



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI. No. 67 OF 2008

HENRY WANYAMA KHAEMBA.....APPLICANT

AND

STANDARD CHARTERED BANK (K) LIMITED.....RESPONDENT

(Application for injunction and stay of execution in an intended appeal from the ruling of the High Court of Kenya

at Nairobi Milimani Commercial & Tax Division delivered at Nairobi (Warsame, J) dated 9th April 2008

in

H.C.C.S. NO. 560 OF 2006)

RULING OF THE COURT

Henry Wanyama Khaemba, the applicant, moved the Court under **Rule 5(2) (b)** and **Rule 1(2)** of the Court of Appeal rules, seeking orders:-

- 1. THAT this Honourable court be pleased to certify this application as urgent.**
- 2. THAT this Honourable court be pleased to issue a temporary injunction restraining the respondent by itself, its servants and/or agents from auctioning, alienating, disposing off or in any way interfering with the applicant's ownership and/or possession of L.R. No. 209/3890 I.R 32478 Nairobi, pending the hearing and determination of an intended Appeal against the ruling and order of Mr. Justice Warsame delivered on 9th April 2008 in HCCC No. 560 of 2006 Nairobi, Milimani.**
- 3. THAT this Honourable court be pleased to stay the execution of the order for costs awarded against the applicant in HCCC No. 560 of 2006 Nairobi, Milimani pending the hearing and determination of an intended appeal.**

4. **THAT the intended Appeal be heard as a matter of urgency upon filing the record of appeal to give way to an expeditious resolution of the matter at hand.**
5. **THAT the costs of this application be provided for and be the applicant's in any event.**

The application was brought on the following grounds:-

1. **The applicant has filed a Notice of Appeal arising from the ruling and order delivered on 9th April 2008.**
2. **The intended appeal is arguable as disclosed in the applicant's supporting affidavit.**
3. **The intended appeal will be rendered nugatory if an injunction and stay is not granted as disclosed in the applicant's supporting affidavit.**
4. **The applicant is ready and willing to comply with any terms of grant of stay or an injunction including depositing any contested amount in court within a reasonable period.**
5. **The applicant guaranteed the sum of Kshs.4.5 million and has since paid Kshs.5.8 million based on the respondent's demand and is challenging interest which no rate was specified in the guarantee and charge documents.**
6. **The respondent continues to do business with the principal borrower and further the respondent allowed the principal borrower to draw more money (more than Kshs.1.2 million) despite the principal borrower being in default and demand to pay having been issued, raising a serious issue as to the validity of the further claim for Kshs.2.617,500.00/= this sum was partly further advanced after the applicant had paid Kshs.5.8 million to the respondent.**
7. **The respondent's advertisement of the applicant's property without first extracting the recent court order discharging the injunction and personally serving the order on the applicant and without making any formal demand for payment is evidence of bad faith and an inequitable intent to dispose off the applicant's property with haste on a claim which is questionable.**

It was supported by the applicant's lengthy affidavit dated 18th April 2008. It gives the history of the dispute herein. The application was brought under certificate of urgency. Bosire, JA, certified the application as urgent on 29th April, 2008, saying in part,

"I trust the respondent's advocate will prevail upon their clients to postpone sale to await the outcome of this motion".

The order of Warsame, J in **HCCC No. 560 of 2006**, which gave rise to this application, reads in part:

"All in all, I am in agreement with the advocate for the defendant that this suit as expressed is res judicata and an abuse of the court process. Accordingly the orders granted by Kasango, J on 17th October 2006 is (sic) hereby discharged and the suit struck out with costs to the defendant".

The applicant was aggrieved by the learned Judge's order, hence, the present application.

The proceedings of the superior court show that by a charge dated 5th November, 2002, the applicant charged his land to the defendant bank to secure a loan of Kshs.4.5 million, advanced to Edward Otieno Owino t/a Dosawi Enterprises. The applicant was a guarantor by a deed dated 1st November 2002 for the said facility. He pleaded in the plaint filed that the charge was irregular. Nevertheless, following the customer's default in repaying the loan the defendant moved to exercise its statutory power of sale over

the applicant's property and advertised it for sale. The applicant paid Kshs.5.8 million, and following that, the defendant demanded a further payment of Kshs.4.1 million representing the interest charged on the loan facility, but the applicant pleaded in the plaint that the charge did not provide for the interest chargeable for the facility, and further that the defendant failed, despite requests, to supply bank statements to the applicant.

It was an application grounded on that plaint, seeking a temporary injunction to stop the sale of the applicant's property by auction, which was heard by Kasango, J, who gave the following order:

“That a temporary injunction is hereby issued restraining the defendant by itself, its servants and or agents from auctioning, alienating, disposing of or in anyway interfering with the plaintiff's ownership and or possession of L.R No. 209/3890, pending the determination of the suit”.

The application giving rise to the order of Warsame, J aforesaid was filed by the defendant bank on 29th August, 2007, seeking the dismissal of the applicants suit, on grounds, *inter alia*, that the issues raised,

“are res judicata and cannot be maintained in law as an earlier suit namely High Court Civil Case No. 45 of 2005 (Milimani Commercial Courts) between Henry Wanyama Khaemba – vs – Standard Chartered Bank Kenya Ltd and 3 others was decided upon (sic) due process of the law upon legal merits in favour of the defendant/ applicant and the suit herein is accordingly res judicata”.

Mr. N.D. Muturi, learned counsel for the applicant, submitted that he disclosed in the plaint and in his submissions before Kasango, J, that there had been an earlier suit between the parties filed by the applicant against the respondent, namely **HCCC No. 45 of 2000**, which was withdrawn vide a **“NOTICE OF DISCONTINUANCE OF THIS SUIT (ORDER XXIV RULE 1 OF THE CIVIL PROCEDURE RULES)”**, filed on 5th October, 2006, which reads,

“TAKE NOTICE that the plaintiff HENRY WANYAMA KHAEMBA has WHOLLY discontinued this suit against all the defendants. Dated at NAIROBI this 4th day of October, 2006”.

Before the withdrawal of the suit aforesaid, the applicant had filed an injunction application to **“restrain the 1st and 2nd defendants from selling, alienating, disposing and/or in any way interfering with the plaintiff's ownership and/or possession of L.R No. 209/3890, pending the hearing and determination of the suit”**. That application was dismissed with costs by Ochieng, J on 19th July, 2005.

Mr. Muturi drew our attention to the ruling of Kasango, J where she dealt with the matter of the earlier suit filed by the applicant, where she said in the ruling:

“The plaintiff's counsel in an attempt to make full disclosure on behalf of the plaintiff stated that the plaintiff had filed a previous suit and under that suit sought an injunction which was dismissed on 19th July 2005. That, the previous suit was based on a claim that there was duress whereby the defendant obtained plaintiff's guarantee to guarantee the defendant's bank manager friend. Plaintiff's counsel withdrew that suit and filed this present suit”.

Mr. Muturi lamented before us that despite the above disclosure, Warsame, J made a finding of fact that there had been non disclosure of the earlier suit by the applicant's counsel, and proceeded to discharge the injunction order granted by Kasango, J and subsequently, **“struck out the suit with costs”**. He submitted further that there are arguable points in the intended appeal, whose notice was filed in the superior court on 17th April, 2008. That the arguable points enumerated in the applicant's affidavit sworn on 15th April 2008 in support of the present application include the issue whether the applicant was **“guilty of material non disclosure”**, and again, whether, **“it was legally acceptable for the learned Judge to rely on observations made in a ruling on an interlocutory application seeking orders to grant an injunction**

as a basis for holding that the matter before the court was res judicata”.

Mr. Muturi submitted that the applicant has never refused to pay the bank to the extent of his guarantee, and indeed when a demand was first made, he paid a sum of Kshs.5.8 million which should have entitled him to be discharged from liability, but he was not. When he later saw a bank statement in respect of this loan on 3rd June 2003, he noticed that the principal debtor had also paid Kshs.4.7 million into the same account and subsequently made withdrawals from the account. Mr. Muturi wondered whether a bank can allow further withdrawals from an account once the liability has accrued and become due and payable. He submitted that any attempts to recover further monies from the applicant by selling his property in

Nairobi valued at Kshs.22 million, for a further demand of Kshs.4.1 million will render the intended appeal nugatory because the subject matter will have gone. He observed that the property still remains charged to the bank, so that the money is fully secured, as such, the balance of convenience is in favour of the applicant. He also submitted that under the Central Bank of Kenya (Amendment) Act 2000, it is provided that the interest chargeable shall not exceed the principal sum loaned, and that is what the bank is trying to do by attempting to sell the applicant's property, after he has paid Kshs. 5.8 million on account of his guarantee of the customer's loan. Mr. Muturi asked the court to grant an injunction and also an order for stay of execution of costs awarded against the applicant in **HCCC No. 560 of 2006**.

Mr. G. N. Karanja, learned counsel for the respondent submitted that though the applicant paid Kshs.5.8 million which was demanded by the bank, the debt has not been paid in full, so he saw no basis for the grant of an injunction order and the stay order. He submitted further that there is no arguable appeal as there is still money owing to the bank, and because of that, the appeal if filed, will not be rendered nugatory. He also challenged the applicant's counsel for not filing or annexing a memorandum of appeal to the application, and asked the Court to make an adverse finding on this.

In considering the application, we had recourse to what this Court said in **Samuel Naiba Kihara vs Housing Finance Company of Kenya Ltd and others** (Civil Application No.11 of 2007) (unreported), thus;

“This Court can only grant an injunction pending appeal under Rule 5(2)(b) of the Rules of this Court if the applicants satisfy us that both the intended appeal is arguable and further that unless the order of injunction in terms sought or a stay of execution is granted the intended appeal would be rendered nugatory see (*Madhupaper International Limited vs. Kerr* [1958] KLR 840; *J. K. Industries vs Kenya Commercial Bank Ltd & Another* [1987] KLR 506 and *Githunguri vs Jimba Credit Corporation Ltd* (No. 2) [1988] KLR 838”.

The applicant filed a Notice of Appeal in the superior court, and came to this Court to seek the relief of injunction as the previous one had been discharged, and an order for a stay of execution of the payment of costs awarded against him when his suit was struck out with costs. As already stated, his affidavit in support of the application contains some grounds of his intended appeal, part of which we have already reproduced in this ruling. Though no draft memorandum of appeal was filed or annexed to the application, we note that **Rule 5(2)(b)** provides:

“in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74, order a stay of execution; an injunction..... on such terms as the Court may think just”

In an application under **Rule 5(2)(b)** it is not necessary that the applicant should file a draft memorandum of appeal specifying the grounds of the intended appeal. It is sufficient if the grounds of the intended appeal are stated either on the body of the appeal or in the supporting affidavit.

On the issue raised by Mr. Muturi during submissions, on the Central Bank of

Kenya (Amendment) Act 2000, we have scrutinized the Act and found that the Act came into operation in 2001. The date of commencement was 1st January 2001. It introduced new sections in the Central Bank of Kenya Act, namely sections 39 and 39A. Section 39 says in part:

1. “The maximum rate of interest which specified banks or specified financial institutions may charge on loans or advances shall be the 91 – day Treasury Bill rate published by the Bank on the last Friday of each month, or the latest published all-day Treasury Bill rate, plus four *per-centum*:

Provided that the maximum interest chargeable under this section shall not exceed the principal sum loaned or advanced and provided further that this section shall only apply to contracts for loans or advances made or renewed after the commencement of this section”.

We are unable to say that the issue of applicability of those amendments to the matter before us is a frivolous one, nor do we find the contention that the applicant’s suit was not *res judicata*, unarguable on appeal. The applicant has thus satisfied us on the first requirement in the application.

The reason given in the application and in submissions to show that the appeal would be rendered nugatory if an injunction is not granted is that the applicant stands to lose his property worth Kshs.22 million, for a claim of interest of Kshs.4.1 million, after he has already paid to the bank, Kshs.5.8 million. We agree with the applicant that the appeal would be rendered nugatory if the injunction is not granted and the bank sells the property, because the applicant will have lost both the property and the money he paid to the bank, on account of his guarantee. It is not enough to contend, as the respondent did in this particular case, that the Bank was capable of compensating the loss. We therefore allow the applicant’s application for injunction and also grant an order to stay the execution of

“the order for costs awarded against the applicant in HCCC No. 560 of 2006 Nairobi, Milimani, pending the hearing and determination of the intended appeal”.

Costs of the application shall be in the intended appeal.

Dated and delivered at Nairobi this 4th day of July, 2008.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR