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

Civil Appli 141 of 2009 (UR 95/2009)

MWANIKI WA NDEGWA.....APPLICANT

AND

1. NATIONAL BANK OF KENYA LTD

2. MARY MBUKI MUGAMBI

3. WAMWA TRADING CO. LTD

4. MICHAEL THAIRU T/A SPUR HINTERLAND FREIGHT …….RESPONDENTS

(Application for injunction and stay of execution of judgment/decree of the High Court of Kenya at Milimani Commercial Courts (Emukule, J) dated 4th April, 2008

in

H.C.C.C. NO. 86 OF 2000)

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RULING OF THE COURT

By this application by way of an amended notice of motion and expressed to be brought under **rule 5(2) (b)** of the Rules of the Court Mwaniki Wa Ndegwa, the applicant, seeks two basic orders, namely:

"**1 That pending the hearing and determination of Civil Appeal No 124/08, the 1st and 3rd respondents be and are hereby restrained by themselves or agents from in any way transferring advertising, realizing and/or in any manner disposing of or in any adverse way dealing with the appellant/applicant's property L.R. No. 3734/198 Lavington Nairobi, being the suit property herein.**

2 That there be a stay of execution of the judgment and decree of the High Court given on 4/4/08 in HCCC 86 of 2000 and all consequential orders more specifically for recovery of costs by the 1st respondent pending the hearing and determination of Civil appeal no 124/08"

The applicant and the 2nd respondent have been business associates in the distributorship of beer. In or

about 1991 and 1996 the 1st respondent, National Bank of Kenya, granted credit facilities to them the loan being secured by a legal charge over a property known as L.R. 3734/198 situate in Lavington Estate, Nairobi (the suit property). It is common ground that not long afterwards there was a down turn in the business and the applicant and the 2nd respondent fell into grave arrears and they were unable to service the loan. The applicant attributes the default to the 2nd respondent's diversion of funds into another business of which he was locked out of management. Due to the default, the 1st respondent threatened to sell the suit property. However, the applicant sought refinancing and as at 1st January, 2000 he had paid Shs. 8,027,436.90. After effecting this payment he declined to make any further payments to the 1st respondent. He averred that he had fully repaid the portion of his loan to the 1st respondent; and thus, it was the responsibility of the 1st respondent to pursue the 2nd respondent for the balance.

The applicant pleaded in his amended plaint that the charge or mortgage over the suit property is unenforceable, firstly, because it did not specify the interest rate; secondly, because nobody had explained to him the effect of **sections 69(1)** and **100A** of the Transfer of Property Act; and thirdly, that he was not given any notice to redeem the suit property before the 1st respondent exercised its statutory power of sale.

The 1st respondent's response to these averments was that it was not obliged to pursue the 2nd respondent in order to recover the balance of the loan since the sharing of the loan is not its concern it being an issue solely involving the applicant and the 2nd respondent as directors of their company and does not in any way affect the 1st respondent's statutory power of sale; and moreover, that all deposits made to reduce the debt were made in the name of the company. The 1st respondent further denied that any deposits were made by the applicant.

Emukule J heard the case and held that the applicant did execute the charge and further charge in the presence of an advocate who witnessed the signing and explained to the applicant the effect of **sections 69 (1)** as read with **section 100A** aforesaid. The learned Judge further held that there was no valid notice given by the 1st respondent to the applicant in terms of the statutory requirements of **section 69A** aforesaid and that until and unless such notice is given the 1st respondent was not in a position to exercise its statutory power of sale. Again, he held that all past statutory notices allegedly given were invalid and unenforceable. He found the applicant and the 2nd respondent liable not as directors of the principal debtor but under their personal covenants under the instruments of guarantee, and also, separately liable under the charge and further charge which he held valid and enforceable in accordance with their terms. Finally the learned Judge dismissed the applicant's suit.

It is against that decision that the applicant has filed Civil Appeal No. 124 of 2008, and for the time being he seeks the orders re-produced earlier on in this ruling to restrain the respondents from further disposing of the suit property and the recovery of costs.

It would appear that after the dismissal of the suit the 1st respondent caused the suit property to be sold by public auction and the sale took place on 22nd May, 2009. The 3rd respondent, Wauwa Trading Co. Ltd was declared the purchaser thereof, however, another party Michael Thairu t/a Spur Hinterland Freight, the 4th respondent herein, who had attended the auction sale contended that he was the highest bidder at the auction and that the property ought to have been sold to him. The Court was also informed that the 4th respondent had filed another suit in the superior court challenging the validity for the sale agreement between the 1st respondent and the 3rd respondent. It is apparent from the submissions of Mr. Odiwuor learned counsel for the 4th respondent made before us that it may not at all be without reasonable belief for venturing to conclude that the 4th respondent is acting at the behest of the applicant to frustrate the 1st respondent from exercising its statutory power of sale. This is manifestly evident from the averments in the 4th respondent's affidavits. We shall say nothing more about this in this interlocutory application.

Mr. Kopere learned counsel for the applicant submitted before us that the applicant has an arguable appeal fundamentally, firstly, on the extent of liability of a guarantor to the chargee vis-a vis the debt owed by the principal debtor to the chargee; secondly, on the validity and effects of the charge which allegedly does not state the interest rate and more so where the charger is not the principal debtor but merely a guarantor; and thirdly on the validity of a certificate issued under sections 69 and 100A of the aforesaid Act.

As we have already stated Mr. Odiwuor associated himself with the submissions of Mr. Kopere and supported the application. Both Mr. Mburu, learned counsel for the 1st respondent, and Mr. Ojiambo, learned counsel for the 3rd respondent, vehemently contested the application. They argued that the applicant's appeal was not arguable since his right of redemption was lost as soon as the 1st respondent as mortgagee sold the suit property by public auction or when it entered into a binding contract of sale with the 3rd respondent. They further submitted that the dispute herein merely relates to accounts and that if the applicant felt aggrieved by what had happened thereafter his remedy lies only in damages.

The applicant has preferred 12 grounds of appeal in his appeal which he lodged on 26th June, 2008. The appeal is pending hearing and may be heard at any time. In the circumstances we shall refrain from expressing any firm view on any issue. Having considered them from the many angles presented to us together with the rival submissions of the parties we are prepared to hold without deciding that they are, indeed, arguable and are not in any way frivolous.

In deciding whether the appeal would be rendered nugatory if we do not grant the orders sought if the appeal eventually succeeds, we will take into account the fact that the suit property had been auctioned, the memorandum of sale executed and a deposit of Shs. 12,000,000 made by the 3rd respondent. We were informed from the bar that the applicant is still in occupation of the suit property whose monthly rental is about Shs. 200,000 and of which the 4th respondent was bidding Shs. 55,000,000. It is obvious therefore from the pleadings before us that the most prejudiced parties in the protracted dispute are the bank, i.e. the 1st respondent and the purchaser i.e. the 3rd respondent. They would obviously suffer greater frustration if the applicant and his other surrogate parties will be engaged in the institution of multiplicity of endless suits and applications as has so far been exhibited. Also, the appeal would be rendered nugatory if the suit property is disposed of before the disposal of the appeal.

We will therefore allow the application but on condition. Consequently, pending the determination of Civil Appeal No. 124 of 2008, we make the following orders.

1 Prayers Nos. 2 and 3 of the amended notice of motion are hereby granted.

2 The applicant shall pay the sum of Shs. 150,000/- per month with effect from 30th September 2009 and at the end of each succeeding month into an interest bearing account to be opened jointly in a reputable bank by the counsel for the applicant, the counsel for the 1st respondent (National Bank of Kenya) and the counsel for the 3rd respondent (Wamwa Trading Co. Limited)

3 In default of payment of any one installment this application shall stand dismissed.

4 The costs of this application shall be in the appeal.

These shall be the orders of the Court.

Dated and delivered at Nairobi this 25th day of September, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR