REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Civil Application 209 of 2011

ERI LIMITED …….....…... APPLICANT

VERSUS

ZAINUL GALIB VELJI ……..…… RESPONDENT

(An application for stay of execution from the Ruling and Order of the High Court of Kenya at Kisumu (Nambuye, J) dated 1st August, 2011

In

H. C. C. C. No. 143 of 2004)

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RULING OF THE COURT

Before us is an application by way of notice of motion brought under ***Rule 5 (2) (b)*** of the Court of Appeal Rules in which the applicant, ERI LIMITED, seeks an order that pending the hearing and determination of the applicant's intended appeal to the Court of Appeal against the decision made by the High Court Kisumu on 1st August, 2011, there be a stay of execution of the orders therein and a stay of further proceedings in the said case. The application is brought on the following grounds:

"(a) THAT the applicant being aggrieved by the said decision has filed a notice of appeal to this Honourable Court against the said decision but is yet to file the record itself as the proceedings are yet to be furnished.

(b) THAT the intended appeal is not frivolous as it raises arguable issues.

(c) THAT unless this application is granted the outcome of the intended appeal is likely to be rendered nugatory in the event that the appeal succeeds."

The application is also supported by the sworn affidavit of RASIK SANGHRAJKA who describes himself as a director of the applicant herein.

The background to this application is that the respondent herein ZAINUL GALIB VELJI was the plaintiff in the High Court Civil Case No. 143 of 2004 at Kisumu in which he sued the applicant herein (as the defendant). The salient features of the plaint as summarized by the learned Judge of the High Court Nambuye, J (as she then was) in her ruling delivered on 1st August, 2011 which is the subject of the intended appeal were as follows:

"That the defendant Eri Limited was the registered owner of land parcel number L. R. KISUMU MUNICIPALITY BLOCK 3/92 until the 12th day of December, 2003.

The defendant fell into arrears of loan repayment and the bank exercised its statutory power of sale under the provisions of the charge document and sold the said property by way of Public Auction to the Plaintiff on the 3rd day of July, 2002, whereupon the plaintiff became the new owner of the said property for all intents and purposes, which transaction culminated in the discharge of the charge against the said property which discharge was registered on the 24th day of December, 2003 and the plaintiff was registered as the proprietor of the said property.

That despite the lawful change of ownership the defendant has continued to remain in possession of the said property."

In consequence thereof the plaintiff sought the following reliefs:-

(a) Vacant possession of the suit property.

(b) General damages for trespass.

(c) Mesne profits from 1st January, 2004 to date of the judgment.

(d) Costs of the suit together with interest thereon at court rates.

The applicant herein responded to the plaint by way of filing a defence in which the salient features according to the learned Judge were as follows:

"Vide paragraph 3 thereof that the property was illegally transferred to the plaintiff by Southern Credit Banking Corporation Limited on 17th November, 2003 in defiance of an order of which the plaintiff was aware issued by the court of appeal on 1st August, 2002 in Civil Application Number NRB 196 OF 2001/UR – 101/2002 (ERI LIMITED VERSUS SOUTHERN CREDIT BANKING CORPORATION.

That the purported exercise often alleged statutory power of sale and sale of the suit property to the plaintiff was illegal, null and void and the same has been challenged by the defendant in Nairobi HCCC No. 594 of 2002 (ERI LIMITED VS SOUTHERN BANKING CORPORATION LIMITED) which is still pending before court.

Contends that the said Bank had no statutory power of sale to exercise and accordingly it could not pass any title to the plaintiff over the suit property.

That by reason of what has been asserted above, the defendant is entitled to occupation under the provisions of Section 30 (g) of the registered Land Act Cap 300 Laws of Kenya.

That by reason of what has been stated above, the plaintiff is not entitled to the reliefs sought.

Intends to add the plaintiff to HCCC No. 594 of 2002.

The plaintiff was put to strict proof to the rest of the averment of the plaint."

By reason of the averments in the defence and the counter-claim the applicant sought declaration orders to the effect that:-

"(a) The first defendant did not have a statutory power of sale over the property known as KISUMU MUNICIPALITY BLOCK 3/92

(b) The purported transfer was illegal, null and void.

(c) The change of registered owner effected on 24th December, 2004 was null and void.

(d) Damages

(e) Costs

(f) Such further order as this Honourable Court may deem fit to grant."

Against the foregoing background the plaintiff filed a chamber summons dated 22nd September, 2010 and filed on the same date and stated as being brought under ***Order VI Rule 13 (1) (b)*** of the Civil Procedure Rules, ***section 3A*** of the Civil Procedure Act and ***section 77 (2)*** of the Registered Land Act. The reliefs sought in that chamber summons application were:-

"1. The defendant defence dated 24th November, 2004 be struck out.

2. In the alternative the defendants defence and counter claim dated 24th November, 2004 and filed on the 26th November, 2004 be struck out.

3. Judgment be entered for the plaintiff against the defendant as prayed in the plaint.

4. Upon the grant of prayer (3) afore going, a preliminary decree be ordered issued in respect or prayer (a) of the plaint.

5. Upon the grant of prayer 3 afore going prayers (b) and (c) of the plaint do proceed to formal proof.

6. Costs of this application be provided for."

That is the application that was placed before the learned Judge for determination. Having considered the rival arguments by counsel appearing for the parties the learned Judge delivered a long ruling on 1st August, 2011. In concluding her ruling the learned Judge rendered herself thus:-

"For reasons given in the assessment, the court proceeds to make the following final orders:-

(1) The plaintiffs application dated 22-9-2010 and filed the same date is not incompetent because of the following reasons:-

(a) Since it was presented before the coming into operation on the current order 51 rule (1) Civil Procedure Rules which it is alleged to infringe, it was properly brought by way of chamber summons under the old provisions of law.

(b) The complaint raised being one of want of form, the same can be cured under the same order 51 rule 10 (1) (2) Civil Procedure Rules.

(2) Paragraph 4, 5, 6, 16 and 21 of the supporting affidavit alleged to be offending the provision of order 19 rule (3) Civil Procedure Rule, are also not struck out because striking out would offend the principle of the overriding objective in section 1A and 1B of the Civil Procedure Act.

(c) The case law assessed stating otherwise are distinguishable as the same were decided before the enactment of section 1A, IB of the CPA which introduced the overriding objective principle.

(d) Further the complaint being one of want of form and technical in nature, allowing the objection to stand would offend the cardinal principle in article 22 (3) (d) and 159 (2) (d) of the constitution which prohibits denial of rendering of justice on account of technicalities.

(e) Substantive justice demanded that parties herein be heard on merits on the application subject of this ruling.

(3) Prayer 1 of the said application is allowed for the reasons explained in the assessment which in a summary form is that the rights of the plaintiff having been solidified by the provisions of section 28 and 77 of the Registered Land Act Cap 300 Laws of Kenya, they cannot be defeated by the rights of the defendant which though asserted under section 30 (g) of the Registered Land Act are nonetheless tainted by section 77 of the Registered Land Act procedures because they are a claim to reversionary title in nature intended to revert from a reversal of the banks exercise of its power of sale over the security offered.

(4) Prayer 2 in the alternative is also available to the plaintiff because once the bank was released and freed from proceedings between it and the defendant, amend *(sic)* ***its defence and counter claim to plead trust against the plaintiff on the one hand. On the other hand, in the absence of participation of the bank in these proceedings, there will be no direct link of a contractual nature between the defendant and the plaintiff on the basis of which the counter claim can be based. Further the bank's participation in the proceedings is necessary because if the sale is faulted then the status quo prevailing before the sale ought to revert, which status can only revert to the bank as the chargee to hold the title for the bank either to restart the process of realization of the security a fresh or for the defendant to avail itself of its rights under the equity of redemption.***

(ii) A problem will also arise here because the transaction between the bank and the defendant as a whole involved two properties one of which has been surrendered to the plaintiff. The defendant has not demonstrated how it is going to truncate this right and enforce it as against one property only. This in itself would operate against the defendant as it will be going against the original contract of mortgaging who *(sic)* ***titles and this alone will operated*** *(sic)* ***to defeat its claim against the bank and any person claiming through the bank as the plaintiff.***

5. By reason of what has been stated in number 3 and 4 above, prayer 3, 4 and 5 of the said application are granted.

6. The plaintiff is at liberty to fix the matter for formal proof with regard to prayer (b) and (c) with the participation of the defendant if they so wish. Notice of such formal proof has to be served upon them.

7. The plaintiff who has succeeded substantially will have costs of the application."

The applicant herein was dissatisfied with that decision and, through his lawyer, filed a Notice of Appeal on 9th August, 2011. And before that appeal is heard and determined the applicant brings this application seeking a stay order and stay of proceedings. That is the application that came up for hearing before us on 30th November, 2011 when Mr. Amondi Kenneth appeared for the applicant while Mr. David Otieno appeared for the respondent.

In his submissions Mr. Amondi stated that the learned Judge failed to find that the applicant had raised substantial issues in the defence and counter-claim and that the best course should have been to

allow the suit proceed to hearing. It was argued that the chargee bank (*Southern Credit Corporation*) had not demonstrated its interest in the property for it to exercise its statutory power of sale. It was further submitted that there was no proper advertisement and sale of the property, and that the hammer never fell. Mr. Amondi went on to submit that the transfer of the suit property was tainted with fraud; and that there were two rival title deeds. These were, in Mr. Amondi's view, issues that were raised before the learned Judge and that she denied her client the right to be heard.

On the nugatory aspect of the application Mr. Amondi submitted that if this application were to be refused there is real danger as the decree and notice to show cause have been issued. Finally Mr. Amondi submitted that damages would not be an adequate remedy to the applicant.

Mr. Otieno opposed this application stating that the intended appeal was frivolous, as in his view, the learned Judge delivered a comprehensive ruling striking out the defence. Mr. Otieno pointed out that the validity of the charge was raised and settled and the property sold by public auction. Mr. Otieno emphasized that once there was a sale, the equity of redemption was extinguished. Finally Mr. Otieno submitted that a claim against a purchaser lies in damages and that there was no claim that his client would not be able to satisfy.

This being an application under ***Rule 5 (2) (b)*** of this Court's Rules, it is trite that the applicant has to satisfy us that it has an appeal which is arguable and not a frivolous one, and secondly that unless we grant to it the orders sought its intended appeal would be rendered nugatory were the said appeal to eventually succeed. These two conditions must both be satisfied before we can grant the application.

It would appear from the record before us that the applicant received and utilized the credit facilities and defaulted in repayment. The suit property was sold by public auction which the applicant claims was tainted with fraud. But the decision of this Court in ***Mbuthia v Jimba Credit Finance Corporation & Another [1988] KLR 1*** does not support the applicant's case; since the equity of redemption could have been lost on the fall of the hammer.

In view of the decision in ***Mbuthia's case (supra)*** and the provisions of Registered Land Act (*Cap 300 Laws of Kenya*) it would appear that damages would in the circumstances suffice.

As we are dealing with an application under ***Rule 5 (2) (b)*** of this Court's Rules we must be careful in our ruling lest we usurp the mandate of the bench that will hear the intended appeal.

In view of the foregoing we are not satisfied that the applicant has demonstrated that the intended appeal is arguable and that if this application is refused the intended appeal, were it to succeed would be rendered nugatory. It follows that we find no merit in this application and we order that the same be and is hereby dismissed with costs to the respondent.

Dated and delivered at Kisumu this 22nd day of March, 2012.

E. O. O'KUBASU

……..……
JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……..……
JUDGE OF APPEAL

J. G. NYAMU

……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR