



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MURGOR, & J. MOHAMMED JJ.A)

CIVIL APPLICATION NO. 94 OF 2014 (UR 77 OF 2014)

BETWEEN

HASHMUKHLAL VIRCHAND SHAH.....1<sup>st</sup> APPLICANT

MAYURI SUNIL SHAL.....2<sup>ND</sup> APPLICANT

JASOBADEN CHANDULAL SHAH.....3<sup>RD</sup> RESPONDENT

AND

INVESTMENT & MORTGAGES BANK LIMITED ..... RESPONDENT

*(Application for an Order of injunction under Rule 5(2) (b) of the Court of Appeal Rules 2010 pending the filing, hearing and determination of an intended Appeal from the Ruling and/or Orders of the High Court of Kenya at Nairobi (Havelock, J) dated 24<sup>th</sup> April, 2014*

in

*Nairobi Commercial & Admiralty Division (Milimani) Civil Suit No. 27 of 2013)*

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RULING OF THE COURT

1. *Hasmukhala Virchand Shah, Mayur Sunil Shah and Jasobaden Chandulal Shah*, the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> applicants herein filed Nairobi HCCC No. Commercial and Tax Division Civil Suit No. 27 of 2013 against ***Investments & Mortgages Banks Limited***, the respondent vide a plaint dated and filed on the 29<sup>th</sup> day of January 2013. The reliefs sought were a permanent injunction to restrain the respondent either through itself, servants or agents from advertising for sale, disposing of, selling by public auction or private treaty ALL THE property known as ***Mombasa/Block XXVI/380-Kizingo*** or otherwise interfering with the plaintiffs ownership or occupation thereof; declaration that the total amount recoverable and for which the property known as ***Mombasa/Block XXVI/380- Kizingo*** stood security for the facility granted by the respondent Kenya shillings Twenty million (Kshs. 20,000,000.00); an order that the defendant does render a true and proper account of all the dealings with the chargors and the applicants and the property be redeemed upon reduction of the accounts and costs.

2. On the plaint, the applicants anchored an interim application by way of notice of motion simultaneously filed with the plaint seeking interim orders to restrain the respondents either through itself,

servants or agents or any one claiming under them from advertising for sale, disposing of, selling by public auction or private treaty or otherwise interfering with the applicants' suit property pending the hearing and determination of the application in the first instance and the suit in the second instance. Interim orders in respect thereto were granted on the 30<sup>th</sup> day of January, 2013.

3. The respondent opposed that application through a replying affidavit of **R.V. Nara Simhan** dated and filed on the 1<sup>st</sup> day of March, 2013. Parties were heard on their merits before (**J.B. Havelock J**) who delivered his ruling on the 24<sup>th</sup> day of April, 2014 dismissing the said interim application with costs to the respondent.

4. The applicants being aggrieved by the decision of the learned Judge are desirous of appealing against that decision and have lodged the requisite notice of appeal. They are now before us seeking an interlocutory relief by their notice of motion dated 27<sup>th</sup> November, 2013. It is predicated on Rule 5(2) (b) of the Court of Appeal Rules 2010. It seeks one substantive order;

***“2. That this Honourable Court be pleased to issue an order of interlocutory injunction restraining the Respondent either through itself, servants or agents from advertising for sale, disposing or selling by public auction or private treaty or otherwise interfering with the applicants' ownership and/or (sic) interest or occupation of all that property known as Mombasa/Block XXVI/380, Kizingo Mombasa pending the hearing and determination of the applicants intended appeal whose notice has been filed.”***

5. The application is based on the grounds in the body of the application as well as the supporting affidavit of **Hasmukhlal Virchand Shah** filed with the application on the 29<sup>th</sup> April, 2014. In summary, the applicants aver that they instituted a suit at the Superior Court (High Court) namely HCCC No. 27 of 2013 seeking an interim injunctive relief to restrain the respondent from selling by public auction the suit property, either by public auction or private treaty; that the cause of action was predicated upon the non compliance by the respondent of the mandatory statutory requirement of the Land Act No. 6 of 2012 and various breaches of the provisions of the charge instrument; that upon presentation of the suit, the applicants premised on it an application for interim injunctive relief and upon being satisfied that the applicants had established sufficient cause, on the 30<sup>th</sup> day of January, 2013 the **Hon. Mr. Justice Havelock** granted *ex parte* interim orders of injunction to restrain the respondent from selling the suit property pending the hearing and determination of the application *inter partes*. However, following the *inter partes* hearing of the interim notice of motion, application on the 24<sup>th</sup> day of April, 2014, the **Hon. Mr. Justice J.B. Havelock** delivered his ruling dismissing the said application holding in the main that the Land Act No.6 of 2012 does not apply to the applicants and further that applicants were wrong doers seeking to hide behind the provisions of Section 96(3) of the Land Act.

6. In his oral submissions before us, learned counsel **Mr. O.K. Odera** appearing for the applicants urged us to allow the relief sought on the grounds that the applicants have satisfied both the prerequisites necessary for the grant of the relief under Rule 5(2) (b) of the Court of Appeal Rules. On arguability of the intended appeal; it was **Mr. Odera's** argument that, they intend to take on appeal the argument that in declining to grant the applicants the injunctive interim relief sought in the High Court, the learned trial Judge fell into an error by relying on wrong principles and extraneous considerations; by failing to appreciate the applicants' case before the High Court namely that the respondent was in breach of the Land Act No.6 of 2012, by seeking to recover the alleged debt beyond the maximum provided in the three security documents relied upon by the respondent with the first charge document giving a ceiling of Kenya shillings five (Kshs.5,000,000.00) million; the second raising it to Kenya shillings nine million (9,000,000.00) and then ten (10,000,000.00) million and with the last raising it to Kenya shillings twenty (20,000,000.00) million.

7. **Mr. Odera** went on to add that, they also intend to argue on appeal that the learned Judge fell into an error when he failed to appreciate that the applicants were genuinely aggrieved when the respondent engaged auctioneers to recover Kenya shillings Kenya shillings eighty five (Kshs. 85,000,000.00) million from the applicants; when he failed to appreciate that the same learned Judge had dealt with a similar

point in another litigation and had ruled that it was wrong for the chargee to recover the debt beyond the maximum ceiling; by failing to address this same issue in the application culminating in this ruling and by failing to note that the respondent itself had not even contested the applicability of the Land Act No.6 of 2012 to the applicants' case and finally by failing to appreciate that rights accrued under the Registered Land Act (RLA) had been saved by Section 78(1) of the Land Act (Supra).

8. Turning to the second limb, **Mr. Odera** urged us to agree with his argument that if the relief sought is not granted, the intended appeal will be rendered nugatory because the property sought to be preserved will be beyond the reach of the applicants; and lastly that the respondents' replying affidavit is of no consequence as it has failed to address the legal points raised by the applicants in this application.

9. In response, **Miss Karen Mate** learned counsel for the respondent while relying entirely on the content of the replying affidavit of **R.V. Narasimhan** filed on 12<sup>th</sup> May, 2014 urged us to dismiss the application, reasons being that it does not meet the threshold for the grant of the relief sought. On arguability, learned counsel **Miss Mate** argued that the intended appeal is not arguable because **one**, the parties before Court are not the proper parties as these comprise the guarantors and the spouses of the chargors, whereas, the loan whose security the respondent has been trying to realize was taken by a company which is not party to these proceedings. **Two**, the issue sought to be taken up on appeal has been litigated previously in civil suit No. 259 of 2010 first by the first applicant; second by the company and the chargors all seeking to injunct the respondent from realizing the security, all of which were dismissed.

10. With regard to the applicability of the Land Act (Supra) **Miss Mate** argued that the learned trial Judge was right in holding that the provisions of the Land Act do not apply as these are confined to the events which took place when the process of the realization of the security arose. **Miss Mate** went on to urge us to ignore issues concerning the spouses' interest in the charged property, and the sentimental value attached to the suit property but the applicants as these were not part of the considerations when the transaction leading to the suit property being offered as security were entered into.

11. With regard to the satisfaction of the second limb, **Miss Mate** argued that this too had not been satisfied as there was no undertaking as to damages.

12. In response to the respondents' submission, **Mr. Odera** reiterated his earlier stand that the provision of the Land Act (Supra) apply to the litigation subject of this ruling as the applicants' right accrued after the commencement of the Land Act and it mattered not when the notice to realize the security was served; that the respondents' non compliance with the provisions of the said Land Act has not been denied, but were simply qualified.

13. With regard to the respondents' argument that the chargors are not party to the proceedings, **Mr. Odera** argued that no miscarriage of justice has been occasioned to any party to these proceedings as the chargors were merely trading in the name of the company. Lastly that consolidation of the charges for purposes of realization of the security notwithstanding, the respondent was bound by the clauses on the maximum ceiling in each charge which left no room for consolidation of the amount forming the ceiling in each charge.

14. On principles of law, the applicant cited various provisions of the Land Act (Supra) and **Guru Prasanna Singh** on principles of statutory interpretation for the proposition that the provisions of the Land Act apply to the litigation subject of this ruling and holding otherwise would occasion hardship and injustice to the applicants.

15. On case law, reliance was placed on the decisions in **Mbogo and another versus Shah [1968] EA93** for the proposition that where a Judge has exercised his judicial discretion improperly a Court of Appeal has jurisdiction to interfere with the exercise of that jurisdiction; the case of **Giella versus Cassman Brown & Co. Ltd [1973] EA358 and Banana Will Investment Limited versus Pan African Bank Limited & 2 others [1987] KLR 351** for the proposition that applicants had made out and have still made out a case for the grant of the interim injunctive relief which had been sought before the High Court, which grounds also go to demonstrate to us that there is sufficient grounds to justify the granting of the

injunctive relief sought by the applicants herein.

16. Turning to the threshold required to be met for an award of a relief under Rule 5(2) (b) of the Court of Appeal Rules, the applicant cited the case of **Githunguri versus Jimba Credit Corporation Ltd [1988]KLR 838** for the proposition that **one**, the jurisdiction of the Court of Appeal under Rule 5(2) (b) of the Court of Appeal Rules to grant either a stay of execution, an injunction or stay of any further proceedings, arises if a notice of appeal has been lodged against the decision or ruling appealed from in accordance with rule 75; **two**, that the general principles on which the Court would base its unfettered discretion were first that the appeal should not be frivolous or the applicant must show that he has an arguable appeal; and secondly, that the Court should ensure that the appeal if successful should not be rendered nugatory; **three**, that where there is demonstration that the charged property is likely to be sold during the pendency of the proceedings, the whole body of the proceedings and the intermediate appeal would be defeated if preservative orders were not to be granted. The case of **Oraro & Rachier Advocates versus Co-Operative Bank of Kenya Ltd Nairobi Civil Application No. Nai 358 of 1999 (UR 149 of 1999)** for the proposition that in deciding whether to withhold or grant the relief under Rule 5(2) (b) of the Court of Appeal Rules, it is prudent to weigh the claim of both sides.

17. Reliance was also placed on the decision in the case of **Judicial Commission of Inquiry into the Goldenberg Affairs & 3 others versus Kilach [2003] KLR 249** for the proposition; that **one**, that there need not be a chain of arguable points to sustain an application under Rule 5(2) (b) of the Court of Appeal Rules. Even one arguable point is sufficient; and **two**, that an appeal can be rendered nugatory is a question of fact and not law and that being so, that issue must be considered in the circumstances of each case.

18. Turning to the issue of variance in the amount claimed and the amount forming the ceiling in a charge, reliance was placed on the decision in the case of **Mrs. Surinder Kumari Mediratta versus Kenya Commercial Bank and 2 others Nai 131 of 2005 (UR.74/05)** where the Court found that where the lender proposed to lend more than a maximum prescribed in the security document, there was an arguable point to take up on appeal. **Second**, that since the intended appeal was against refusal to grant an injunctive relief, it was prudent to grant a preservative order. The case of **Stanley Kangethe Kinyanjui versus Tony Ketter and five others Civil Application No. 31 of 2012** for the proposition, **one**, that the exercise of jurisdiction under Rule 5(2) (b) of the Court of Appeal Rules is purely discretionary; **two**, that an arguable appeal need not be one which must necessarily succeed but one which needs to be argued fully before Court.

19. Turning to the respondent, reliance was placed on the decision in the case of **Jimmy Wafula versus Fidelity Commercial Bank Ltd [2013] eKLR** wherein the trial Judge ousted the operation of the provisions of the Land Act (Supra) to transactions which took place before the Act came into effect. The case of **E.N.W. versus PWM and 3 others [2013] eKLR** for the proposition that the Land Registration Act 2012 has no retrospective effect. Lastly the case of **Humphrey Kilambo Mcharo versus Kenya Commercial Bank Ltd [2005] eKLR** for the proposition that in the absence of demonstration that the bank will not be in a position to pay such damages where property is sold during the pendency of an appeal an injunctive relief will not issue.

20. Our jurisdiction to grant or withhold relief under Rule 5(2) (b) is purely discretionary. The Rule provides, inter alia:-

***“Subject to sub rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution but the Court may in any civil proceedings where or notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just”***

21. The exercise of this jurisdiction is both original and discretionary. See (**Reuben and 9 others vs. Nderitu and another [1989] KLR 459**) with the only caveat being that in determining either way we have to bear in mind that though the exercise of this discretion is wide and unfettered, we have to exercise caution so as not to make any definitive or final findings of either fact or law at this stage so as not to

preempt the outcome of the pending appeal or alternatively to embarrass the ultimate hearing of the main appeal (*See Damji Pragji Mandavia versus Sara Lee House Hold & Body Care (K) Ltd Civil Appeal No. Nai 345 of 2004*).

22. Applying the above assessed principles of law to the rival arguments herein, we are satisfied that the applicant has fulfilled the first requirement of properly invoking our jurisdiction, that is, by lodging of an appropriate notice of appeal (*Halai & Another versus Tharton & Turpin [1963] Ltd [1990] KLR 365*).

23. On the issue of the intended appeal being arguable, it is now trite that an arguable point need not be one which will succeed, but one which is worth of the Courts' interrogation (see the case of *Joseph Gitahi Gachau & another versus Planner Holdings (a) Ltd & 2 others Civil Application No. 124 of 2008*) and *Stanley Kangethe Kinyanjui versus Tony Ketter and 5 others [2013] eKLR*). Secondly that existence of a solitary bonafide arguable point will suffice (see the case of *Damji Pragji Mandavia versus Sara Lee House Hold & Body Care (K) Ltd Civil Application No. Nai 345 of 2004*); that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court, one which is not frivolous See (*Joseph Gitahi Gachau & Another versus Pioneer Holdings (A) Ltd & 2 others (Civil Application No. 124 of 2008)*).

24. We have revisited the intended grounds of appeal as set out in the body of the application and the submissions of learned counsel for the applicant **Mr. Odera**. We are satisfied that the issues raised therein are not frivolous. It is arguable. For example: whether the applicants are proper parties to the proceedings before the High Court giving rise to the cited appeal. (ii) whether the respondent ought to have complied with the requirements of the provisions of the Land Act No.6 of 2012 before moving to realize the security; (iii) whether in moving to realize the security, the respondent ought to have borne in mind the amount comprising the ceiling of indebtedness in the last charge only or there was room for them to combine the total aggregate of the amounts forming the ceiling in each of the three charges forming the total aggregate of the amount claimed; (iv) whether the learned trial Judge properly directing his mind to the facts before him ought to have granted the injunctive relief which had been sought from him; (v) whether the learned trial Judge having granted an injunctive relief based on similar clauses of ceiling of indebtedness in an earlier but unrelated matter ought to have availed the injunctive relief sought by the applicant solely on the basis that this too had been based on clauses on ceiling of the amount forming the indebtedness in each charge.

25. As for the second requirement, we have to ensure that the word “**nugatory**” has been given its full meaning, namely that the appeal will not be rendered worthless, futile; invalid or even trifling (*Reliance Bank Ltd versus Nor Lake Investment Ltd [2002] IEA 227*). Secondly we have to consider whether what has been sought to be stayed is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

26. In the circumstances of the case before us, we find that considering that the intended appeal arises from the trial Court's refusal to grant an injunctive relief on the one hand, and on the other that by reason of what we have stated above, the rights of litigants to the High Court litigation have not yet been crystallized by a merit determination of that litigation, we find merit in the applicant's arguments that if the relief sought from us is not granted, the substratum of the High Court litigation will be put out of reach of the applicants. Further that, where the applicants allege wrong doing on the part of the respondent, it is only proper that preservative orders be made. It is now trite that both ingredients have to be met before a party can access relief under Rule 5(2) (b) of this Court's Rules. We find both of these satisfied as demonstrated above.

27. Issue was also raised by the respondent about the applicants' failure to give an undertaking as to damages as a ground for withholding the relief. To this, we say that this is not one of the criteria to be considered under Rule 5(2) (b) of this Court's Rules save that we are alive to and take judicial notice of the same that in instances where a money decree is involved, this Court would not hesitate in making appropriate orders as regards undertaking as to damages as a pre-condition for the granting of a relief of stay of execution or alternatively an injunctive relief irrespective of whether such an undertaking has been offered or not. We however do not hesitate in stating that the circumstances displayed herein do not invite

such an indulgence considering that there is a dispute as to the exact amount which should form the basis of the possible outstanding debt which should have formed the basis for the respondents' move to realize the security on the basis of the three charges forming the back bone of the High Court litigation.

**28.** On the issue of the applicants' failure to secure injunctive reliefs in other numerous similar applications, we opine that this touches on the merits of the intended appeal. It is unsafe for us to make any pronouncement on it for the reasons that it may prejudice or pre-empt the outcome of the intended appeal.

As mentioned above, the rule is that, both ingredients have to be met before a litigant can access the relief under Rule 5(2) (b) of this Court's Rules. The applicant has done that that. We find merit in this application. We proceed to allow the same in terms of prayer (2). Costs of the application to abide the outcome of the intended appeal.

**Dated and delivered at Nairobi this 13<sup>th</sup> day of June, 2014.**

**R.N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original.**

**DEPUTY REGISTRAR**

**D/O**