



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Civil Appli 106 of 2009 (UR 67/2009)

TRANSWESTERN CANE HARVESTERS LIMITED

NAIROBI GRAPES PLANTATION LIMITED APPLICANTS

AND

BARCLAYS BANK OF (K) LIMITED RESPONDENT

(Application for an injunction pending the lodging, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya Kisii (Musinga, J.) date 1st day of April, 2009

in

H.C.C.C. NO. 97 OF 2008)

RULING OF THE COURT

By their notice of motion dated 20th April, 2009, the applicants herein, *TRANSWESTERN CANE HARVESTERS LIMITED* and *NAIROBI GRAPES PLANTATION LIMITED* seek an order under rule 5(2) (b) of the Rules of this Court in the following terms:-

“1. THAT pending the lodging, hearing and determination of the applicant’s intended appeal, this Honourable Court be pleased to issue a temporary injunction restraining the respondent its agents or servants or otherwise howsoever from disposing of or alienating land parcel No. SUNA EAST/WASWETA 1/1372.

2. THAT the costs of this application be provided for.”

The application which was supported by the affidavit of *SUNIT PARSHOTTAM PATEL*, a director in both applicant companies was brought on the following grounds:-

“1. Unless the application which seeks an injunction is heard as a matter of urgency, the land forming the subject matter of the application will be sold by the time the substantive appeal is heard thereby rendering the Appeal nugatory and occasioning loss and prejudice to the applicant.

2. The applicant has an arguable (sic) with good prospects of success for the reasons inter alia:-

a) THAT the learned Judge erred in law by failing to have due regard and to take into account the

various issues raised in the affidavit of **SUNIT PARSHOTTAM PATEL** sworn on 29th day of August, 2008.

- b) *THAT as a consequence of ground 1 above, the learned Judge failed to appreciate that there are very substantial issues of fact disclosed by the application and other documents on record.*
- c) *THAT the learned Judge misdirected himself fundamentally in failing to hold that the temporary overdraft of **Kshs.5,000,000/=** given as a loan facility to the 1st appellant was never guaranteed by the 2nd Appellant's free property No. SUNA EAST/WASWETA 1/1372 as security.*
- d) *THAT the learned judge misdirected himself by not holding that the suit property Land Parcel No. SUNA EAST/WASWETA 1/1372 in the names of the 2nd Appellant was to cover a sum of Kshs.6 million and not the entire loan facility of Kshs.32,000,000/= in accordance with the letter of offer.*
- e) *THAT the learned Judge erred in failing to make a finding on the variations in the bank statements arising from the same transaction, the interest rates charged and entries made in the bank statements were illegal and fraudulent.*
- f) *THAT the learned Judge erred in law and in fact by finding the appellant's case unmeritorious and dismissing the same with costs.*
- g) *The learned Judge failed to consider any of the authorities cited is (sic) support of the application.*

3. This appeal will be rendered nugatory if the stay is not granted as prayed for the reasons that the respondent is in the process of proceeding in the exercise of statutory power of sale of land parcel No. SUNA EAST/WASWETA 1/1372 and apply the proceeds without taking into account the applicant's claim.

4. The balance of convenience clearly weighs in favour of the applicant in this matter owing to the substantial amount of Kshs.17,618,770.10 involved."

A short background to this dispute may be necessary so as to appreciate what is before us in this notice of motion. By an application dated 29th August, 2008, the applicants herein (*as plaintiffs*) sought orders of injunction to restrain the respondent from selling the property (suit property) known as *L.R. No. SUNA EAST/WASWETA 1/1372*, pending the hearing and determination of a suit which they had filed in the High Court. That was the application that was placed before the superior court (Musinga, J.) for determination. In support of that application for injunction, Sunit P. Patel, a director of the 1st applicant swore an affidavit to the effect that the suit property which was registered in the name of the 2nd applicant was charged to the respondent to secure a loan of *K.Shs.32,000,000/=* which was advanced to the 1st applicant. Mr. Patel deposed that on 20th June, 2008 the respondent, through its advocates, instructed M/s Garam Investments (Auctioneers) to sell the suit property by public auction alleging that there was an outstanding balance of *K.Shs.17,618,770/=* as at 30th August, 2008. The deponent averred that the intended sale was malicious and in bad faith since the 1st applicant had not only fully repaid the aforesaid loan but had over paid by a sum of *K.Shs.4,054,469.22*. He further stated that the figures in the bank statements were not correct as they were based on monthly interest debits that had been fraudulently worked out using interest rates that were illegal and above the maximum allowed by law of 91 day Treasury Bills rates plus 4% per annum stipulated in the Central Bank of Kenya (*Amendment*) Act 2004 that was in force during the period in question from 1st January, 2001 to 31st July, 2001. Mr. Patel further asserted that by demanding an amount of *K.Shs.17,618,770.10*, the respondent was acting in breach of the provisions of **Section 52(3)** of the Banking Act.

To counter the foregoing, Nereah A. Okongo, the respondent's Legal Counsel in charge of Business Support and Corporate Recoveries, swore a replying affidavit on behalf of the respondent. She deposed that the applicants' application for temporary injunction was devoid of any merit and was fatally

incompetent since its substratum was an alleged misapplication of interest rates by the respondent. That alleged miscalculation of interest rates was grounded upon a legislation whose operation and effect had been declared unconstitutional and, further, it was based upon a third opinion of which probative value was worth a trifle, the deponent contended. She added that the applicants' claim was founded upon a dispute as to the amount repayable and it was now settled law that such dispute cannot be a ground for a grant of an injunction.

Counsel further stated that upon the sole request of the 1st applicant, the respondent advanced to the 1st applicant a loan facility of Kshs.32 million whereupon the 1st applicant not having sufficient security, entered into an agreement with the 2nd applicant wherein the latter agreed to create a guarantee supported by a legal charge in favour of the respondent over *L.R. Nos. 209/4498 Nairobi and Suna East/Wasweta 1/1372* in order to secure the financial accommodation. Counsel went on to state that in *October, 2003*, the respondent accorded to the 1st applicant a further financial accommodation of *K.Shs.5 million* by way of an overdraft, a fact which had not been disclosed to the Court by the applicants' counsel.

She continued to state that the 1st applicant was truly and justly indebted to the respondent in the sum of *Kshs.17,618,770.10* as at *30th August, 2006*. On account of that default in repayment of the loan sum, the second applicant was duly served with a statutory notice by way of registered post, a fact not denied by the 2nd applicant. A valid notification of sale was also served upon the 2nd applicant.

The learned Judge considered what was deposed to in those affidavits together with the submissions of counsel appearing for the parties and came to the conclusion that the applicants were not entitled to the orders sought in their application dated *29th August, 2008*. In concluding his ruling delivered at Kisii on *1st April, 2009*, the learned Judge said:-

From the foregoing, it is evident that none of the plaintiffs' listed grounds can entitle them to the orders sought.

In any event, it is now settled law that a dispute as to the exact amount repayable is not a ground upon which a borrower who was served with a valid statutory notice can obtain an injunction to restrain a bank from exercising its statutory power of sale, see HABIB BANK A.G. ZURICH VS. POP-IN (K) LTD. & OTHERS, Civil Appeal No. 147 of 1989 (unreported).

I am not persuaded that the plaintiffs have a prima facie case with a likelihood of success which is the first principle in granting an interlocutory injunction as per the celebrated case of GIELLA VS. CASSMAN BROWN & CO. LTD. [1973] E.A. 358.

The plaintiffs have also not shown that they will suffer irreparable loss if any of the charged property is sold. Once a property has been charged to secure a loan it becomes a chattel on sale if there is any default on the part of a borrower. If for any reason it eventually turns out that the second plaintiff's charged property was wrongfully sold, the defendant will be able to compensate the second plaintiff.

All in all, I do not find any merit in this application and I dismiss it with costs to the defendant."

The principles that apply in the superior court for consideration of interlocutory relief are different from the considerations this Court has to make in an application under **rule 5(2) (b)** of the Rules of this Court. The applicants before us must establish that they, not only have an arguable appeal, that is one which is not frivolous, but also that unless we grant to them the order of stay their proposed appeal, were it to succeed, would have been rendered nugatory. A solitary arguable issue would be sufficient – See **JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIRS & 3 OTHERS VS. KILACH** [2003] KLR 2459.

Both learned Counsel Mr. G.K. Bosire, for the applicants, and Mr. J.J. Joroge, for the respondent, were acutely aware of these principles.

Mr. Bosire sought to satisfy the first principle that the intended appeal raises triable issues. He referred to the facts as set out in the affidavit of Mr. Patel and submitted that the respondent was not entitled to exercise its statutory power of sale and that it was in breach of the relevant law at the time. Mr. Bosire further submitted that the additional loan by way of overdraft had not been consented to by the 2nd applicant as it was not part of the guarantee. On those two grounds, so argued Mr. Bosire, the applicants had demonstrated that the intended appeal was arguable.

On the nugatory aspect of the application, Mr. Bosire contended that on the suit property was an academy with over 400 students and that if it were to be sold the damage would be irreparable.

On his part, Mr. Joroge opposed the application on the ground that the charge had secured all the amounts and once there was default, the respondent was entitled to exercise its statutory power of sale. For that reason, so submitted Mr. Joroge, the intended appeal raises no arguable point. As regards **section 39** of the Central Bank of Kenya Act, he contended that the Act had been declared unconstitutional on the issue of its retrospective effect.

We have anxiously considered the material before us and the submissions of the learned counsel for which we are grateful. Our view of the matter is that the intended appeal is not frivolous as, indeed, issues arise, inter alia, the interpretation of **section 39** of the Central Bank of Kenya Act (*Cap. 491 Laws of Kenya*) and the Central Bank of Kenya (Amendment) Act No. 8 of 2004. We were told that Act No. 4 was declared unconstitutional as regards its retrospective operation. These issues cannot be said to be frivolous and, we think, they are arguable.

We think, with respect, however, that the second hurdle (*the nugatory aspect of the intended appeal were it to succeed*) has not been surmounted. As pointed out by Mr. Joroge, once a property is charged it becomes a marketable security. Although it was argued that there was a school, nay, academy, on the suit land, and therefore the applicants would suffer irreparable damage if the security was realized, that is not our mandate as already stated earlier in this ruling. If there is an academy on the suit land the successful bidder at the auction may well wish to continue using the property as an academy and should the applicants succeed in their intended appeal, they will not be without remedy.

In view of the foregoing, we find no merit in this application which we accordingly order that it be and is hereby dismissed with costs.

Dated and delivered at Kisumu this 17th day of July, 2009.

E.O. O’KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR