



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

Civil Appli 114 of 2009 (UR 73/09)

NYANZA FISH PROCESSORS LIMITED ..... APPLICANT

AND

BARCLAYS BANK OF KENYA LIMITED ..... RESPONDENT

*(Application for an injunction pending the hearing and determination of an appeal from the Ruling of the High Court of Kenya at Milimani Commercial Courts (Kimaru, J.) dated 17<sup>th</sup> April, 2009*

in

*H.C.C.C. NO. 40 OF 2005)*

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RULING OF THE COURT

*Nyanza Fish Processors Limited*, the applicant in the application before us expressed to be brought under rule 5(2)(b) of the Court of Appeal Rules, has moved this Court for an order of injunction restraining the respondent, *Barclays Bank of Kenya Ltd.*, from advertising or offering for sale or alienating the property known as *Kisumu Municipality/Block 3/123* until the hearing and determination of an intended appeal against the ruling of the superior court (*Kimaru, J.*) given on 17<sup>th</sup> April, 2009, in its *Civil Case No. 40 of 2005*.

The basic facts as can be gleaned from the record are that the respondent advanced some money to *Afro Meat Company Ltd.*, a sister Company of the applicant with the same directors and shareholders, on the security of the aforesaid property. The property was given as security upon a resolution of the directors of the applicant. Apparently, the *Afro Meat Company Ltd. (the debtor)* defaulted in repayment and the respondent took steps to realize its security. The applicant filed *Civil Suit No. 40 of 2005* on 21<sup>st</sup> January, 2005; challenging the attempted sale of the property and with the suit it filed an application for injunction prohibiting the defendant from advertising or offering for sale or alienating the suit property pending determination of that suit.

The respondent in turn filed *Civil Suit No. 140 of 2006* against *Afro Meat Company Ltd.*; the applicant herein; *Karim Mohamed Hassanali* and *Mohammed Hassanali*, apparently to enforce guarantees executed for the aforesaid lending and to enforce a deed of settlement in regard thereto. The

suit was filed sometime in *March 2006*, by which time the last named defendant had died. This suit and *Civil Case No. 40 of 2005* were consolidated by order of the superior court (Warsame, J.) dated *12<sup>th</sup> June, 2008*, on the application of the respondent. In that application for consolidation, the respondent had included a prayer for summary judgment, but the Court declined to grant it. The applicant herein intends to appeal against that decision as it filed a notice of appeal declaring that intention.

The application for injunction by this applicant was argued before Kimaru, J. and in a ruling delivered on *17<sup>th</sup> April, 2008*, he declined to grant an injunction on the basis that he was not satisfied that the applicant as plaintiff had established a prima facie case with the probability of success upon trial. A preservation order is sought herein pending determination of an intended appeal from that decision. It filed a notice of appeal on *22<sup>nd</sup> April, 2009*.

In applications of this nature this Court exercises original jurisdiction and in exercise of that jurisdiction the Court is guided by two well established principles, firstly, that an applicant must show his appeal or intended appeal is arguable or that it is not frivolous. Secondly, that unless the applicant is granted the injunction or stay prayed for and its appeal or intended appeal were eventually to be successful, that success would be rendered nugatory. This Court has also held time and again that an applicant needs to establish both these aspects for it to be successful in its application.

Mr. Nagpal argued the application on behalf of the applicant. His submissions before us on the first principle were threefold. Firstly, that the charge the respondent is relying on was not drawn according to the standard form provided under the ***Registered Land Act, Cap. 300 of the Laws of Kenya***, to wit ***R.L. 9***. Mr. Nagpal, in putting forward that submission was relying on the provisions of ***Section 65(1)*** of that Act, which as is material provides as follows:-

***“65(1) A proprietor may, by an instrument in the standard form, charge his land, lease or charge to secure the repayment ..... of money.....”***

Secondly, that the respondent having not lent any money to the applicant the charge of the property to the respondent by the applicant was without consideration. Thirdly, learned counsel submitted that no money is shown to be owing to the respondent either by the applicant or Afro Meat Company Ltd.

Mr. Karunge, for the respondent, in response, did not think any arguable points had been raised by the application. In his view, since the respondent and Afro Meat Co. Ltd. have common directors and shareholders, and both companies had approved the borrowing, the applicant has no basis for denying liability. Besides, he said, the debtor had not denied the debt.

There is no dispute that the respondent lent money to Afro Meat Company Limited. It may be that this Company is in default in the repayment of that money. It is also apparent that the charge over the suit property is not in the standard form provided under the *Registered Land Act*. The legal effect of the failure to draw the charge in the standard form is an arguable point. It is also arguable whether or not the borrowing for which the subject land was given as security is for the direct benefit of the proprietor of the land. In an application like the one before us an applicant need not show more than one arguable point. It is also true that the arguable point need not be one which is likely to succeed in the appeal or intended appeal. The Court at this stage is not so much concerned with the strength or weakness of the applicant's intended appeal but merely whether an arguable point or points exist for consideration by the bench that will eventually hear the appeal or intended appeal. The basis for that is not difficult to understand. At this stage the Court is not seised of all the material necessary to determine the appeal.

On the question whether unless we grant the injunction prayed for the success of the intended appeal will be rendered nugatory, Mr. Nagpal urged the view that the suit property has been specially developed with expertise from Europe. For that reason and considering its location, he said, it is a unique property with the result that if it is sold the applicants are unlikely to get an appropriate substitute, and damages, whatever the amount will not be an adequate remedy. Consequently, he said the applicant's appeal will be rendered nugatory.

For the respondent, it was contended that the applicant's fish factory on the suit property ceased operations some time ago, and that the applicant presently has no income from it. That fact was conceded by Mr. Nagpal who stated that operations at that factory stopped when the European Union declined fish imports from Kenya.

It is conceded by the applicant that it offered its property herein as security for the borrowing by Afro Meat Company Limited. It is deposed on behalf of the respondent in a replying affidavit by one, **Nereah Okanga**, that that company has not made any repayment of the money borrowed a fact which has not been challenged by the applicant. What the applicant says is that it does not know how much money was borrowed and how much is outstanding.

If the property, the subject matter of this litigation is sold, the loss to the applicant will be financial. True, it may be the property is unique. Its value, however, is ascertainable. That being our view of the matter, and weighing one thing against the other, it cannot be said that if the property is sold and the applicant eventually succeeds in its intended appeal, that success will be rendered nugatory.

The applicant itself had offered the property as security. No matter that the validity of the charge is being challenged. The conduct of the applicant in charging the same made it a commercial property the loss of which in an appropriate case would entitle the applicant to damages. The respondent is a bank and there is no gainsaying that it will be able to satisfy the loss.

In the result and for the reasons we have endeavoured to set out, the applicant has not satisfied this Court that an injunction should issue as prayed. Consequently, the application dated 22<sup>nd</sup> April, 2009 is dismissed with costs. We so order.

***Dated and delivered at Nairobi this 3<sup>rd</sup> day of July 2009.***

***P.K. TUNOI***

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***JUDGE OF APPEAL***

***S.E.O. BOSIRE***

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***JUDGE OF APPEAL***

***E.M. GITHINJI***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**