REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME & KIAGE, JJ.A)

CIVIL APPLICATION NO NAI 182 OF 2014 (UR 141/2014)

BETWEEN

COLLIN BETT

T/A C.K. BETT TRADERS..... APPLICANT

AND

ECOBANK KENYA LIMITED ..... 1st RESPONDENT

WATTS ENTERPRISES..... 2nd RESPONDENT

(being an application for an injunction pending the lodging, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Machakos (Mutende, J.) given on 30th June 2014

in

H. C. C. C. No 120 of 2012

RULING OF THE COURT

In the year 2009, the applicant, Collin Bett, applied for several loan facilities from Ecobank Kenya Limited, the 1st respondent, in order to facilitate some business ventures. As security the applicant executed a charge over his property known as Title No Kajiado/Kaputei North/19044, to the 1st respondent. It was a term of the charge that the loan facility was to be repaid and discharged within 24 months. The applicant defaulted in servicing said loan and as a result, the 1st respondent moved to realise its security by issuing a statutory notice in respect of the property. This prompted the applicant to file before the High Court Civil Case No 120 of 2012 in which he sought an injunction restraining the respondent from exercising its statutory power of sale.

That application was settled by way of a consent order recorded before Dulu, J. on 5th June 2012 in which the 1st respondent was required to issue a fresh statutory notice in respect of the suit property; to serve a copy of the said statutory notice upon the applicant through his address P.O. Box 203 Kitengela, and to serve the applicant's advocate on record. A further term of the consent was that the applicant was to pay

the sum of Kshs 200,000.00 to Watts Enterprises, the 2nd respondent herein, in respect of the auctioneer's costs, within forty (40) days of the date of the consent, and that the 1st respondent was to exercise its statutory power of sale over the suit property in a lawful manner.

Thereafter, in June 2012, the applicant was served with a statutory notice by the 1st respondent, and subsequently with a notification of sale from the 2nd respondent on the 10th September 2012. Once more, the applicant filed a motion in the High Court, in which he sought an order restraining the 1st respondent from exercising its statutory power of sale. The grounds for this application were that the statutory power of sale had not crystallised since the applicant had not been validly served and that no demand notice had been served on the applicant, who was ready and willing to comply with the terms of the consent in order to settle the loan arrears.

The application was heard by Mutende J., who found that the statutory notice as issued was valid; that it was the applicant who had breached the consent order, and that since the applicant had failed to act in good faith in the two years since recording of the consent order, to issue an order of injunction would be prejudicial to the 1st respondent, as it would be tantamount to deterring it from recovering the debt owed. The learned judge also expressed the view that should the applicant succeed, the bank was in a position to compensate him by way of damages, and therefore dismissed the application with costs to the respondents.

The applicant, being dissatisfied with that decision, now comes to this Court under the auspices of rule 5 (2)(b) of this Court's rules. He seeks an order in the main that "pending the lodging, hearing and determination of his intended appeal, the respondents, either by themselves, their officers, servants, agents or otherwise howsoever be restrained from selling, transferring and/or disposing by public auction or private treaty the applicant's house or home standing on all that property commonly described as Title No Kajiado/Kaputei- North/19044".

The gist of the applicant's case is that the 1st respondent did not comply with the terms of the consent order in that it has not served a valid statutory notice; that the respondents have advertised the suit property and intend to sell it at an undervalued price; that he has an appeal with good prospects of success; and that if an order of injunction is not granted, then the appeal would be rendered nugatory.

The 1st respondent opposed the application. Its position is that it is yet to exercise its right of sale over the suit property, but shall do so in a lawful manner. The 1st respondent avers that the appeal filed herein is not arguable as the appellant has failed to honour his obligations under the charge and the consent order, and urges that this Court has an obligation to give effect to the parties' intention in entering into a binding agreement, which intention was that the 1st respondent would realise the security should the appellant fail to pay the amount owed. Moreover, the 1st respondent avers that even if the suit property was sold, the intended appeal if successful would not be rendered nugatory as the value is capable of being determined by a valuation process.

Mr Masika for the applicant submitted that that the issues to be considered during the appeal are first, whether or not the statutory power of sale had crystallised, and second whether or not the applicant had been validly served with the statutory notice of sale. Mr Masika stated that the intended appeal is arguable as it was apparent that section 65 (2) of the Registered Land Act (now repealed) had not been complied with by the 1st respondent, yet the Judge had erroneously found that the requirement of a demand under that section had been omitted by the consent. It is the applicant's case that the statutory power of sale had not arisen and that it is incumbent upon the 1st respondent to follow the correct and lawful steps before a valid sale can be undertaken. On the nugatory aspect, Mr Masika submitted that should this application not be granted, the suit property which is the substratum of the appeal, would be lost as it would be sold and that the property could not adequately be quantified in monetary terms.

On the other hand, Mr Luseno, counsel for the 1st respondent, stated that the applicant has not met the two standards in order to entitle him to the reliefs he seeks. Counsel argued that the applicant had never

questioned the terms of the consent and that it was he who placed before the 1st respondent the suit property as security. Counsel therefore submitted that to grant this application would be in effect defeating the very essence of the property being offered as a security.

It is against this background that we are called upon to determine this application. The jurisdiction granted to this Court under rule 5 (2)(b) is discretionary. This discretion is to be exercised judicially and not capriciously or arbitrarily. See the decision of this Court in Madhupaper International Limited v Kerr [1985] KLR 840.

As has been oft-stated by this Court, there are two main principles that guide the Court in determining applications such as the present one. These are first, that the applicant must demonstrate that the (intended) appeal is arguable, and secondly that the intended appeal would be rendered nugatory should the order of stay sought not be granted. These principles are well settled and have been restated in several decisions of this Court, such as in Githunguri v Jimba Credit Corporation Ltd [1988] KLR 825 where they were set out in the following manner:

> "The conditions for the grant of an interlocutory injunction are, first, that an applicant must show a prima facie case with a probability of success and, secondly, that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages; thirdly, if the court is in doubt, it will decide the application on the balance of convenience."

The principles were reiterated by this Court in Githinji v Amrit & Another [2004] eKLR where the Court held that:

> "The principles applicable in an application under rule 5(2)(b) of the Court of Appeal Rules are now well settled. The applicant must demonstrate that he has an arguable appeal which is not frivolous. Secondly, he also needs to show that the result of such appeal, if successful, would be rendered nugatory if the application for stay was refused."

It is the duty of the applicant to satisfy the Court of these principles. In Patel v Transworld Safaris Ltd [2004] eKLR (Civil Application No. Nai. 197 of 2003) it was held that:

> "In deciding the matter before it the Court exercises discretionary jurisdiction which discretion has to be based on evidence and sound legal principles. The duty, obviously, squarely falls on the applicant to place such evidence before the court hearing his application." (emphasis ours)

This was echoed in Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd [2006] eKLR (Civil Application No. NAI 157 of 2006) where this Court stated that:

> "The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory."

We have carefully considered the material placed before us a well as the rival submissions of counsel. To support the arguability of the intended appeal, the applicant has annexed to his affidavit a draft memorandum of appeal in which he has set out eight (8) grounds which he

will rely on in the intended appeal. This Court has previously accepted that

"in considering whether an arguable appeal has been made out, it is not a requirement that that appeal will necessarily succeed. It is sufficient that the appeal appears one that will be fully argued before the

Court ... And besides, an appeal is considered arguable even if it raises a single bona fide [point] only." See the decision of this Court in Kenya Medical Lab Technicians & Technologists Boards v Prime Communications Limited [2014] eKLR (Civil Application No.56 of 2013 (UR.36/2013)).

Appreciating that an arguable appeal does not necessarily mean an appeal that will succeed, and taking into consideration the material before us, we are not persuaded that the applicant has raised an arguable appeal. It has not escaped us that even after the entry of the consent order in 2012, where the applicant admitted his debt, and the subsequent issuance of the statutory notice, the applicant made no steps whatsoever to redeem his property. In fact, from his conduct, it seems that the applicant was intent on obstructing the 1st respondent from exercising its statutory power of sale and to prolong this matter further. We therefore entertain serious doubts as to whether the appeal is arguable at all, and as has been stated by this Court in Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 Others [2014] eKLR (Civil Application No 256 of 2013), "mounting only a doubtful case as to arguability of an appeal will not satisfy the first limb." We hasten to add, however, that this is a preliminary view based on the material before us.

Despite the fact that we have found that the applicant has failed to demonstrate that he has an arguable appeal, which alone would militate against the grant of the orders sought, we will still consider whether or not the applicant has placed enough material to show us that should the order he seeks not be granted, his appeal will be rendered nugatory.

The applicant has not suggested to us that should his intended appeal be successful, the 1st respondent would not be in a position to repay the amount realised from the sale of the suit property. In Daniel Kamita Gichuhi & Another v Consolidated Bank Of Kenya [2007] eKLR (Civil Application No. NAI159 of 2007 an applicant was denied orders of stay for failing to show that the respondent bank could not be financially capable of fully compensating him. Based on the material placed before us, we find that the applicant has not demonstrated that unless the order of injunction is granted, his appeal would be rendered nugatory. It will be fairly easy, should the intended appeal succeed, to conduct a valuation of the property and compensate the applicant for any loss he may incur.

I n St. Ann's Limited v Plan farm Limited & Another Civil Appeal No. 79 Of 2009 (as cited in Shimmers Plaza Limited v National Bank of Kenya Ltd [2013] eKLR (Civil Application 38 of 2013) this Court stated that where a dispute relates to a property which has been put forth as security, the property can be valued easily and the applicant's claim is capable of being compensated by way of damages.

There is another reason why we find that the applicant would not be deserving of order of stay. It is trite law that the Court will not grant an order of injunction where such an order would cause undue hardship to other parties - see Githunguri v Jimba Credit (supra). In addition in Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Limited & 2 Others [2009] eKLR (Nairobi Civil Appeal No. 124 of 2008) this Court pointed out that where a property, even a residential property, is charged to secure a loan, it is converted into a commodity for sale and where there is a failure to pay the charge debt or loan, no sentimental value or attachment to the mortgaged property, however great, would operate against the exercise of the statutory power of sale by the mortgagee.

Another factor that we have considered is the applicant's conduct. In the terms of the consent order entered into on the 5th July 2012, the applicant was to make payment of Kshs 200,000.00 within 40 days, that is before the 15th July 2012. He eventually paid this sum on the 24th October 2012. This is a demonstration that the applicant was the one who was in breach of the consent order. In David Kamau Gakuru v National Industrial Credit Bank Ltd [2002] eKLR (Civil Appeal No. 84 of 2001) this Court refused to grant an injunction based on the conduct of the applicant. The Court stated that:

> "In our view, the injunction that was sought by the appellant, being an equitable remedy, should not issue in his favour as he demonstrated openly by his conduct that he was undeserving of the equitable relief."

As we have stated above, it behoves the applicant to demonstrate that the twin principles upon which we

exercise our jurisdiction under rule 5 (2)(b) of this Court's rules. Taking into consideration all the material placed before us, the applicant has not satisfied any of the conditions precedent for the grant of the orders sought. In any event, the conduct of the applicant clearly militates against granting him equitable relief. We therefore refuse his invitation and decline to exercise our discretion in his favour. In the result, we are constrained to dismiss this application, which we hereby do, with costs to the 1st respondent.

Dated and delivered at Nairobi this 14th day of November 2014.

M. KOOME

JUDGE OF APPEAL

M. WARSAME

JUDGE OF APPEAL

P.O. KIAGE

JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR