



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: BOSIRE, GITHINJI & NYAMU, JJ.A.)
CIVIL APPLICATION NO. NAI 131 OF 2011 (UR 86/2011)

FRANCIS M. MUTUA.....APPLICANT

VERSUS

SOUTHERN CREDIT BANKING CORPORATION.....RESPONDENT

(Being an application for an injunction pending the hearing and determination of Nairobi Civil Appeal No. 272 of 2010 in respect of an appeal from the decision of the High Court of Kenya at Nairobi (Njagi, J.) dated 8th July 2010

in

H.C.C.NO.81 OF 2010)

RULING OF THE COURT

This is a **Rule 5(2)(b)** application which seeks an order to restrain the sale of **Nairobi/Block 82/1970**. An injunction has been sought to stop the chargee, **Messrs Southern Credit Banking Corporation**, from selling the property pursuant to the chargee's statutory power of sale conferred by the charge.

The applicant **Mr Mutua** is an advocate of the High Court of Kenya and acted in person during the hearing of the application before us, whereas **Mrs Karanu**, advocate, represented the respondent bank.

The principal grounds relied on by the applicant in support of the application are that the applicant had agreed to guarantee the principal debtor company, **Messrs Wamco Petroleum Company Limited** an overdraft with the respondent to the extent of Kshs.3 million but the limit was allegedly fraudulently increased to Kshs. 10 million and for this reason it is contended that if an injunction order was not given by the Court the sale would take place and the intended appeal rendered nugatory. A similar injunction order was sought in **HCCC No.81 of 2010** in Milimani Commercial Court (Njagi, J.) but the same was not granted for reasons that on a **prima facie** basis although the applicant appears not to have executed the charge for Kshs.3 million it was clear to the Court that all the same he had executed a charge for Kshs.10 million over the same property, a property which had a known commercial value as per the exhibited valuation reports, and for that reason an award of damages would constitute an adequate remedy since the respondent bank had the means to pay damages, should they be awarded after a hearing of the suit on merit; and finally on the ground that the plaint had no prayer for an injunction which was only raised in the chamber application for the first time.

Mrs Karanu, learned counsel for the respondent drew the Court's attention to paragraph 7 of the applicant's affidavit in support of the application where he depones:

“That I also discovered that at the time I executed a charge over my property, the respondent had already granted the borrower the said overdraft of Kshs. 10 million and the charge over my property was purely intended to be a cover-up.”

Mrs Karanu further submitted that the contents of paragraph 7 of the affidavit as reproduced above constitutes an admission that the applicant did as a matter of fact execute a charge for Kshs.10 million and since default in making payment as per the charge had not been denied, the statutory power of sale had arisen and was exercisable by the respondent in the circumstances.

We have on our part considered the matter in the light of **Rule 5(2) (b)** requirements, namely, whether there was an arguable appeal and whether the intended appeal might be rendered nugatory in the absence of a restraining order. In the circumstances, we consider that the applicant has not demonstrated an arguable appeal and has further failed to demonstrate that the intended appeal might be rendered nugatory since damages would be an adequate remedy in any event. In addition, and in the special circumstances of this case, as no injunction was sought in the plaint we agree with the learned Judge that no injunction order may ordinarily be granted.

In the result, the application is dismissed with costs to the respondent.

It is so ordered.

Dated at Nairobi this 7th Day of September, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR