



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, GATEMBU, MURGOR JJ, A)

CIVIL APPLICATION NO. NAI. 232 OF 2013

BETWEEN

PETER NGANGA MUIRURI.....1ST APPELLANT

AND

CO-OPERATIVE BANK OF KENYA LTD.....1ST RESPONDENT

GATHOGO T/A VALLEY AUCTIONEERS.....2ND RESPONDENT

ELIZABETH W. MUNGAI T/A WAGLEY AUCTIONEERS.....3RD RESPONDENT

(An application for injunction pending the hearing and determination of intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Kamau, J) delivered on 31st July 2013

in

H.C.C.C. NO. 235 OF 2008

RULING OF THE COURT

Before us is an application that arises from the judgment and decree, of B.N. Kamau, J, made on 31st July 2013. In the application, the applicant seeks an injunction pending the hearing and determination of the intended appeal from the judgment and decree of the High Court.

Briefly, the facts, as they relate to this application, are that the applicant created two charges, dated 6th October 1994 and 5th January 1995 over title No. Nyandarua/Nandarasi/332 and Land Reference No. 12959/3 Nairobi respectively (“*the charged properties*”) to secure a sum of Kshs.1,700,000/= advanced to Intertwin Company Limited by Co-operative Finance Limited (“*the Chargee*”). Arising from the applicant’s failure to repay the loan amount, on 3rd May 2008, the 1st respondent sought to serve a statutory notice on the applicant, through the 2nd and 3rd respondents for the sale of the charged properties by public auction on 6th May, 2008 and 29th May 2008 to recover a sum of Kshs. 31,297,900. According to the applicant, he had not issued any charge in favour of the 1st respondent, as the charges issued were in favour of the Chargee. The applicant contended that he was unaware of the transfer of ownership of the

charges over the charged properties to the 1st respondent, as no transfer or assignment of the charges to the 1st respondent were registered against the charged properties.

In a judgment delivered on 31st July 2013 the learned judge rendered herself thus:-

“The court finds that the general custom and usage of contracts was that the parties therein intend to refer to their successors, and assigns and where necessary, personal administrators despite the omission of including the successors and assigns in their contracts. Luckily in this case, the inclusion of assigns and successors could not to be inferred as it was clearly stipulated in the Charge Instruments. The court cannot construe the same any differently from what the parties intended. In the circumstances, the court rejects the Plaintiff’s argument that the Charge Instruments did not include successors and assigns of the Chargor as they were expressly provided for.”

Being dissatisfied with the decision of the High Court, the applicant filed this Notice of Motion dated 23rd August 2013 which is before us under **Rule 5(2)(b)** of the **Court of Appeal Rules** for orders that:-

The 1st respondent its servants, agents, representatives, successors or assignees be restrained by an order of injunction from applying or presenting for registration or registering a transfer or certificate of sale of the charge dated 6th October 1994 between Peter Muiruri Njuguna and Co-operative Finance limited on title number Nyandarua/Nandarasi/332 from Co-operative Finance Ltd to the 1st Respondent and restraining the respondents or any of them from selling transferring disposing off or alienating Applicant’s title

No. Nyandarua/Nandarasi/332 and LR No. 12959/3 or howsoever dealing with the said titles in any manner defeating the applicant’s absolute title to ownership possession and use thereof pending hearing and determination of the intended appeal.

The application is premised on seven grounds on its face and on the supporting affidavit sworn by **Peter Nganga Muiruri**, where in summary he deponed that after executing into a charge in favour of the Chargee for an advance of Kshs. 1,500,000, the Chargee, unknown to the applicant, was voluntarily wound up. The applicant deponed that the statutory notices of sale of the charged properties dated 3rd May 2007 referred to the applicant interchangeably as Peter Nganga Muiruri and Peter Muiruri Njuguna, while conversely, the Notifications of sale by the 2nd and 3rd respondents referred to the applicant as Peter Nganga Muiruri. Additionally, the learned judge had found that the 1st respondent was not the registered owner of the charges and therefore lacked capacity to issue the statutory notices or exercise the statutory power of sale, but had in any event concluded that the Kenya Gazette No 6406 of 4th October 2004, published by the Minister for Finance for the intended transfer of the Chargee’s assets and liabilities to the 1st respondent amounted to a transfer and registration of the charges over the charged properties, and added that the reference to “successors” and “assigns” in the charge documents constituted evidence that the charges had been duly assigned to the successors of the Chargee.

In a replying affidavit sworn by **Sam Mwaura Kibugi**, the Head of the Legal department of the 1st respondent, it was deponed that, the charged properties were secured in favour of the 1st respondent who by then was referred to as the Co-operative Finance Ltd, and later changed its name to Co-operative Merchant Bank Limited, and subsequently, with the approval of the Minister by an agreement dated 12th July 2002 published in the Kenya Gazette, the Chargee transferred its assets and liabilities to the 1st respondent. The injunction sought by the applicant to stop the presentation for registration of the transfer of the charge dated 6th October 1994 following the change of name by the 1st respondent has no merit or basis in law and should therefore be refused. It was also deponed that the applicant’s attempt to frustrate the 1st respondent’s statutory right of sale to recover the debt owed by the applicant was misconceived,

mischievous and made in bad faith.

When the application came up for hearing before us, **Mr. Wamalwa** learned counsel for the applicant contended that there was an arguable appeal as the learned judge had found that the statutory notice of sale was defective, as the exercise of the power of sale should have been within 30 days, and section 74 of the Registered land Act (now repealed) provides for the sale after a period of 3 months; and that the statutory notice of sale of 3rd May 2007, had since expired following the lapse of 12 years. Additionally, the land being agricultural land, it was a requirement that land control board consent be obtained to charge the property in favour of the 1st respondent, which issue was not addressed by the High Court in its judgment. Counsel submitted that, the learned judge had acknowledged that the 1st respondent was not the legally registered chargee of the charged properties, and therefore required time to register the charges in its favour; that the central issue was that the Chargee had been wound up without the involvement of the Official Receiver or a liquidator which was unprocedural and irregular; and that given that the Chargee had been wound up, who was the legitimate entity to execute the documentation on its behalf, as execution by any other entity would be irregular.

On whether a successful appeal would be rendered nugatory, Mr. Wamalwa, submitted that, should the 1st respondent proceed with the sale of the charged properties, the substratum of the appeal would be lost, to the detriment of the applicant.

In response, Mr. Kimani learned counsel for the respondents, argued that, the charge existed between the applicant and the 1st respondent; that a change of name from the Chargee to that of the 1st respondent was effected under section 20 of the Companies Act, and a certificate duly issued, and therefore the Chargee had not been wound up but had been amalgamated with 1st respondent. Section 9 of the Banking Act, provides for the consent of the Minister in respect of any amalgamation or arrangement involving a financial institution, which consent was provided accordingly, and which gave way to a takeover of the assets and liabilities of the Chargee by the 1st respondent. A transfer of the charge to the 1st respondent was effected on LR 12959/3 Nairobi, but no transfer was effected in respect of the charge over title No. Nyandarua/Nandarasi/332; that land control board consent was not required in respect of this property; and that section 19 (1) of the Limitations Act did not apply, as the Chargee was only exercising its statutory right of sale, which is not contemplated by the provisions of the Act. Contrary to the applicant's contention, the High Court found that the statutory notices to be valid, only that they were incapable of being issued by the 1st respondent. Mr. Kimani concluded that the intended appeal was frivolous, and that the 1st respondent would suffer grave prejudice, as no amounts had been paid towards liquidating the loan amount, and there had been no proposal for settlement. Lastly, the applicant had not shown that the appeal would be rendered nugatory.

We have considered the arguments, submissions and the obtaining circumstances in respect of this application for injunction brought pursuant to **rule 5(2) (b)** of the Court of Appeal Rules. The principles which guide this Court in considering applications made under this **Rule** are now well settled and we need only restate them from **Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd** – Civil Appl. No. Nai. 93/02 (UR): -

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,***
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”***

With respect to whether the application is arguable and not frivolous, the applicant advanced several arguments, in particular that, the statutory notice of sale of 3rd May 2007 were defective, and in any event had since expired following the lapse of 12 years; that it was a requirement that, the land being

agricultural land, land control board consent was necessary to facilitate registration of a charge over title No. Nyandarua/Nandarasi/332, which issue was not addressed by the High Court in the judgment.

The applicant's main complaint was that, the transfer of the charge over the applicant's properties from the chargee to the 1st respondent had not been registered and as such, the 1st respondent did not have the capacity to issue the statutory notices of 3rd May 2008, or exercise the statutory power of sale. It followed that if a charge over the charged properties was not registered in the name of the 1st respondent, were the statutory notices valid? And if not, on what authority were the charged properties to be sold? Without going into the legitimacy or not of this argument given that it will be considered by another bench hearing the intended appeal, on account of this argument, we consider the application to be arguable.

On the nugatory aspect, the applicant's concern is that the 1st respondent is not the legitimate registered chargee of the charged properties. The 1st respondent has argued that it is indeed the legitimate chargee, as by an agreement executed between the Chargee and the 1st respondent dated 12th July 2002, it was agreed that the assets and liabilities of loan facilities and other financial accommodation to customers valued at Kshs 1, 710,272,632.10 as at 31st May 2002 (hereinafter the loans) be transferred to the 1st respondent, and that the 1st respondent would be entitled to take possession of the assets and to take possession of the business on the thirty first day of July two thousand and two and that the risk and the profit in the assets and liabilities shall pass to the Transferee including the income and expenses of the business.

Clearly, from that agreement, it was agreed that all assets and liabilities of the Chargee would be transferred to the 1st respondent. It was a term of the agreement that, the Chargee would assign, at the cost of the 1st respondent, the securities for the Loan accounts to the 1st respondent. That makes it clear that the applicant's loan together with all loans of the chargee's other customers were to be formally transferred to the 1st respondent. With respect to title Nyandarua/Nandarasi/ 332, it was undisputed that a transfer or assignment of the charge over it has not been registered against the property in favour of the 1st respondent. This being the case, the question arises as to whether the 1st respondent could have been considered as the legitimate and authorized holder of the charges over the charged properties, capable of issuing a statutory Notice of sale, or exercising the statutory power of sale?

We agree with the applicant that there remain questions surrounding the legitimate ownership of the charges over the charged properties. To our mind, these questions would remain unaddressed, if the 1st respondent proceeded to dispose of the charged properties. In effect, the substratum of the appeal, would be lost, to the prejudice of the applicant. Under these circumstances, we consider it prudent to forestall the sale of the charged properties.

Accordingly, we allow the application in terms of the Notice of Motion dated 23rd August 2013. The costs of this application shall be in the intended appeal.

Dated and Delivered at Nairobi this 10th day of APRIL, 2014

D.K. MAGARA

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JUDGE OF APPEAL

S. GATEMBU-KAIRU

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR