IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, NYAMU & MARAGA, JJ.A.)

CIVIL APPLICATION NO. NAI 264 OF 2011 (UR 174/2011)

BETWEEN

JOHN JOEL KANYALI.....APPLICANT

AND

FIDELITY COMMERCIAL BANK LTD.....RESPONDENT

(An Application for injunction and stay of further proceedings pending the hearing and determination of an appeal against the decision, ruling and order of the High Court (Hon. Mr. Justice G.K. Kimondo)

in
H.C.C.C. NO. 709 OF 2009
****
RULING OF THE COURT

This is a ***Rule 5(2)(b)*** application which inter alia seeks an injunction to restrain the respondent Bank from realizing property, ***Kwale/Diani Beach/Block/603*** in exercise of its statutory powers of sale and further seeks a stay of further proceedings in ***High Court Civil Case No. 709 of 2009*** pending the hearing of an intended appeal against a ruling of the High Court ***(Kimondo, J.)***, made on 17th November 2011 in ***High Court Civil Case No. 709 of 2009***. The application is supported by an affidavit sworn by the applicant/chargor on 24th November 2011.

The factual background of the dispute is that in 2007, the applicant who is the registered owner of Kwale/Diani Beach/Block/603 applied for a development loan in the sum of Kshs.7 million to complete construction of a commercial building adjacent to the aforesaid parcel being Kwale/Diani Beach/Block/605. The loan was approved in March 2008 and a charge over parcel 603 (above) was executed on 26th March 2008 and the disbursements of the loan to the applicant commenced in April 2008. It was anticipated that the construction work would take six (6) months from the date of disbursement. However, it turned out that the disbursements of the loan made between April 2008 and June 2008 were not sufficient to complete the construction and the applicant was constrained to apply for a further loan of Kshs.3 million, in June 2008, which was approved in July 2008 and a further charge executed and registered against parcel 603 in August 2008. The building was completed in October/November 2008 by which time the repayment of the loan had commenced and since the applicant needed time to market the completed building in order to attract tenants to enable him to service the loan, the respondent agreed to give the applicant an overdraft facility of 2 million. This amount was aimed at servicing the instalments and the first two instalments paid by instalments of Kshs.170,227 and

Kshs.72,95,5 respectively were paid resulting in a total monthly repayment of Kshs.243,182. To secure the overdraft facility, a second further charge was registered in December 2008. In June 2009, exactly six months after the registration of the second further charge, the applicant was served with a statutory notice recalling the two term loans and the overdraft on the ground that the applicant was in default and a notification of sale in respect of the charged property was issued in October 2009. This state of affairs resulted in the applicant filing suit on 22nd October 2011 seeking inter alia an injunction to restrain the sale. Following the dismissal of the injunction application, the applicant has filed a notice of appeal against the decision to refuse an injunction order hence this application.

When the application came up for hearing, Mr. K'Opere advocate, represented the applicant and Mr. Muma advocate, represented the respondent Bank.

In articulating the applicant's case on the first requirement of a ***rule 5(2)(b)*** application, namely whether the applicant's intended appeal is arguable, Mr. K'Opere, in the main submitted that as at the time the statutory notice was issued in June 2009, the applicant was not in default or in arrears because the term loans were being serviced by the overdraft of Kshs.2 million and that the applicable law provides for the realization process to commence after a period of three months upon default which the respondent failed to honour and consequently the statutory notice was illegal and secondly, the respondent had failed to forward an account showing how the overdraft facility of Kshs.2 million could have risen to the whooping figure of 12 million within a period of two years. He submitted that whereas the repayment period for the term loans was 60 months (5 years), the applicant had paid a total of Kshs.5,948,869 within 35 months as at 30th September 2011, against a borrowing of 12 million out of which Kshs.2 million was an overdraft meant to service the loan of Kshs.10 million. Mr. K'Opere further submitted that, unlike in many other cases where the issues are disputed accounts, the applicant herein was not a defaulter in that he had continued to pay the respondent Kshs.243,182 every month and the repayments amounted to Kshs.6,435,233.

Concerning the second requirement under ***Rule 5(2),*** which is whether the success of the intended appal shall be rendered nugatory unless w grant the orers sought, Mr. K'Opere submitted that the applicant resided in the charged property, and although he had indicated to the respondent that he was ready and willing to substitute the securities so that a charge is executed and registered over the other parcel namely, parcel 605 (above), the respondent appeared unwilling to make the substitution. For this reason, since the charged property was his residence, damages would not be an adequate remedy in the special circumstances of the case. He further added that since the applicant's contention was that he was not in default when the realization of his property was commenced, this factor should outweigh all other considerations including the contention that the intended appeal could not be rendered nugatory. He urged the Court to take the special circumstances and decline to incline to the view that in such a situation, an applicant not in default ab initio should not be made to be content with a consolation by way of damages, and that in the circumstances a stay could better serve the interests of justice.

On his part, Mr. Muma while acknowledging the fact that the respondent had not filed a replying affidavit to controvert the averments in the applicant's affidavit in support of the application, sought refuge in the affidavit in opposition to the application for certification of urgency sworn by Philip Mote, the respondent's legal officer on 17th January 2012. He submitted that both parties had entered into two repayment arrangements. The first arrangement involved payment of Kshs.243,182 from 31st March 2012, in respect of the two terms loans and the second was for monthly repayment of Kshs.120,000, from 31st March 2012 in respect of the overdraft account. As regards the second repayment arrangement, the applicant was only able to make two payments and he only partially honoured the first repayment proposal and for this reason, the applicant was knocking on the courts' door with unclean hands! He submitted that the statutory notice was therefore valid and for the sale to be stopped, the applicant should be required to deposit what he admits to be due in full and then demand that an account be taken.

Having put the rival arguments on the scales, it is clear to us that as at June 2009, the respondent who has not specifically controverted the allegations against it, has not shown on a prima facie basis that the applicant was in default and if so, to what extent. The respondent bank could have very easily furnished

the details by filing a replying affidavit. Whether or not the applicant was in default, is therefore an arguable issue. This in turn explains why the applicant intends to contend in the intended appeal that the statutory notice was illegal and could not result in a valid sale being concluded. To our mind, these are no frivolous grounds and for this reason we consider that the applicant has satisfied the requirement of arguability.

As regards the second requirement, we agree with Mr. K'Opere that if the applicant is finally successful that the notice which triggered the realization process was illegal ***void ab initio,*** in the special circumstances, it would not be sufficient consolation that damages could be an adequate remedy especially in a situation where the applicant has shown that the commercial building (parcel 605) could be offered as sufficient security should the respondent be eventually successful in the intended appeal. In view of the above, our inclination is to exercise our power in the special circumstances of this case in a proportionate manner as required of us by ***section 3A*** of the Appellate Jurisdiction Act. As regards this requirement, since it is common ground that the applicant is servicing the loans and this has not been controverted by affidavit evidence, the scales of justice tilt heavily in favour of granting an injunction. The same is granted in terms of prayer 2. However, in the special circumstances of this case, we decline to grant a stay of the High Court proceedings because in our view, a full and speedy determination of the case including the taking of accounts could resolve this matter and consequently an order of stay of the proceedings would not be in the interests of justice. In our view success or failure in interlocutory applications and appeals do not fully justify the ends of justice, instead it is the full and speedy hearings on merit which do. Rejection of this prayer would in our view, result in the just, expeditious, proportionate and affordable resolution of this matter.

We order that the costs of the application abide the outcome of the intended appeal.

It is so ordered

Dated and delivered at Nairobi this 28th day of March 2012.

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR