



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**

**Civil Appli 315 of 2008 (UR 209/2008)**

**LOUIS ROGER OUANDJI .....APPLICANT**

**AND**

**BANK OF INDIA ..... 1<sup>ST</sup> RESPONDENT**

**TRACTOR BELL LIMITED ..... 2<sup>ND</sup> RESPONDENT**

***(An application for an injunction pending the hearing and determination of an intended appeal from a ruling and order of the High Court of Kenya at Nairobi (Kimaru, J.) dated 13<sup>th</sup> November, 2008***

**in**

**H.C.C.C. NO. 84 OF 2008)**

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**RULING OF THE COURT**

By his motion dated 8<sup>th</sup> December, 2008 made under **rule 5 (2) (b)** of the rules of this Court, **Louis Roger Ouandji** (“*the applicant*”) seeks an order: -

“1. That this Honourable Court do grant an injunction restraining the 1<sup>st</sup> respondent by itself, its officers or agents from transferring or effecting a change of registration over or otherwise howsoever disposing of or alienating ALL THAT parcel of land known as L.R. no. 330/1290 within Nairobi pending the hearing and final determination of the intended appeal herein”

That order will issue if the applicant satisfies the usual twin requirements under the rule; firstly, show that the intended appeal is arguable, and secondly, that if the order sought is not granted, then the success of the intended appeal, if that be the eventuality, will be rendered nugatory. See **Reliance Bank Ltd (in liquidation) vs. Morlake Investments Ltd. C.A. NAI. 98/02 (ur)**. The background to the application may be briefly stated: -

In the year 2005, the applicant applied for and received financial accommodation from the Bank of India (“*the Bank*”) to facilitate the development of two apartment blocks of 16 units each on **LR. No. 330/417** along Bamboo Lane, in Thompson Estate Nairobi. The loan facility was up to a maximum of Kshs.60 million and the applicant executed a mortgage over the property **LR. No. 330/417** (“*the mortgaged property*”) to secure the loan. The deed of mortgage was dated 31<sup>st</sup> December, 2005, and was registered on 10<sup>th</sup> February, 2006. Over the next two years or so, the bank advanced to the applicant a

total of Shs.50,912,302.80 and the apartments were substantially developed. The bank, however, complained that the applicant was not keeping its part of the bargain by failing to make his agreed capital contribution to the project or making periodic payments on interest and other bank charges. By 30<sup>th</sup> July, 2007, the total outlay stood at Shs.60.51 million and on 22<sup>nd</sup> August, 2007, the bank issued a statutory notice calling in the loan. The notice was not complied with and therefore auctioneers were instructed to commence recovery process. They served the relevant 45 days redemption notice under **Rule 15 (d)** of the Auctioneers Rules and notification of sale under **rule 15 (b)** of the same rules before advertising the mortgaged property for sale. In the meantime the mortgaged property had been subdivided into two by the applicant, with the concurrence of the bank, and approved deed plans for the two portions **LR Nos. 330/1290** and **330/1291** had been issued. The auction was targeted at the portion **LR. 330/1290** and was scheduled for 8<sup>th</sup> February, 2008. It was sold in the presence of the applicant, to the highest bidder, the second respondent **M/S. Tractor Bell Ltd** (“the purchaser”) at Shs.60.5 million and a memorandum of sale was signed on the same day upon compliance with the terms and conditions of sale.

The applicant felt aggrieved by the bank’s actions and he went to the superior court about two weeks later, on 20<sup>th</sup> February, 2008, and sued the bank and the purchaser. He pleaded a breach of contract by the bank in failing to advance the agreed sum of Shs.60 million in full; inflation of the amount advanced through unauthorized and illegal interest and penalty charges; illegality and fraud in the exercise of the power of sale by failing to serve the statutory notice or notification of sale; selling an unregistered subdivision instead of the mortgaged property; and selling the property at an under value. He sought an injunction to restrain the bank from transferring or alienating the mortgaged property or the subdivision of it, and declarations that there was no statutory notice served; that the sale was fraudulent, illegal and null and void; and that the right of redemption was still alive. As an alternative prayer, the applicant prayed for general damages from the bank.

On the same day, the applicant sought by way of a chamber summons, a temporary injunction to restrain the bank and the purchaser from transferring, alienating, disposing, selling or otherwise dealing with the mortgaged property or any part thereof pending the hearing and determination of the suit. That matter fell for hearing and determination before Luka Kimaru, J. who dismissed the application on 13<sup>th</sup> November, 2008. The applicant filed a notice of appeal timeously and took out the motion now before us.

In dismissing the application the learned Judge found that the applicant had failed to establish a *prima facie* case with a probability of success which is the first requirement in the leading case of **Giella v Cassman Brown Ltd. [1973] EA 358**, and that even if he were to succeed, his remedy lay in damages and not an injunction. At all events the balance of convenience tilted towards the purchaser. He considered and rejected the contentions by the applicant that there was breach of the loan agreement by the bank; that there was no authority to sell a portion of the mortgaged property; that the requisite statutory and redemption notices were not issued; that oppressive interest charges and penalties vitiated the sale; and that the conduct of the auction itself was irregular. All these findings will be re-agitated in the intended appeal which the applicant says is not frivolous;

Learned counsel for the applicant, Mr. Richard Kwach, who led Mr. Osundwa in submissions before us, referred to the purported sale of the mortgaged property as a racket. According to him, the certificate in the mortgage instrument was not properly executed, thus vitiating the whole document. Secondly, the memorandum of sale indicates that the deposit on the sale was made in advance of the sale thus vitiating the contract of sale as was held in **Mwathi v. Kenya Commercial Finance Co. C.A Nai. 12/87 (UR)**. Thirdly, the Title documents for the property sold did not exist. Fourthly, the purchaser was a phantom as it was non-existent in the Companies registry and it also issued cheques which were not banked. In those circumstances, he submitted, there was a gross abuse of the mortgagee’s duty to the mortgagor and ample evidence of fraud and conspiracy. The intended appeal was therefore arguable.

In responding to those submissions, learned counsel for the bank, Mr. Karanja, submitted that some of the issues raised were not before the superior court and cannot therefore be urged either in this application or in the intended appeal. There was no challenge on the mortgage deed or its execution and the identity of the purchaser was never raised or challenged at any stage. As for the property sold, Mr. Karanja

referred to the mortgage deed which authorizes the bank to sell either the mortgaged property or a part thereof and indeed an identified and surveyed part of the mortgaged property was auctioned. The remaining portion is still held by the applicant. The terms of the auction were fully advertised before hand and they included the identity of the property to be sold, the mode of payment, including advance payment before the auction, and the balance at the fall of the hammer. The relevant documents were all on record. There was therefore no conspiracy or fraud, hence the frivolity of the issues raised, concluded Mr. Karanja.

For his part, Mr. Havi, learned counsel for the purchaser found nothing arguable as against his client. Firstly, the identity of the purchaser was not an issue raised before the superior court and in any event the existence and capacity of the purchaser was admitted in the plaint. Secondly, the validity of the charge cannot impinge a *bona fide* purchaser in an auction, as spelt out in **section 69 (B)** of the Transfer of Property Act. Thirdly, the value of property does not invalidate a sale. The purchaser, in his view, was perfectly entitled to purchase the property since there are no title deeds issuable under the **Government Lands Act (GLA)** properties; only a conveyance which will be processed in favour of the purchaser. Finally, he submitted, there can be no challenge in law, of the finding by the superior court that the remedy available to the applicant is in damages and not an injunction and therefore the appeal is not arguable.

We have anxiously considered the first limb of the guiding principles under **rule 5 (2) (b)**, the affidavits on record, the ruling of the superior court and the submissions of counsel before us. It is manifest that the issues intended to be raised on appeal as urged by the applicant, were not raised in the pleadings or before the superior court, and are not therefore for consideration before us. Such issues as the propriety of execution of the mortgage deed and therefore the validity of it, and the legal existence or otherwise of the purchaser, are irrelevant and therefore frivolous. So are the claims that the deposit of purchase price was made in advance by the purchaser and that a portion of the mortgaged property was auctioned instead of the whole property. As correctly pointed out by learned counsel for the respondents, there was authority and legality in the mortgage deed and notification of sale for sale of part of the mortgaged property and to receive Shs.500,000 in advance of the auction. We say nothing about the other issues laid out in the draft memorandum of appeal save to express our doubts on the prospects of success.

As for the nugatory aspect, it was argued on behalf of the applicant that the mortgaged property will be put beyond his reach before the intended appeal is determined thus rendering any success pyrrhic. The purchaser will not only move in and complete the development of the apartments and dispose of them, but the bank will still pursue the applicant for the balance of the loan. In those circumstances it was proposed that the *status quo* which has been maintained through an interim order issued by this Court since 18<sup>th</sup> February, 2009 be sustained.

In opposition to those submissions, it was argued on behalf of the respondents that from all factual and legal indications there was a valid exercise of the bank's statutory power of sale and it would be unjust to withhold the completion of the sale to a *bona fide* purchaser who has paid for it. At any rate there was no allegation that either the bank or the purchaser were incapable of paying the damages which are sought by the applicant as an alternative.

It is indeed so that there is a prayer for payment of damages which are quantifiable and there is no averment that the two respondents are incapable of meeting such damages. The subject matter is a property which was offered as security with a clear understanding that it may be alienated if the terms of the loan were not complied with. In this case only part of it was sold and there is no immediate threat to the other part. In all the circumstances we are of the view that the intended appeal will not be rendered nugatory.

In the result the application is not meritorious and we order that it be and is hereby dismissed with costs.

***Dated and delivered at Nairobi this 10<sup>th</sup> day of July, 2009.***

**P.N. WAKI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**