IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & M'INOTI JJ.A.)

CIVIL APPLICATION NO. NAI 279 OF 2011 (UR 182/2011)

BETWEEN

GEORGE W. OMONDI……..……..……..……APPLICANT

AND

GUILDERS INTERNATIONAL BANK LIMITED……..RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Kimaru,J.) dated 29th October, 2010

in

H.C.C. C. NO. 1217 OF 2002)

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RULING OF THE COURT

By his Notice of Motion taken out under ***rule 5(2)(b) of the Court of Appeal Rules***, the applicant, ***George W. Omondi***, craves stay of execution of the decree of the High Court (***Kimaru, J.)*** in which the learned judge ordered the applicant to pay to the respondent, ***Guilders International Bank Ltd***, ***Kshs 36,137,388.05*** being the amount that was found to be due and owing to the respondent from the applicant as of 10th February, 2002. That amount was to be paid together with interest at 18% per annum from the date aforesaid until payment in full. In default of payment, the learned judge allowed the respondent, in exercise of its statutory power of sale, to sell ***LR No. 209/4401/301***, hereafter for convenience referred to ***"the Makadara property".***

1 The applicant also seeks an order restraining the respondent from acting on the above part of the decree as well as an order for the maintenance of the *status quo* obtaining as of the date of the decree.

The facts leading to this application are that on or about 24th March 1997, the applicant borrowed ***Kshs 8 million*** from the respondent. That amount was payable within six months at 35% per annum rate of interest. The loan was secured by a charge over the applicant's property known as ***LR No. 3437/311*** which for convenience we shall refer to as ***"the Lavington property"***.

Upon default in paying the loan within the agreed period, the respondent on 10th November 1997 served

upon the applicant a statutory notice evincing intention to realize the security. Thereafter the parties entered into negotiations in which, according to the applicant, it was agreed that the respondent would discharge the Lavington property and in lieu thereof charge the Makadara property. After charging the Makadara property, the respondent declined to discharge the Lavington property and threatened to exercise its power of sale in respect of both properties.

The applicant responded by filing ***HCCC No 1217 of 2002*** in which he sought, among other reliefs, a permanent injunction to restrain the respondent from selling the two properties; an order to compel the respondent to discharge and release to him the documents of title for the Lavington property; and an order that he was indebted to the respondent only in the sum borrowed less the sums already paid.

2 In its defence the respondent contended that the Makadara property was offered as additional security and not in lieu of the Lavington property and that its statutory power of sale having well and truly accrued, it was entitled to sell the two properties to recover from the applicants the outstanding debt which then stood at slightly more than Kshs 36 million.

Kimaru, J. heard the suit and in a judgment dated 29th October 2010 held that the parties had agreed that in consideration of the Makadara property being charged, the respondent would discharge the Lavington property. Accordingly, the learned judge ordered the respondent to discharge and release to the applicant the documents of title for the latter property. As against the applicant, the learned judge found that he owed the respondent Kshs 36,137,388.05, which he ordered him to pay as earlier stated, failing which the respondent would be at liberty to sell the Makadara property in exercise of its statutory power of sale.

Aggrieved by the part of the decree that ordered him to pay the Kshs 36,137,388.05 to the respondent at the risk of sale of the Makadara property, the applicant lodged a Notice of Appeal in this Court on 10th

November, 2010 and followed it up with the Motion now before us.

For the applicant, ***Mr. Wasuna***, learned counsel, submitted that the intended appeal was arguable and that the same would be rendered nugatory if stay of execution was not granted as prayed in the Motion. To demonstrate an arguable appeal, counsel laid emphasis on four issues proposed to be canvassed at the hearing of the intended appeal.

3 The first is that the learned judge had erred in entering judgment for the respondent for Kshs 36,137,388.05 while in its defence, the respondent had neither filed a counter-claim nor claimed the above sum. In counsel's view therefore, the learned judge had granted an order that had not been prayed for by the respondent.

Secondly, counsel submitted, the applicant had challenged the validity of the statutory notice that had been served by the respondent, but the learned judge had failed to make a finding on the issue. In counsel's view, the learned judge had erred by failing to pronounce himself on an issue that had been submitted for his decision.

Thirdly, Mr. Wasuna submitted that the applicant had suffered serious prejudice because the respondent was awarded Kshs 36,137,388.05 without having raised the issue of the applicant's indebtedness. Had the respondent raised the issue, counsel contented, the applicant would have availed himself the defence of limitation, which he was denied an opportunity to raise.

Lastly, learned counsel submitted that the applicant will fault the learned judge for finding that the suit could be sustained even after the respondent had merged with ***Guardian Bank Ltd*** and ceased to exist in law as Guilders International Bank Ltd. In counsel's view, the learned judge had erred by perceiving the merger of the two banks as a mere issue of change of name.

On whether the intended appeal would be rendered nugatory in the absence of an order of stay of execution, Mr. Wasuna submitted that the amount presently claimed by the respondent from the applicant had

4 escalated to more than Kshs 100 million and that the applicant was in possession of the Makadara property from which he was collecting rent. In the event the property was sold, counsel contended, the applicant would be denied income and it would not be possible to reverse the sale.

The decision of this Court in ***BUTT V. RENT RESTRICTION TRIBUNAL (1982) KLR 417*** was cited in support of the proposition that in the absence of compelling reasons, the Court's discretion in applications for stay of execution should be exercised so as to protect an applicant's undoubted right of appeal and that in exercise of that discretion the Court will consider the special and unique circumstances of each case. The decisions in ***ORARO & RACHIER ADVOCATES V. CO-OPERATIVE BANK KENYA LTD, CA NO NAI 358 OF 1999 (UR 149/99)***, ***RELIANCE BANK LTD V. NORLAKE INVESTMENTS LTD, (2002) 1 EA 218*** and ***STANLEY KANGETHE KINYANJUI V. TONY KETTER & OTHERS, CA NO 31 OF 2012*** were relied upon to make the argument that the Court must weigh the competing claims of the parties and the overall balance of convenience, including whether the amount involved in the claim is so huge as to adversely affect one of the parties should it be paid in the interim.

The respondent vigorously opposed the application through an affidavit sworn on 27th May 2014 by ***Mary Omullo***, the respondent's Manager-Legal. The respondent's answer to the application, as urged by ***Mr. Murugara***, learned counsel, is that the Makadara property has already been sold to ***Messrs. Zen Nominees Ltd*** for Kshs 14,500,000/= on 2nd November 2012 and therefore there is nothing left to protect by an order of stay of execution.

5 In the alternative, learned counsel submitted that the applicant had not made out an arguable appeal to justify an order of stay of execution. On the complaint that the learned judge had determined issues that were not pleaded and granted remedies that had not been sought, counsel, while conceding that the respondent had not filed any counter-claim, contended that the issue of whether the applicant was indebted to the respondent and the extent of the indebtedness was raised in the pleadings. In addition, counsel submitted, the parties had fully addressed the issue and left it to the learned judge to decide, so that he could not be faulted for determining the extent of the applicant's indebtedness to the respondent.

On the validity of the statutory notices, learned counsel contended that by allowing the Makadara property to be sold in exercise of the respondent's statutory power of sale in the event of default in payment by the applicant, the learned judge had effectively found that the notices were valid.

Regarding the alleged defence of limitation, counsel submitted that the same was a red herring as the money was advanced in 1997 and the replacement charge was registered in 1998. Since the suit was filed in 2002, counsel submitted, the issue of limitation did not arise. To learned counsel the merger of Guardian Bank Ltd and Gilders International Bank Ltd was equally a non-issue because the new entity had succeeded the two former institutions and had assumed their assets and liabilities.

Lastly, on whether the intended appeal would be rendered nugatory, Mr. Murugara submitted that it would not because if it were successful, the applicant would be adequately compensated by an award of damages.

6 Counsel pointed out that the applicant had not alleged in his application that the respondent would be unable to repay any money that was paid to it by the applicant in the unlikely event of the intended appeal succeeding.

We have duly considered this application, the submissions of learned counsel, the authorities cited and the law. The principles that guide this Court when it is seized of an application under rule 5(2)(b) of its Rules are well known. The Court stated those principles as follows in **REPUBLIC V. MUNICIPAL COUNCIL OF MOMBASA & 2 OTHERS EXP. ADOPT A LIGHT LTD, CA No 15 of 2007:**

> ***"The principles upon which this Court exercises its jurisdiction under Rule 5(2)(b) of its rules are well known. It is original and discretionary. For the applicant to succeed, it must satisfy the two guiding principles that the intended appeal is not frivolous or is arguable, and that unless a***

stay is granted, the appeal or intended appeal, if successful would be rendered nugatory. Those principles will, of course, be considered against the facts and circumstances of each case – see Githunguri vs. Jimba Credit Corporation Ltd (No. 2) [1988] KLR 838 and J. K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] KAR 1088."

It has long been accepted that an arguable appeal is not one that must necessarily succeed. To the contrary, it is merely an appeal that raises an issue that is deserving of consideration by the Court. In ***KENYA TEA GROWERS ASSOCIATION & ANOTHER V. KENYA PLANTERS & AGRICULTURAL WORKERS UNION Civil Application No Nai 72 of 2001***,

this Court expressed itself thus on what constitutes an arguable appeal:

"He (the applicant) need not show that such appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision."

7 (See also ***KENYA RAILWAYS CORPORATION V. EDERMANN***

PROPERTIES LTD Civil Application No Nai 176 of 2012).

To establish an arguable appeal, the applicant is not required to present to the Court any particular number of arguable points or grounds. A single *bona fide* arguable ground will suffice to entitle the applicant to an order of stay of execution, subject to satisfying that Court that the intended appeal would be rendered nugatory if the order of stay of execution were not granted. (See ***AHMED MUSA ISMAEL VS KUMBA OLE NTAMORUA & 4***

OTHERS (Civil Application No. 256 of 2013).

We are satisfied that the applicant's intended appeal is not frivolous and it deserves an opportunity to be heard. We do not feel obliged to say more on that score lest we embarrass the bench, which will ultimately hear the appeal or in any other way prejudice the appeal. For as it was stated in

CENTRAL BANK OF KENYA DEPOSIT PROTECTION FUND BOARD V. UHURU HIGHWAY DEVELOPMENT LTD & OTHERS, CA No 95 of 1999, it would be wrong for this Court, in an application for stay of execution, to say anything that indicates a concluded view on the merits of the intended appeal.

On whether the intended appeal will be rendered nugatory, the applicant has not suggested that the respondent is unable to refund the full value of the Makadara property should his intended appeal succeed. What he submits is that looking at all the circumstances, including the amount of money now demanded by the respondent which on account of interest has increased to more than Kshs 100 million, the balance of convenience, as far as the application for stay of execution is concerned, tilts in his favour.

8 In appropriate cases this Court has stated that it will consider the respective hardships that each party will be exposed to in the event of grant or refusal of an order of stay of execution. That is the reason why in ***ERWEN ELECTRONICS LTD & 3 OTHERS V. RADIO AFRICA LTD & ANOTHER, CA No Nai 82 of 2011***, the Court stated:

"Turning to the second requirement on whether if a stay order was refused, the intended appeal might be rendered nugatory, although we are not oblivious of the fact that the subject matter involves a money decree, we consider it necessary to weigh the claims of hardship of the applicants as against the hardship likely to be suffered by the first respondent."

And in ***RELIANCE BANK LTD V. NORLAKE INVESTMENTS LTD (supra)*** in making out a case for consideration of the respective hardships that may be suffered by the parties, this Court stated that in a decree for payment of money, the inability of the respondent to refund the decretal sum if it has been paid over to him is not necessarily the only thing or decisive factor that would render a successful appeal

nugatory. See also

NATION MEDIA GROUP & 2 OTHERS V. JOHN JOSEPH KAMOTHO & 3 OTHERS, CA No. 108 of 2006.

In this application, although the respondent has entered into a sale agreement with Zen Nominees Ltd regarding the Makadara property, the transfer has not been registered in favour of the purchaser. The applicant has been and continues in possession of the property. To that extent an order of stay of execution would not be an order issued in vain. From the material before us, the applicant has been collecting Kshs 250,000 per month from the building. That notwithstanding, he has allowed the decretal amount to continue growing exponentially. In ***NDUHIU GITAHI VS WARUGUONGO***

9 ***(1988) KLR 621***, this Court stated that it will seek to ensure, in an even-handed manner, that an intended arguable appeal should not be prejudiced and on the other hand, the decretal amount should be available to the respondent if required.

In the circumstances of this application, the order that commends itself to us is to grant the applicant stay of execution of the decree of the High Court on condition that he deposits within the next thirty (30) days ***Kshs 36,137,388.05*** in a mutually agreed financial institution. Such deposit shall be in an interest earning account in the joint names of the advocates of the parties. The costs of this application shall be in the appeal.

In default of compliance with the order pertaining to deposit of the decretal sum, the motion herein shall stand dismissed with costs.

Dated and delivered at Nairobi this 7th day of November, 2014

R. N. NAMBUYE

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR