



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 147 & 99 OF 2009

JOPA VILLAS LLC APPLICANT

AND

OVERSEAS PRIVATE INVESTMENT CORPORATION..... 1ST RESPONDENT

HARVEEN GADHOKE 2ND RESPONDENT

DANIEL MUTISYA NDONYE 3RD RESPONDENT

(Application for injunction pending the hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Machakos (Lenaola, J.) dated 20th May, 2009

in

H.C.C.C. NO. 215 OF 2008)

RULING OF THE COURT

The applicant, **JOPA VILLAS LLC**, brings this application under **Rule 5(2)(b)** of the Court of Appeal Rules seeking the orders:-

- 1. THAT pending the hearing and final determination of the intended appeal against the ruling and order of the High Court at Machakos made on the 20th May, 2009 in High Court Civil Case No. 215 of 2009 Machakos (Hon. Justice Isaac Lenaola) an injunction do issue directed to the Respondents whether by themselves, their agents or advocates or auctioneers or any of them or otherwise be restrained by a temporary order of injunction from doing the following acts or any of them, that is to say, from interfering with the applicant’s right of possession, advertising for sale, disposing of, selling by public auction or otherwise however at any other time or completing any conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting to and or interest in all that parcel of land known as L.R. No. 27253/42 situated in Mavoko Municipality in Machakos District pending the hearing and determination of the intended appeal and this order be noted in the register of the said parcel of land at the Lands Office.***

2. ***THAT further and or in the alternative a mandatory order of injunction do issue directed to the Respondents and their agents and/or servants to be ejected and removed from all the Applicant's premises and properties and the applicant's possession of all the premises and properties be reinstated pending the hearing and determination of the intended appeal.***

3. ***THAT costs of this application be provided for.***

The application which is supported by the affidavit of **John Paul Njoroge** (who described himself as "the President of the Applicant") is brought on the following grounds:-

"i) The Applicant has an arguable appeal with good prospects of success as follows:-

(a) *The learned Judge erred in holding that Prima facie the debenture was executed by the applicant.*

(b) *The learned Judge erred in his failure to take into account or consideration the issues raised by the Applicant in respect of fault in the Debenture and charge documents.*

(c) *The learned Judge wrongly exercised his discretion.*

(d) *The learned Judge erred in dismissing the Applicant's application.*

(e) *The learned Judge erred in basing his findings on assumptions.*

(ii) The appeal will be rendered nugatory if the injunction is not granted at this stage since the Respondents have advertised the suit property for sale on or about the 9th June, 2009."

The application came up for hearing on 12th October, 2010 when Mr. Peter King'ara, appeared for the applicant while Mrs. Esther Opiyo, together with Ms Cosima Watende appeared for the respondents.

The factual background to this application is that by a plaint dated 18th November, 2008, the applicant (as the plaintiff) sought certain orders against the respondents and all relate to L.R. No. 27253/42 situated in Mavoko Municipality in Machakos District which property is registered in the applicant's name. As is usual with disputes of this nature, the applicant filed a Chamber Summons application pursuant to **Order XXXIX Rules 1, 2, 3 and 9** of the Civil Procedure Rules seeking the following orders:-

"ii. THAT the 2nd and 3rd defendants be restrained whether by themselves, their agents and or servants or otherwise howsoever from acting or purporting to act as Receivers and/or managers of the plaintiff and from interfering in any manner with the plaintiffs quiet possession and enjoyment of all its land, bank accounts, properties machinery, equipment, assets and general day to day running/management of the plaintiff.

iii. THAT the Defendants by themselves, servants, agents, advocates or auctioneers or any of them or otherwise be restrained by a temporary order of injunction from doing the following acts or any of them, that is to say, from interfering with the plaintiff's right of possession, advertising for sale, disposing of, selling by public auction or otherwise however at any other time or completing any conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting to and or interest in all that parcel of land known as L.R. No. 27253/42 situated in Mavoko Municipality in Machakos District pending the hearing and determination of this suit and this order be noted in the register of the said parcel of land at the Lands Office.

iv. THAT further and or in the alternative a mandatory order of injunction do issue directed to the defendants and their agents and/or servants to be ejected and removed from all the plaintiff's premises and properties be reinstated pending the hearing and determination of this suit.

v. ***THAT costs of this application be provided for.***”

That Chamber Summons application was placed before the High Court at Machakos (Lenaola, J.) for determination. The learned judge considered all that was placed before him for and against the application and in the end came to the conclusion that the application lacked merit. He accordingly dismissed it with costs to the respondents. In the course of his ruling which he delivered on 20th May, 2009, the learned judge stated inter alia:-

“16. Has the applicant made out a prima facie case with a probability of success? I think not.

17. I say so because it is admitted that the applicant approached the 1st defendant for funding to put up housing units on the suit land. It is admitted that upon execution of certain documents, the first instalment was disbursed. It is admitted that there was default in repayment and the 1st defendant exercised its lawful powers and appointed receivers and managers to take over the project and the assets of the applicant.

18. The applicant has however only upon default raised an interesting argument, that the debenture is invalid. My view on that point is really straight forward; prima facie I do not see what makes it so. There may in fact be a case to be made to the contrary that one John Paul Njoroje may have been less than candid when he deponed that he never signed some of the documents in issue. My mind, at this stage is however tilted towards believing Debra Erb, Nathan Bayer and Susan Fribush because the Debenture and charge were to be executed before any monies could be disbursed. This is what parties covenanted to do under Section 4 01 (c) of the Loan Agreement. Under Section 3.01 (b) and Section 5.02 of the Loan Agreement parties again covenanted that the two documents once executed and registered (and they were) then they were legal, valid and created binding obligations on each party, the plaintiff included.”

The applicant was naturally aggrieved by the ruling of the learned judge and through its advocates filed a notice of appeal on 21st May, 2009. Before that appeal is finally heard and determined, the applicant now comes to this Court pursuant to **Rule 5(2)(b)** of this Court’s Rules seeking the orders set out at the commencement of this ruling.

In his submission, Mr. King’ara stated that the applicant has an arguable appeal in that it is disputing the validity of the debenture as, in his view, it was not executed by the appellant. Mr. King’ara went on to point out that there is nobody in possession of the suit property except two guards. Mr. King’ara further submitted that it was not possible for his client to sign a document in Kenya and in U.S.A. on the same day. It was Mr. King’ara’s contention that the appointment of the receivers was premature.

On the nugatory aspect of the application, Mr. King’ara submitted that the 1st respondent did not have a single asset in Kenya and hence damages would not be an adequate remedy in the event that the applicant succeeded in its appeal. It was further pointed out that if we refused to grant the application a total of 374 people who had applied for the houses would be left without remedy.

In response to the foregoing, Mrs. Opiyo submitted that the applicant did not have an arguable appeal since, in her view, the debt had been admitted. She further argued that the issue of the debenture was carefully considered by the learned judge who found that the applicant had executed the debenture.

On the nugatory aspect of the matter, Mrs. Opiyo submitted that the suit property was a commercial property and hence damages would be an adequate remedy.

Both sides buttressed their submissions with authorities.

On our part, we have put the submissions made on behalf of the parties on the scales. It is trite that the jurisdiction of this Court under **rule 5(2)(b)** of its Rules is original and discretionary and that for an applicant to succeed, he should show that his appeal or intended appeal is not only arguable but also that unless the order sought is granted, the intended appeal or appeal if successful, the success will be rendered nugatory. In **BOB MORGAN SYSTEMS LTD. & ANOTHER VS. JONES** [2004] 1 KLR 194 at p. 196 this Court stated:-

“The powers of the Court under rule 5(2)(b), aforesaid, are specific. The Court will grant a stay or injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly, that unless a stay or injunction is granted his appeal or intended appeal if successful, will be rendered nugatory.”

And in **RUBEN & 9 OTHERS V. NDERITO & ANOTHER** [1989] KLR 459 this Court said:-

“In dealing with rule 5(2)(b) applicants, this Court exercises original jurisdiction and this has been so stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court, the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds de novo (anew) on the propriety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial judge’s discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous, or put the other way round, he must satisfy the court that he has an arguable appeal. Secondly, it must be shown that the appeal, if successful, would be rendered nugatory: See Stanley Munga Githunguri v. Jimba Credit Corporation Ltd. Civil Application NAI. 161 of 1988.”

We must bear in mind the foregoing as we consider this application before us. We have given a brief factual background to this matter right from the plaint dated 18th November, 2008 to the present application. The first issue to be considered is whether in view of the factual position and the submissions by counsel, the applicant has demonstrated that it has an arguable appeal. As it has been repeatedly stated an arguable appeal does not mean an appeal that will succeed. From Mr. King’ara’s submission it would appear that his strong point is that the applicant is disputing the validity of the debenture. It is the applicant’s contention that it never signed the debenture. Mr. King’ara pointed out that it was not possible for his client to sign a document in Kenya and in the U.S.A on the same day. It therefore follows that as the debenture is disputed the appointment of the receivers should not have arisen, so argued Mr. King’ara. In our view, these are not frivolous issues but matters that call for closer scrutiny. Hence it can safely be said that these issues would constitute an arguable appeal. We should hasten to add that even one arguable point would suffice. In **Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others vs. Kilach** [2003] KLR this Court said:-

“We think the applicants have shown to us some arguable points in their intended appeal. First they intend to show in their proposed appeal that even if it be true that the son of Mr. Justice Bosire is an employee of the Central Bank, or that Mr. Gatonye has previously acted for that bank, those are not such terribly important factors as to warrant the crippling of the operations of the Commission by an order of stay as Mbito J. did. The respondent, on the other hand and relying on the decision of R v. Bow Street Stipendiary Magistrate ex parte Urgate Pinochet quoted in his letter the contents of which we have already reproduced, contends that the relationship of son and father is such that the judge ought not to sit. We think this, even if it were the only point, is an arguable one and the length of time counsel spent before us was itself sufficient proof that the point is worth investigating on appeal and is not a frivolous one.

There may or may not be other arguable points but as we have said before even one arguable point is sufficient for the purposes of rule 5(2); there need not be a chain of arguable points to sustain an application.”

On our part, we are satisfied that the applicant has demonstrated that the intended appeal is arguable.

As regards the nugatory aspect, it has to be noted that the suit property is a commercial property of considerable value. We have been told that nobody is in possession but two guards who are stationed on the property presumably to keep away intruders. In that case the applicant would be adequately compensated by way of damages in the event that it is successful in the appeal. We are satisfied that the refusal to grant this application would not render the success of the appeal nugatory.

Since the applicant has not satisfied us on the nugatory aspect we are of the view that the application cannot be granted. For all the foregoing reasons we order that the application be and is hereby dismissed with costs to the respondents.

Dated and delivered at NAIROBI this 19th day of November, 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR