REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 145 of 2008 (UR 92/2008)

STEPHEN KIMANI MUHU ……….......................……………………APPLICANT

AND

SAVINGS AND LOAN KENYA LIMITED...........................….1ST RESPONDENT

RICHARD N. NYARIKI T/A BASELINE AUCTIONEERS....2ND RESPONDENT

(An application for temporary injunction pending the filing, hearing and determination of an intended appeal from a ruling and order of the High Court of Kenya at Milimani Commercial Courts (Warsame, J) dated 3rd April 2008

in

H.C.C.C. NO. 493 OF 2006)

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RULING OF THE COURT

We have before us, an application by way of notice of motion dated 25th June, 2008 and lodged in Court on 26th June 2008. It is brought pursuant to ***rules 5 (2) (b)*** and ***47 (1)*** of the Court of Appeal Rules (the Rules) and the applicant ***Stephen Kimani Muhu*** is seeking two orders against the first respondent ***Savings and Loan Kenya Limited*** and the second respondent ***Baseline Auctioneers*** as follows:-

"***1. That there be a temporary injunction restraining the intended respondents by themselves and/or their agents, servants and/or employees from further advertising, offering for sale, selling by public auction or otherwise and/or in any manner whatsoever disposing the property known as LR No. Nairobi/Block 72/1249 pending the hearing and determination of this appeal.***

2. That costs of and incidental to this application be in the intended appeal."

The grounds cited in support of the application are four and these are that:-

"***(a) The ruling and order of the superior court intended to be appealed from was made in blatant disregard of applicant's case as presented in the supporting affidavit and submission by counsel.***

(b) The ruling and order of the superior court intended to be appealed against was made in total disregard of the established principles for grant of equitable of (sic) injunction as laid out in the case

of <u>Giella vs. Cassman Brown</u> (1968) EA 358 remedy (sic).

(c) The effect of the said ruling is to open the door for 1st respondent to benefit from a glaring illegality of backdating the charge registered and signed in 1986 to 1982 and levying interest without a contractual (charge) having been registered.

(d) The applicant has an arguable appeal with a high chance of success and unless a temporary injunction is granted the appeal shall be rendered nugatory."

The law as regards the principles that guide the Court in deciding matters brought under ***rule 5 (2) (b)*** of the Rules is now well settled. The applicant has to satisfy the Court first, that the intended appeal or the appeal, if one is already filed is arguable, that is to say, it is not frivolous, and second that were the appeal or intended appeal to succeed, such success would be rendered nugatory by the Court's refusal to grant the application – see this Court's various decisions in ***<u>Reliance Bank Limited vs. Norlake Investments Limited</u>*** *(2002) 1 EALR 227*, ***<u>Hanishai Devani Ltd vs. Kenya Commercial Bank Limited</u>*** Civil Application No. Nai. 128 of 2006 (UR) and ***<u>Mohamed Said Ahmed vs. Grand Batian Hotels Ltd</u>*** – CA No. NAI. 263 of 2004. It is with the above principles in mind that we now proceed to consider this application. But first, the brief facts.

The applicant was a civil servant in the late 1970s and early 1980s. He was a member of the Civil Servants Union. That Union floated a company, Civil Servants Housing Company Limited which undertook private development of certain houses at Langata, known as Langata Civil Servants Estate. This was for the benefit of its members, one of whom was the applicant. The first respondent agreed to provide funds for the development of the same but it would appear that the funds were to be advanced to individual successful civil servants and each such civil servant entered into a contract with the first respondent whereby each was treated as a mortgagor. Each executed a charge. The applicant executed a charge which he says, in his affidavit, he signed in the year 1982. The document annexed to the record shows that that charge was dated 24th December, 1982. It was registered on 23rd May 1986. The applicant says that by the time he signed the charge the property – the subject of the charge - had not been developed and was in fact not surveyed as yet. The amount advanced to him and which he signed for was Ksh. 286,200/=. He then continued repaying the loan. After he had paid Ksh.2,286,664/=, he got a demand letter on 17th March 2003 from the first respondent dated the same day demanding immediate payment of Ksh.610,000/=, the amount then allegedly still owing on his mortgage account. He was not amused. He instructed his advocate to take up the matter with the first respondent as his property was being threatened with sale unless he paid that amount. Several correspondence then ensued between his advocates and the first respondent but to no favourable results to him. Meetings were held between the two parties in attempts to settle the problem but again with no results. Eventually, the first respondent sought and obtained the services of the second respondent which is an auctioneer, to sell the property pursuant to its statutory powers of sale to recover the balance of the loan due which was far in excess of Ksh.610,000/= demanded as that amount had increased due to further interest demands. The applicant moved to Court by way of a plaint filed on 5th September, 2006 seeking judgment against the first respondent and the auctioneer, (the second respondent) who had issued notification of sale to him. He sought permanent injunction against both respondents and an order directing the first respondent to recalculate the amount payable under the mortgage with effect from 23rd May 1986 based on principal amount of Ksh.286,200/=. The second order was sought because the applicant alleged that although the charge was registered on 23rd May 1986, the first respondent purported to have granted to him the mortgage on 7th July 1982 and so started calculating interest chargeable from 7th July 1982 instead of charging the same from 23rd May 1986 when the charge was registered and thus came into existence. Further he alleged that although in the charge document the amount advanced to him was Ksh.286,200/= that amount was adjusted upwards to read Ksh.414,907/= which was not the actual amount advanced to him. Together with that plaint, the applicant also filed chamber summons dated 5th September, 2006 seeking temporary injunction orders till the suit is heard and disposed of. As that was filed during the Court vacation, he also filed notice of motion on the same day seeking that the chamber summons be heard during the court vacation. The application for injunction was opposed and the respondent in a lengthy affidavit sought its dismissal. Eventually, the application was placed before Warsame J., who

after full hearing dismissed it.

The applicant felt aggrieved and intends to appeal against that dismissal. He filed notice of appeal and then proceeded to file this notice of motion seeking the orders stated above. The respondents oppose the application. In a replying affidavit sworn by one James E. O. Odwako, the first respondent states that the facts and issues raised in the intended appeal were properly addressed by the superior court which made its decision based on that consideration; that the application lacks merit and falls short of the principles that are required to be satisfied before the injunction sought would be granted; and that as the superior court exercised its discretion properly in dismissing the injunction application that was before it, this Court should not interfere with that proper exercise of discretionary powers of the superior court.

Before us, Mr. Ngunjiri argued that the two principles required to be satisfied in an application such as this, brought under ***rule 5 (2) (b)*** of this Court's Rules had been met in that, first, the effective date of seeking interest should have been 23rd May 1986 when the charge was registered and not 20th December, 1982 as by that time the charge had not been registered. Secondly, the amount that was advanced was Ksh.286,200/= and interest chargeable should have been based on that amount and not on the amount of Ksh.414,907/= which reflected an illegal increase of the mortgage amount. He referred us to ***section 65 (3)*** of the Registered Land Act Chapter 300 Laws of Kenya for his contention that the charge takes effect from the date of registration and not when it is dated. He also submitted that the first respondent illegally increased the rate of interest from 14% to 16% without any notice to the applicant as is required by the law. Lastly, Mr. Ngunjiri submitted that in a case where the mortgagee has acted in blatant breach of the law such as in this case, the Court should not allow it to sell on account that it can meet the damages if the applicant succeeded on appeal. Mr. Koech, the learned counsel for the respondents, on the other hand submitted that no arguable point had been raised by the applicant in the notice of motion to warrant the orders sought as the learned Judge of the superior court considered all aspects of the application that was before him properly as required by the principles enunciated in ***Giella vs. Cassman Brown's*** case (supra) and lastly that in any event the applicant has not demonstrated that the success of his appeal would be rendered nugatory.

We have anxiously considered the application, the affidavit in support and the replying affidavit, the record, the submissions of the learned counsel for all parties as well as the law which we have set out hereinabove. In our view, the issue as to when the charge became effective, that is, when the first respondent should have treated it as a valid charge for purposes of repayment and charging of interest i.e. whether the interest should have been charged as from 20th December, 1982 when the charge was signed or from 23rd May 1986 when the charge was registered is an arguable point. Further, whether the amount advanced upon which the interest should have been charged was Ksh.286,200/= as is apparent in the charge or Ksh.414,907/= as apparently used elsewhere in the record is another arguable point. The effect of these two matters is another point which is whether the amount already paid of Ksh.2,286,664/= plus the amount still being demanded which stood at Ksh.1,387,001/91 as at 5th September 2006, being the total amount due on the calculation of the loan amount based on alleged mortgage sum of Ksh.414,907 from 20th December, 1982 as opposed to the mortgage amount of Ksh.286,200/= from 23rd May 1986, is the correct amount that would be due and whether there is still any loan due if calculations were based on the amount of Ksh.286,200/= from 23rd May 1986 are all arguable points. We are thus not in doubt that the intended appeal is arguable. Those points need to be investigated thoroughly in the intended appeal.

What about the second limb? Here is a situation where if the property is sold, the applicant stands to lose Ksh.2, 286,664/= he had paid and a house altogether for a loan advanced at Ksh.286,200/= or Ksh.414,907/=. The Court cannot look the other way in such a situation. The total loss if the house is sold, before the intended appeal is heard would, in our view be totally disproportionate to any amount of damages. We think the most equitable action to take in such a situation is to stop the sale till the intended appeal is heard.

In short, the application is granted. There shall be a temporary injunction restraining the respondents by themselves and/or their agents, servants and/or employees from further advertising, offering for sale, selling by public auction or otherwise and/or in any manner whatsoever disposing of the property known

as L.R. No. NAIROBI/BLOCK 72/1249 pending the hearing and determination of the intended appeal. The costs of this application shall be in the intended appeal. Orders accordingly.

Dated and delivered at Nairobi this 10th day of July, 2009.

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

………………………

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