



IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appli. Nai 178 of 2008 (UR. 112/2008)

BAWAN ROSES LIMITED APPLICANT

AND

BARCLAYS BANK OF KENYA LIMITED RESPONDENT

(Application for injunction pending filing, hearing and determination of the intended appeal from the ruling of the High Court of Kenya at Nyeri (Lady Justice Kasango) dated 30th June, 2008

in

H.C.C.C. NO. 78 OF 2007)

RULING OF THE COURT

This is an application for injunction made under **Rule 5 (2) (b)** of the Court of Appeal Rules to restrain the respondent bank (bank) from offering for sale, entering into any agreement of sale, disposing, transferring or interfering with the applicants possession of L.R. No. 295/17 and L.R. No. 10874/7 pending the hearing and determination of an intended appeal from the ruling of the superior court (Kasango J) dismissing an application for an interlocutory injunction.

The two suit properties originally belonged to *Bawan Holdings Limited* which apparently was a sister company to *Bawan Roses Limited* (BRL) incorporated on 10th August, 1995. The authorized and issued share capital of BRL was Shs.26,520,000/= divided into 1,326,000 shares of Shs.20/= each held as to 1,325,999 shares by Bawan Holdings Ltd and as to 1 share by Betty-Ann Mboche. Sometime in 2003, Bawan Holdings Ltd agreed to sell the two properties to Mrs. Betty Ann Mboche and Mr. Wilson Mboche Waithaka for Shs.53,000,000/= and to save on the stamp duty it was further agreed that the two properties would be transferred to BRL and that Betty Anne Mboche and Wilson Mboche Waithaka would buy the entire capital of BRL at a price of Shs.10,000,000/=.

After the management bought out of BRL, Betty Ann Mboche and Wilson Mboche Waithaka became the shareholders and directors of BRL holding 795,599 and 530,400 shares respectively. The two properties were transferred to BRL on 9th May, 2003 pursuant to the agreement. The management buy out of BRL was financed by Shs.70,000,000/= advanced by the bank to BRL and apportioned as follows:

- (i) Shs.38,000,000/= term loan to discharge outstanding facilities owed by BRL to respondent bank.
- (ii) Shs.10 million to the previous shareholders to pay off initial investment loan.

- (iii) Shs.5,200,000/= to discharge the outstanding loan from International Finance Corporation to BRL.
- (iv) Shs.17,000,000/= overdraft to current shareholders.

The loan was secured by a mortgage and charge executed by BRL in favour of the respondent bank on 1st April, 2003. The two properties which are adjacent to each other and consolidated are situated west of Thika Municipality. L.R. No. 10874/7 comprises of approximately 2.8 acres while L.R. No. 295/17 comprises of approximately 173 acres. The two pieces of land are apparently registered under the Registration of Titles Act and are used for floriculture – flower growing.

It seems that the BRL did not service the loan to the satisfaction of the bank and by a statutory notice dated 15th September, 2005 the bank gave BRL a three months notice to pay Kshs.96,844,801/70 outstanding as at 7th September, 2005 in default which the bank would exercise its statutory power of sale. The bank did not however advertise the properties for sale until 28th February, 2007. The charged properties were not sold as BRL claims that it entered into negotiations with the bank from January, 2007. However, it came to the notice of BRL on 15th October, 2007 that the bank intended to sell the two properties by private treaty whereupon BRL filed a suit *Nyeri H.C.C.C. No. 78 of 2007* for various reliefs including a permanent injunction to restrain the bank from selling the two properties. The applicant BRL also filed an application for interlocutory injunction pending the hearing of the suit. In both the suit and the application, BRL complained, among other things, that the charge and mortgage was null and void for various reasons; that the statutory notice was fatally defective; that the bank had charged usurious and unconscionable interest rates; that the bank had clogged BRL's equity of redemption by, among other things, diverting a total of Shs.58,000,000/= paid by BRL towards the secured loan to pay the unsecured Euro loan debt of previous shareholder which liability was not transferred to BRL.

The bank opposed the application and filed an affidavit sworn by Faith Majiwa – Corporate Recovery Officer in which she denied the claims made by BRL and deposed that BRL had failed to disclose that it had tacitly admitted the debt and had offered to dispose of the charged properties to settle the debt. By a ruling dated 30th June, 2008, the superior court dismissed BRL's application for an interlocutory injunction on the ground that BRL had not shown that it had a prima facie case with a probability of success and that damages would not be an adequate remedy. BRL being aggrieved by the decision filed a notice of appeal dated 2nd July, 2007. It also filed the present application on 8th July, 2008.

The application is supported by the affidavit of Betty Ann Mboche a director of BRL. She deposes, among other things, that the applicant has an arguable appeal.

The bank opposes the application on the grounds contained in the replying affidavit sworn by its Legal Counsel, Nereah Okanga wherein she deposes, *inter alia*, that the BRL's right to redeem the properties has been extinguished by an agreement of sale entered between the bank and a third party on 24th September, 2008 and that the intended appeal is not arguable.

The jurisdiction of this Court under *Rule 5 (2) (b)* of the Court of Appeal Rules to grant an injunction pending appeal is discretionary and an applicant who seeks such discretion must show that a reasonable argument can be put forward in support of the intended appeal or appeal and further that unless an order of injunction is granted the intended appeal or appeal, if successful, would be rendered nugatory (see *J. K. Industries Ltd. vs. Kenya Commercial Bank Ltd. & Another* [1987] KLR 506. Further, as this Court said in *Madhupaper International Ltd. vs. Kerr* [1985] KLR 840), it would be wrong to grant an injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid.

The superior court was dealing with an application for an interlocutory injunction pending the hearing and determination of the main suit – which is an equitable and discretionary order. The superior court considered the principles for granting an injunction. It referred to three letters written by BRL to the bank which, in its view, amounted to admission of indebtedness. The superior court ultimately concluded that in the light of the admissions, BRL had failed to show a prima facie case with a probability of success or

that damages would not be an adequate remedy. The superior court appreciated that it was not required to decide the issues of fact in an interlocutory application for injunction but rather to weigh up the strength of each sides' case. The superior court resisted the invitation to make final findings of fact saying:

“I remind myself of that holding because the plaintiff by the amount of argument brought in this application seemed to require this court to make final findings of fact. That would not be proper at this stage”.

The applicant intends to appeal against the exercise of the judge's discretion refusing to grant an equitable remedy. The general principle is that an appellate court should not interfere with the exercise of discretion by a trial judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion resulting in injustice (see *Mbogo vs. Shah* [1968] EA 93). In order to satisfy us that the intended appeal is arguable, BRL has, in our view, to show that there are reasonable arguments to be raised in support of the appeal regarding the manner the superior court exercised its discretion – that is to say, arguments to show, *inter alia*, that the superior court misdirected itself either by failing to consider relevant matters or by considering irrelevant matters. The grounds of appeal in the draft memorandum of appeal and the submissions of the learned counsel for BRL are not fashioned that way. The superior court lamented that the applicant was asking the court to make findings of fact at an interlocutory stage. Some of the grounds of the intended appeal in the draft memorandum of appeal fault the superior court for failing to make findings of fact or law – e.g. failing to make a finding that the joint mortgage and charge was illegal and failing to hold that the bank was wrongfully appropriating payment for secured facility to unsecured facility. The superior court could not have made those findings at an interlocutory state. The finding of the superior court that the BRL had not shown a *prima facie* case with a probability of success was based on the admission of indebtedness in three letters. It has not been shown that on true construction of the three letters any arguable points arise regarding the admission of indebtedness.

Indeed, it is a common ground that BRL is still indebted to the bank although the actual amount is in dispute.

In the final analysis, we are not satisfied that the intended appeal is indeed arguable.

There is another intervening development which has a bearing on the present application. After BRL's application for interlocutory injunction was dismissed by the superior court and after the present application was filed on 8th July, 2008, the bank, on 24th September, 2008 entered into an agreement with Diana International Limited for the sale of the two charged property.

A copy of the agreement of sale has been provided. It shows that the agreed purchase price is Shs.82,000,000/= and that the purchaser was required to deposit Shs.8,200,000/= with the vendor's advocates on or before the execution of the agreement. The agreement further shows that the completion date of the sale is 28th November, 2008. It is the fear by BRL that the bank intended to sell the charged properties by private treaty that triggered the suit and the application in the superior court. It has now been confirmed that the bank had entered into an agreement to sell the charged properties before the present application was heard.

Mr. King'ara, learned counsel for the BRL submitted that the purported sale is of no consequence as it was done in contempt of the court and in order to derail the application.

Mr. Ogunde, learned counsel for the bank, on the other hand, contended that leave of the court to sell the charged properties was not required; that there was nothing to stop the bank from entering into an agreement of sale and that the agreement of sale is not illegal.

It is not true that the agreement for sale dated 24th September, 2008 is of no consequence. By the agreement of sale, the bank has divested itself of its rights as a mortgagee to the properties and conferred the rights to the properties, subject to completion, on the purchaser.

This Court has no jurisdiction in the present proceedings to adjudicate on the legality or otherwise of the agreement of sale. The agreement of sale can only be questioned in an appropriate forum. In our view, until the agreement of sale is set aside, it has pre-empted the present application and rendered it futile.

For the foregoing reasons, it is not necessary to decide whether or not the rejection of the application would render the intended appeal nugatory.

Having considered the application, we have come to the conclusion that it has no merit. In our view an injunction pending appeal would in the circumstances of this case cause greater hardship to the bank and to the purchaser of the charged properties than it would avoid. We dismiss the application with no orders as to the costs. Orders accordingly.

Dated and delivered at Nairobi this 17th day of October, 2008.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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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