IN THE COURT OF APPEAL

AT NAIROBI

CORAM: P. KIHARA KARIUKI (PCA), KIAGE & M'INOTI, JJ.A.

CIVIL APPLICATION NO. NAI 251 OF 2013 (UR 181/2013)

BETWEEN

YUSUF KIFUMA CHANZU……..……....…..……..……...…….APPLICANT

AND

EQUITY BANK LIMITED…….…..... 1ST RESPONDENT

CAPITAL CONSTRUCTION COMPANY LIMITED.……...……...2ND RESPONDENT

(Application for an injunction pending the hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi, (Mutava, J.) dated 26th April, 2012

in

HCCC NO 762 OF 2009)

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RULING OF THE COURT

On 19th September, 2013, the applicant, ***Yusuf Kifuma Chanzu***, took out the Motion on Notice before us under ***Rule 5 (2) (b)*** of the Rules of this Court, praying principally for an injunction to restrain the respondents from selling or transferring ***LR NO 10198/6 (Title No IR 66702), Nairobi*** (the suit property), pending the hearing and determination of ***Civil Appeal No. 164 of 2012,*** currently pending before this Court. The appeal arises from the judgment and decree of the High Court (***Mutava, J.***) dated 26th April, 2012 in which the learned judge dismissed the applicant's suit after finding that he was well and truly indebted to the 1st respondent, ***Equity Bank Ltd.***

The background to the application is a letter of guarantee and indemnity executed by the applicant

on 2nd November 2007 in favour of the 1st respondent, in consideration of the 1st respondent extending loans, advances and other financial facilities to the 2nd respondent, ***Capital Construction Company Ltd.*** By that letter, the applicant guaranteed to pay to the 1st respondent on demand, all monies owing to it from the 2nd respondent. The liability of the applicant under the guarantee was however, limited to the sum of ***Kshs 19 million***. In addition to the letter of guarantee, the applicant, on the same date, executed a charge over the suit property to secure repayment of the said amount.

It appears that the 2nd respondent defaulted in payment of moneys advanced to it by the 1st respondent, and on 15th January, 2009, the 1st respondent served upon the applicant a notice under the letter of guarantee, demanding from him a whopping ***Kshs 640,814,172.32***. The applicant responded to the demand by filing ***HCCC No 762 of 2009*** seeking a declaration that the charge of the suit property was null and void and a permanent injunction to restrain the 1st respondent from selling or alienating the suit property.

In the suit the applicant claimed that the charge and the guarantee were fraudulent; that the rate of interest charged by the 1st respondent was illegal and in breach the charge, the letter of guarantee and section 44 of the Banking Act; and that he was automatically discharged from his obligations under the charge and guarantee upon variation of the terms thereof by the respondents without recourse to him.

Pending the hearing and determination of the suit, on 27th January, 2010, the High Court ***(Apondi, J.)*** issued an interim injunction restraining the 1st respondent from advertising for sale, selling or alienating the suit property or interfering with the applicant's occupation of the same. Ultimately the suit was heard by ***Mutava, J***. who, as already stated, found no merit in it, dismissed the same, and discharged the interim injunction on 26th April, 2012.

After filing a Notice of Appeal on 7th May, 2012, the applicant filed in this Court, ***Civil Application No 138 of 2012*** seeking an order of injunction to preserve the suit property, pending the hearing and determination of his intended appeal. It appears that on 26th June, 2012, the applicant filed another application in the High Court *under* ***Order 42 Rule 6 of the Civil Procedure Rules, 2010,*** seeking stay of execution of Mutava, J.'s judgment and decree, *pending the hearing and determination of* ***Civil Application No 138 of 2012*** *by this Court*. On 27th September, 2012, Mutava, J. granted that application.

For reasons that we are not able to fathom, the applicant withdrew ***Civil Application No 138 of 2012*** which was before this Court, and by a Notice of Motion dated 16th April, 2013, applied before the High Court for stay of execution of Mutava, J.'s judgment and decree, *pending the hearing and determination of* ***Civil Appeal No. 164 of 2012*** *by this Court*. The applicant also prayed for an injunction to stop the sale or transfer of the suit property. Although the applicant claims that the withdrawal of the application before this court was to avoid two applications on the same matter, it is obviously clear to us that the application in the High Court sought interim relief pending the hearing and determination of the application before this Court, while the application before this Court sought an injunction pending the hearing and determination of the intended appeal. Be that as it may, the new application in the High Court was heard by Ogola, J. who on 30th May, 2013 allowed the application on condition that the applicant pays to the 1st respondent Kshs 19 million within 30 days, otherwise the application stood dismissed.

Having come to the end of the road in the High Court, the applicant filed the Motion presently before us.

Mr Wachakana, learned counsel for the applicant presented his application on the footing that the applicant was aggrieved by the order of Ogola, J, until we drew his attention to the fact that there was no notice of appeal filed against the ruling and order of Ogola, J. and that Civil Appeal No. 164 of 2012 arose from the judgment and decree of Mutava, J.

Back on the right track, Mr Wachakana, in trying to demonstrate that Civil Appeal No. 164 of 2012 is

arguable, submitted that the learned trial judge had erred in failing to find that the applicant was automatically discharged from his obligations under the guarantee and the charge the moment the respondents varied the terms of the lending agreement; that the 1st respondent had failed to notify the applicant of the variation of the rate of interest and was thereby estopped from realizing the security; that the trial judge erred by finding that the 1st respondent had not violated section 44 of the Banking Act; and that the 1st respondent had not explained how the secured amount had skyrocketed from Kshs 19 million to more than Kshs six hundred million in a period of two years.

On whether, if the orders sought were not granted, the intended appeal would be rendered nugatory in the event it is successful, learned counsel answered in the affirmative, contending that alienation of the suit property in the intervening period, would render the entire appeal academic. Mr Wachakana relied on the rulings of this Court in ***DAVID MORTON SILVERSTEIN VS ATSANGO CHESONI, Civil Application No. Nai 189 of 2001***; ***KENYA HOTEL PROPERTIES LTD VS WILLISDEN INVESTMENTS LTD & 4 OTHERS*** , ***Civil Application No. 24 of 2012*** and ***EQUITY BANK LTD VS WEST LINK MBO LTD, Civil Application No 78 of 2011*** to demonstrate the application of the principles that guide this Court in the exercise of its discretion under Rule 5(2) (b).

Learned counsel concluded by stating that the applicant was ready to abide by any conditions that the Court may impose and prayed that the application for injunction should be allowed. The case of ***RISING FREIGHT LTD VS REVERLAND LTD, Civil Application No. 269 of 2008*** in which this Court ordered stay of execution on condition that half of the decretal amount was deposited in a joint interest earning account was relied upon.

Ms Ndirangu, learned counsel for the 1st respondent, opposed the application on the basis of grounds of opposition dated 2nd May, 2014. In counsel's view the applicant's application was misconceived because it was attacking the ruling of Ogola, J. whilst no notice of appeal had been filed against the same; that the applicant's assertion that the order of stay given by Mutava J on 27th September, 2012 were still subsisting had no merit because that order was limited in time to the hearing and determination of ***Civil Application No 138 of 2012***, by this Court, which application was withdrawn by the applicant; that the applicant had already obtained from the High Court upon conditions, the order he was seeking from this Court; that the applicant had failed to comply with the conditions upon which the order was granted; and that the Kshs 19 million was found not to be disputed.

Learned counsel relied on the ruling of this Court in ***HUNKER TRADING CO LTD VS ELF OIL KENYA LTD, Civil Application No. 6 of 2010*** to fortify the point that the applicant, having obtained from the High Court orders similar to those he is now seeking before this Court, and having failed to comply with the conditions upon which those orders were issued, was undeserving of exercise of the Court's discretion in his favour. Counsel concluded by asking us to dismiss the application as there was no arguable appeal disclosed and in any event, the applicant had not demonstrated how the appeal would be rendered nugatory.

To entitle the applicant to the orders sought under ***Rule 5(2) (b***) of the rules of this Court, he has to demonstrate firstly, that he has an arguable appeal or an appeal that is not frivolous, and secondly that if we do not grant the order, the intended appeal will be rendered nugatory, if it eventually succeeds. (See ***GITHUNGURI VS. JIMBA CREDIT CORPORATION LIMITED Civil Application No. 161 of 1988*** and ***ISHMAEL KAGUNYI THANDE VS. HOUSING FINANCE OF KENYA LTD, Civil Application No. NAI. 157 of 2006.*** Other pertinent principles to bear in mind regarding the jurisdiction of the Court under ***Rule 5 (2) (b)*** include; that the applicant must satisfy the two limbs referred to above and that it will not suffice to satisfy only one of them, (***PETER MBURU NDURURI V JAMES MACHARIA NJORE Civil Application No. 29 OF 2009 (UR 14/2009);*** that even a single arguable issue will suffice to satisfy the first limb, (***KENYA TEA GROWERS ASSOCIATION & ANOTHER VS. KENYA PLANTERS & AGRICULTURAL WORKERS UNION, Civil Application No. Nai. 72 of 2001);*** that an arguable appeal is not one that will necessarily or definitely succeed, it is enough to show serious questions of law or reasonable argument deserving consideration by this Court ***(KENYA RAILWAYS CORPORATION VS. EDERMANN PROPERTIES LTD, Civil Application No. Nai 176 of 2012)***; and

that in determining the application, each case must depend on its own facts (***DAVID MORTON SILVERSTEIN VS ATSANGO CHESONI, Civil Application No. Nai 189 of 2001).***

The issues relied upon by the applicant to demonstrate an arguable appeal relate primarily to construction and interpretation of the charge document and the letter of guarantee and indemnity, which the trial judge considered very carefully before arriving at his decision. The other issue relates to the exponential ballooning of the guaranteed amount within a period of about two years.

In ***PRISCILLAH KROBOUGHT VS KENYA COMMERCIAL FINANCE CO LTD & OTHERS, Civil Application No. 227 of 1995*** and in ***ROBERT KIBAGENDI OTACHI & ANOTHER VS HOUSING FINANCE COMPANY OF KENYA LTD & OTHERS, Civil Application No. 251 of 1996,*** this Court 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 our opinion, this is one such case where the order sought should not issue, because the trial judge concluded that the money due from the applicant was only the amount under the letter of guarantee, which he found undisputed. The 1st respondent similarly confirmed that the amount of ***Kshs 640,814,172.32*** included other facilities it had extended to the 2nd respondent, outside the charge and letter of guarantee and that the only amount claimed from the applicant was the amount in the letter of guarantee and the charge. In any event, the applicant has not demonstrated *bona fides* by paying what he is not disputing.

We are not satisfied therefore that the applicant has placed before us an arguable appeal. We hasten to add that even if the applicant had so satisfied us, we still would not have granted the order sought because the applicant did not place before us anything to convince us that his appeal will be rendered nugatory if it ultimately succeeds. In ***CENTRAL BANK OF KENYA DEPOSIT PROTECTION FUND BOARD VS UHURU HIGHWAY DEVELOPERS LTD & OTHERS, Civil Application No. 95 of1999*** and ***CANELAND LTD & OTHERS VS DELPHIS BANK LTD, Civil Application No. 344 of 1999***, this Court affirmed that the burden is upon the applicant to satisfy the Court that the respondent will not be able to refund any sums paid in satisfaction of the decree. In the present appeal, there is absolutely no averment by the applicant that the 1st respondent is incapable of refunding any money paid to it in the event that the applicant's appeal succeeds.

It is not lost to us too, that the applicant had already obtained from Ogola, J. substantially the same orders that he is now seeking before this Court and that he did not comply with the terms upon which those orders were granted. He did not file any notice of appeal against the order of Ogola, J. and had not otherwise challenged the conditions upon which the stay of execution was granted. In ***HUNKER TRADING CO LTD VS ELF OIL KENYA LTD, (supra)*** on similar facts, this Court considered such action an abuse of the process of the court and waste of judicial time and resources. The Court expressed itself thus:

> ***"As the applicant did not appeal against the order of stay on terms and has not challenged it in any way for example demonstrating that it was onerous or unjust but just ignored the order, in our view, the application falls outside the provisions of Rule 5(2) (b) and section 3A and is therefore incompetent. The order of stay of execution on terms was subsequent to the decree. In the circumstances, we find that the exercise by us of any original jurisdiction would be inappropriate where, as in this case, the lower court has exercised a parallel jurisdiction, it must be demonstrated to this Court that the jurisdiction of the lower court has not been properly exercised, otherwise we would be encouraging duplication of effort and poor management of the available resources."***

We have ultimately come to the conclusion that the application dated 11th September, 2013 has no merit and the same is hereby dismissed with costs to the 1st respondent. We award no costs to the 2nd respondent who did not participate in the application.

Dated and delivered at Nairobi this 27th day of June, 2014.

P. KIHARA KARIUKI, PCA

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR