels continued to be auctioned, but that the auctioneers continue to lodge the returns detailing the proceeds of sale as and when the applicant's motor vehicles are sold. It was counsel's submission that the Statutory Notice clearly gave the applicant a period of 3 months that would begin to run from the date of service of the notice on the applicant. Counsel was of the view that, in any event, if the Statutory Notice was defective, the respondent was at liberty to issue a fresh notice. In support of this contention counsel cited **National Bank of Kenya Limited vs Shimmers Plaza Civil Appeal 26 of 2002** and **Albert Mario Cordiero & another vs Vishram Shamji Civil Suit No. 328 of 2014**. With respect to the increase in interest under **section 40 and 40 (a)** of the **Land Act**, counsel submitted that this issue was not addressed in the High Court.

On whether the refusal to grant the stay of execution would render the appeal nugatory, counsel for the respondent submitted that the charged property was not a dwelling house but a commercial property from which rental income was earned. Counsel continued that even if all the motor vehicles were sold and the charged property was auctioned, the sums realised would still not be sufficient to liquidate the entire debt owed by the applicant and interest continues to accrue on the outstanding sums. Counsel concluded by stating that in the event the appeal was successful, the respondent would be in a position to compensate the applicant for the sums ascertained as damages.

In reply, **Mr. Okero** submitted that the respondent was aware that the Statutory Notice was defective as this had been communicated to the respondent vide the letter dated 7th August 2014 from the applicant's advocate, and that the respondent had not demonstrated that the applicant had been duly served with the notice, or that the provisions of the Land Act had been complied with.

We have considered the arguments, submissions and the obtaining circumstances in respect of this application for stay of execution brought pursuant to **rule 5(2) (b)** of the **Court of Appeal Rules**. The principles which guide the Court in considering applications made under **rule 5 (2) (b)** are now well settled. The two requirements that must be fulfilled are that firstly, the appeal or intended appeal should be an arguable one, and secondly, that if an order of stay or injunction is not granted, and the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory, see **Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR)**.

On the first aspect as to whether the application is arguable and not frivolous, the applicant's main complaint is that the Statutory Notice dated 29th May 2014 was defective and a nullity as it did not comply with the requirements of **section 9 (2) (b)** of the **Land Act** given that the notice period given was

less than 3 months. A review of the Statutory Notice shows that it was specified that the notice period would begin to run ten (10) days from the date of service. The record also shows that notices were duly served on the applicant in various ways, to begin with, by hand delivery on 30th May 2014, and thereafter under certificate of posting and Certificate of Posting Registered Postal Article on 3rd June 2014. Consequently, service having been properly effected, the notice period was expected to commence ten (10) days from the date of such notice. This meant that the applicant was given the full period of three months by law provided.

Regarding the contention that the redeemable sums were uncertain, we do not find this to be a viable argument as it is not in dispute between the parties that the amount due to the respondent is in the region of Kshs. 186,000,000. In any event there are numerous authorities including *St. Elizabeth Academy vs Housing Finance Company of Kenya HCCC No 747 of 2012.* that support the position that unascertained or disputed sums cannot be the basis of an order of stay of execution. On the issue that **section 40 and 40 (a)** was not complied with as the Minister's consent to raise the interest rate had not been obtained, no basis for the same was advanced and we accordingly reject counsel's argument on that. We also do not think the argument was raised before the High Court.

Turning to the second aspect of whether the appeal would be rendered nugatory if the appeal was to succeed, it is noteworthy that the sums outstanding are substantial, yet no proposal has been made by the applicant on the manner in which the sums should be liquidated. The respondent on the other hand has stated that in the event the appeal were to succeed, and the applicant were to be awarded damages as compensation, it has the financial capability to adequately repay the applicant.

Accordingly, we are not satisfied that, either of the two requirements for the fulfillment of **rule 5 (2) (b)** application have been met. We therefore dismiss this application. The costs of the application shall be in the intended appeal.

Dated and Delivered at Kisumu this 17th day of December, 2015

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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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

DEPUTY REGISTRAR