



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 56 OF 2008 (UR 32 OF 2008)

BIJAL VIRCHAND MALDE

(Executor of the Estate of Lalitaben Kantilal Shah)..... APPLICANT

AND

SOUTHERN CREDIT BANKING CORPORATION LTD..... 1ST RESPONDENT

CROWN GASES LTD 2ND RESPONDENT

(An application for injunction pending appeal from a ruling and orders of the High Court of Kenya at Nairobi (Okwengu, J.) dated 18th March, 2008)

in

H.C.C.C No. 543 of 2005)

RULING OF THE COURT

The applicant, **Bijal Virchand Malde**, in this notice of motion dated 3rd April 2008, is the executor of the Estate of Lalitaben Kantilal Shah (deceased), who was the wife of Kantilal Punja Shah (deceased). Lalitaben was also the sole beneficiary and executor of the estate of her said husband before she passed on on 29th August, 2006. The brief facts leading to the application before us are as follows:-

Kantilal Punja Shah who died on 24th August, 2004 was the registered owner of a property L.R. No. 209/75/15, Nairobi (the suit property). The record before us shows, and it is not in dispute, that prior to his death, he executed a charge dated 22nd October, 2003 in favour of the first respondent in this notice of motion, **Southern Credit Banking Corporation Limited**, to secure a principal amount of Ksh.90 million advanced to three borrowing companies, namely Kempaper Limited, Malde Transporters Ltd. and Africa Wastepaper Limited. Thus, before his demise, the husband of Lalitaben Kantilal Shah executed a charge over the subject property to guarantee overdrafts of Ksh.90 million from the first respondent advanced to three companies probably all associated with him in one way or another. It would appear

from a copy of the plaint availed in the record to which there is no defence as yet that the principal debtors did receive further credit facilities on 25th June, 2004 and on 25th November 2004. Kantilal Punja Shah died on 24th August, 2004 about three months before the last credit facilities were offered to the borrower companies. Apparently, one of the borrowers did not fully repay the monies advanced and the first respondent, through Guram Auctioneers, issued notification of sale of the suit property by public auction to recover Ksh.30,044,045/70 being debt allegedly owing from one of the companies Kempaper Limited. That notification of sale was issued after the death of Kantilal Punja Shah. At this time Lalitaben, his wife, was the executor of his estate. The sale was scheduled for 6th October, 2005. Lalitaben Kantilal Shah filed a plaint dated 30th September, 2005 in which she prayed for judgment against the first respondent as follows:-

“(a) An injunction to restrain the defendant by itself, its agents, servants and/or employees from selling, whether by private treaty or public auction, transferring, alienating, interfering with or in or (sic) any way whatsoever dealing with property L.R. No. 209/75/15 Nairobi.

(b) An order compelling the defendant to execute a discharge of the charge dated 22nd October, 2003, registered over L.R. No. 209/75/15 within seven (7) days of delivery of judgment herein and in default, the Deputy Registrar of this Honourable Court do execute the discharge.

(c) Costs and incidental to the suit.

(d) Any other or further relief or order that this Honourable Court may deem fit to grant.”

One of the grounds upon which Lalitaben sought the above judgment was that the charge was invalid and unenforceable because after the property was charged, further agreements were entered into between the first respondent and the borrowers which seriously affected the guaranteed overdrafts but which the guarantor was not aware of since the guarantor was either ailing or was already dead.

That plaint filed by Lalitaben Kantilal Shah was accompanied with a chamber summons dated 30th September, 2005 in which she sought temporary injunction to restrain the first respondent, who was then the only defendant, by itself, its agents, servants and/or employees from selling, whether by private treaty or public auction, transferring, alienating, interfering or in any way whatsoever dealing with property L.R. 209/75/15 Nairobi pending the hearing and determination of that suit.

That application went before the superior court (Kasango J.) who, after hearing it fully, allowed it in a ruling dated 15th February 2006 but delivered by another Judge (Azangalala J.) on 17th February 2006. In allowing it, the learned Judge addressed herself thus:

“All these issues I believe ought to be given ventilation at a full hearing and particularly the plaintiff’s claim as the wife of the registered owner. It is arguable that perhaps a time has come in the evolution of our law where a generous consideration ought to be given to the claims of wives who lay claims against the mortgage where matrimonial properties are used by their husbands without notice to them and without their consent. The end result of this ruling is that:

A temporary injunction do issue to restrain the defendant by itself, its agents, servants and/or employee from selling, whether by private treaty or public auction, transferring, alienating, interfering or in any way whatsoever dealing with property L.R. No. 209/75/15 Nairobi pending the hearing and determination of this suit.

The plaintiff is hereby awarded costs of the chamber summons dated 30th September 2005.”

We need to add that one of the reasons why the application was allowed was that the first respondent had not served a valid statutory notice upon the estate of the deceased guarantor and so its power of sale had not arisen. The first respondent felt aggrieved by that ruling. It came to this Court by way of Civil Appeal No. 147 of 2006 in which it challenged the ruling of Kasango J. delivered on 17th February 2006.

As ill luck would have it, before that appeal could be heard and apparently before defence filed against the plaint filed by Lalitaben Kantilal Shah, Lalitaben passed on on 29th August 2006. She died testate and in her will, she appointed Bijal Virchand Malde, the applicant in this notice of motion, the executor of her will. Bijal V. Malde claims in his affidavit before us that he was busy in Uganda and so did not proceed to court within one year after Lalitaben's demise to apply for substitution. The result of that delay was devastating to the entire case as will be clear hereafter. On 26th September 2007, about one year and twenty eight days after the demise of Lalitaben, the first respondent executed an instrument of transfer of the subject property to the second respondent, **Crown Gases Limited**. The applicant contends that as at the time the alleged instruments of transfer were executed, the second respondent, Crown Gases Limited, had not come into existence as at that time the registered entity was Crown Solution which was registered as such on 22nd August, 2006 but changed its name to Crown Gases on 11th October 2006. That, they contended, means that the transfer to the second respondent was a transfer to a non existent entity. Be that as it may, there is no evidence that that sale was made strictly after proper statutory notice had been issued and served upon the executor of the estate of Lalitaben as is required by law and the first respondent took that action before its appeal was heard and determined. The applicant, being the executor was not amused by that action taken by the first and second respondent. He moved to the superior court by way of a notice of motion dated 12th November 2007 in which he sought seven orders including the order for costs and an order seeking certification of that application as sought. The substantive orders he sought were:

“(ii) That the name of the deceased plaintiff be deleted from the pleadings and substituted by the executor, Bijal Virchand Malde suing on behalf of the deceased's plaintiff's estate.

(iii) Crown Gases Limited be enjoined as a party to this suit and service of this application be made by registered post.

(iv) A temporary injunction do issue prohibiting Crown Gases Limited, whether by themselves, their agents, attorney or whomsoever from transferring, leasing, disposing, wasting, damaging, taking possession of/or interfering in any way with Land Reference Number 209/75/15 (Original Number 209/75/9/3) pending the hearing and determination of this suit.

(v) Entry number 11 endorsed to certificate of title number L.R. 34652 in respect of L.R. 209/75/15 be cancelled and substituted with an entry prohibiting the defendant whether by itself, its agents, servants and/or employees from selling whether by private treaty or public auction, from transferring, alienating or dealing in any way whatsoever with L.R. No. 209/75/15 pending the hearing of this suit.

(vi) Muthoni Kuria and Aliraza Yusuf, in their capacity as signatories to the transfer conferring title to Crown Gases Limited and as the Managing Director and Executive Director of the defendant, respectively, be detained in prison for a term not exceeding six (6) months for disobeying and breaking the orders of this court given on 15th February 2006.”

That application was premised on two grounds namely that Lalitaben Kantilal Shah passed on on 29th August 2006 and the applicant was appointed the executor of her will and that the first respondent, in utter contempt of a court order delivered on 17th February 2006, had sold and transferred the subject property to the second respondent which may in turn transfer the property to another party and thus defeat the ends of justice. The respondents opposed that application. They filed a replying affidavit sworn by the first respondent Manager, Legal Services. The first respondent in that affidavit, admitted having sold the suit property to the second respondent but stated that that was done because the suit had automatically abated by operation of law as the deceased, Lalitaben Kantilal Shah, who was the plaintiff, had not been substituted within the time provided by law and no application for substitution was made within the required time. That is the application that went before Okwengu J. and of which decision is the subject of an intended appeal by the applicant. In dismissing that application, Okwengu J. had this to say:

“There being no suit in existence, it follows that the interested party cannot be joined to a non-

existent suit, and therefore the orders sought against it are also not available. As regards the prayer to have the defendant's director committed to civil jail for disobeying and breaching the order of the court given on 15th February, 2006, it is clear from the above that as at 26th September, 2007, when the transfer is alleged to have taken place, the temporary orders of injunction issued against the defendant were spent. Neither the defendant nor its directors were therefore in contempt of any court orders.

The upshot of the above is that the plaintiff's application fails and is accordingly dismissed with costs."

As we have stated above, the applicant felt aggrieved by that ruling. He filed a notice of appeal dated 28th March 2008 on 31st March 2008. He has now come to this Court by way of notice of motion dated 3rd April 2008 in which he is seeking only one substantive order and that is an order that:

"(a) An injunction be issued to restrain the respondents, by themselves, servants, agents or whosoever from offering for sale, interfering, alienating or in any manner dealing with the suit property comprised in the title number L.R. 209/75/15 original number 209/75/9/3 situated in Nairobi."

The applicant has not cited any grounds in support of the application, preferring to state that the motion is supported by the annexed affidavit sworn by the applicant on 28th March 2008. That affidavit states in brief that the intended appeal is arguable in that the only statutory notice that had been served by the first respondent pursuant to the legal requirements had been declared by the superior court in its ruling delivered on 17th February 2006 to be defective. That in effect meant the property was sold without a valid statutory notice having been served upon the estate; that the injunction granted by the superior court was to be in place until the suit was heard and determined and so the first respondent had no power to transfer the suit property before the suit was heard and finally determined and that the suit could not automatically abate upon the expiry of one year without a court order to that effect. The respondents, though they opposed the notice of motion, did not file any affidavits in reply.

Mr. Ougo, the learned counsel for the applicant, submitted that the intended appeal is arguable and raised three main points, if we understood him correctly. These were first, that the property was sold notwithstanding the order of the superior court which found the statutory notice served upon the estate of the deceased guarantor invalid, and issued injunction till the suit was heard and determined; secondly, that the sale was in any event illegal as the subject property was sold to a non-existent entity, and, lastly, that the point as to whether the provisions of **Order XXIII rule 3(2)** of the Civil Procedure Rules operate automatically if no application to substitute the legal representative is made within one year or whether there is need for a court order to that effect is an arguable point. He further submitted that should the application be refused at this point in time and the appeal eventually succeeds, the success would be rendered nugatory as the property, which was a matrimonial property and is being currently inhabited by the daughter of the deceased guarantor and his wife who is also deceased. The daughter attaches sentimental value to the subject property which is her only home.

Mr. Nyaoga, the learned counsel for the first respondent, in his opposition to the application rightly submitted that the first respondent, having transferred the suit property to the second respondent, can no longer be enjoined from disposing of the property as it is no longer in control of the property. He submitted further that as to arguability of the intended appeal, in his view, the intended appeal is not arguable as the provisions of **Order XXIII rule (3) (2)** are clear and the only legal interpretation conceivable of that rule, is that a suit would automatically abate if no application for substitution was made within one year. According to him, this was a legal matter and no room was left for any other interpretation as the word "*shall*" is used in the rule.

Mr. Ogunde, for the second respondent, contended that as the second respondent was not yet a party to the proceedings, the court has no powers to grant orders against the second respondent.

The above are the facts and the submissions before us. We have considered them, the record and the law. The notice of motion is brought pursuant to **rule 5(2) (b)** of the Court of Appeal Rules (the Rules). The law as regards the principles that guide this court in deciding such an application is now well settled. In order that the applicant in such an application may succeed, he has to demonstrate two aspects. First, that the appeal, or intended appeal as the case may be, is arguable, that is to say, that it is not frivolous. Second, he has to show that if the application is not granted and the appeal or intended appeal eventually succeeds, the success of the appeal will be rendered nugatory. These principles are spelt out in several authorities of this Court. One such case is that of **Reliance Bank Ltd. (in Liquidation) vs. Norlake Investments Ltd.** – **Civil Application No. Nai. 93 of 2002** (unreported) in which this Court stated as follows:

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal.**
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay of injunction.”**

All we need to consider at this stage is whether an arguable point is raised by the appeal or the intended appeal. It is not ours to solve the point or to decide on it finally. That must be left to the court that will eventually hear the appeal or the intended appeal, for if we were to give our views on such a point once raised either by the affidavit in support of the application or in the grounds of the application or in the draft memorandum of appeal annexed to the application, then we run the risk of seriously interfering with the powers of the court that would hear the appeal or the intended appeal. In the case of **Githunguri vs. Jimba Credit Corporation Limited (No. 2) [1988] KLR 838**, this Court was faced with a situation similar to the one before us. It stated on its powers at this stage as follows:

“We think, eyebrows may well be raised on the morality of the applicant’s contention on this part of the case. But this is a Court of law not of morals and if the applicant’s contention is well founded in law, this Court’s clear duty is to give effect to it. But is it right? We do not feel called upon to pronounce on this at this stage.”

(underlining supplied)

In the matter before us, the main ground for dismissing the applicant’s application was that the entire suit had automatically abated pursuant to **Order XXIII rule 3(2)** of the Civil Procedure Rules and that being so, the orders sought for substitution, enjoining the second respondent, temporary injunction against the respondents could not be granted as the suit which was the substratum of the entire dispute had abated. The applicant’s argument before the superior court and before us is that the provisions of **Order XXIII rule 3(2)** do not automatically take effect upon there being no application for substitution of a representative within one year after the death of the plaintiff. The respondents on the other hand contend that as the word “*shall*” is used in the rule, the abatement is automatic and there is no need for a court order to that effect as it is a legal provision. We have anxiously considered the rival views. In our view, as is stated in the case of **Githunguri vs. Jimba Credit Corporation Ltd (No. 2)** (supra), we cannot decide on that issue in this ruling as it is not our duty at this stage to pronounce our views on the same. We are of the view, however, that it is an arguable point which requires the court to ventilate and to give its views upon. Indeed, we feel the court’s view on this point may be of grave importance to the development of jurisprudence in this country. On passing, we are reminded that the provisions of **rule 82(a)** of this Courts Rules which also provide for what may appear automatic withdrawal of a notice of appeal has since been subjected to the court’s decision and the withdrawal is no longer automatic. We do not say the court, on full consideration of **Order XXIII rule 3(2)**, will come to the same conclusion. We are aware that these are different provisions of different rules. All we are saying is that what looks obvious may not in law be so when weighed upon legal scales. Suffice it to say that the point is arguable and is not frivolous. What then is the effect of our decision on that first point? We agree with Mr.

Nyaoga that there cannot be an order of temporary injunction against the first respondent. First, the first respondent has transferred the subject property to the second respondent. That is not in dispute. That being so, it can no longer control the subject property. Secondly, we note that in the application before the superior court, which we have substantially reproduced hereinabove, the applicant did not seek injunctive orders against the first respondent. That in effect means the superior court could not grant such an order against the first respondent. By dint of **section 3(3)** of the Appellate Jurisdiction Act Chapter 9, we too cannot make such orders. As to the second respondent, we have gone into the entire history of the entire saga to show that although the superior court did not join it as a party, that refusal to join it as a party is a matter that will be subject of appeal or intended appeal. It would therefore not be proper to argue, as Mr. Ogunde did, with respect, that no order can be given against it at this juncture. The property is of sentimental value to the deceased guarantor's estate. The history we have narrated which includes the as yet undisputed allegation that the subject property was sold without a valid statutory notice having been served upon the estate of the deceased are, in our view, matters that demand that the subject property be preserved, for if the question as to whether the abatement is automatic or not is solved in favour of the applicant on appeal, then the question as to whether the selling and transfer was proper may very well be a matter of consideration. We do not think monetary compensation in such a situation would be satisfactory to the estate. On the other hand, the second respondent has the title and should not be restrained from acquiring possession of what is his property as at this time.

Considering all the above, and doing our best in the circumstances of this case, we make a limited order of injunction only confined to preservation of the property.

In the result, we allow the application to the extent that the second respondent is restrained by itself, servants, agents or whatsoever from offering for sale, alienating in any manner the suit property comprised in title number L.R 209/75/15 original number 209/75/9/3 situated in Nairobi till the intended appeal is heard and determined. Costs of the notice of motion to be in the intended appeal. Order accordingly.

Dated and delivered at Nairobi this 30th day of May, 2008.

E.O. O'KUBASU

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR