



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 264 OF 2008 (UR 169/2008)

VANESSA GATHONI KAMAU.....APPLICANT

AND

BANK OF INDIA.....RESPONDENT

(Being an application for an injunction and/or stay of proceedings pending lodging, hearing and determination of an intended appeal from the ruling and orders of the High Court of Kenya

Nairobi (Milimani Commercial Courts) (Kimaru, J) dated 15th September, 2008

in

H.C.C.C. NO. 491 of 2008)

RULING OF THE COURT

The notice of motion which we are dealing with and which is the subject matter of this ruling is dated 25th September, 2008. It was lodged in court on 29th September 2008, under a certificate of urgency. It is brought under Rule 5(2)(b) of the Court of Appeal Rules, and prays for orders, that:-

- “1.
- 2.

3. THAT pending the filing, hearing and determination of the applicant’s intended appeal against the ruling of the Honourable Mr. Justice Luka Kimaru delivered on 15th September, 2008, an injunction be and is hereby issued restraining the respondent either by itself, its servants, agents, auctioneers or otherwise howsoever from selling, disposing, transferring, interfering with or alienating in any manner whatsoever the applicant’s property known as Nairobi Block 91/50 situated at Gigiri Nairobi pending the filing, hearing and determination of the appeal against the ruling and orders of Mr. Justice Luka Kimaru delivered on the 15th September 2008.

4. THAT pending the lodging, hearing and determination of the applicant’s intended appeal, the proceedings in Milimani High Court Civil Case Number 491 of 2008 be and are hereby stayed.

5. THAT the costs of this application be provided for”.

By its decision of 15th September 2007, the superior court (Kimaru, J), found the injunction application filed by Vanessa Gathoni Kamau (*hereinafter Vanessa*) in HCCC No. 491 of 2008, *res judicata*, and dismissed it with costs.

In his ruling, the learned Judge gave a background of the dispute as revealed in an earlier suit relating to the same suit premises namely, **L.R. No. NAIROBI/91/50** (*hereinafter the suit premises*), filed by Vanessa as director of Urban Village Enterprises Ltd (*hereinafter the company*). The learned Judge said:-

“The plaintiff is a director of a company known as Urban Village Enterprises Limited (hereinafter referred to as the company). The company filed suit being NAIROBI HCCC NO. 54 OF 2008 (Milimani Commercial Courts) against the defendant herein. In the said suit, the company sought various reliefs from the court, including a declaratory order that the defendant be permanently restrained from fettering or clogging the company’s equity of redemption and further from offering, advertising or selling by public auction or otherwise alienating or disposing of all that parcel of land known as L.R No. NAIROBI BLOCK 91/50 (hereinafter referred to as the suit property). The plaintiff swore an affidavit in support of the company’s application for temporary injunction in her capacity as a director of the company. In the said affidavit, the plaintiff swore that she had offered the suit property as a security to secure the loan which the defendant had advanced to the company”.

The suit was compromised by the recording of a consent order on 11th February 2007, in the following terms:-

“1. That a temporary injunction be and is hereby granted to the defendant by itself, its agents and/or servants (including its auctioneers M/s Dalali Traders) or any other auctioneers from offering/advertising, selling by public auction or otherwise, alienating, disposing and/or dealing in whatsoever manner with the premises known as L.R NO. NAIROBI/BLOCK 91/50 pending the hearing and final disposal of the suit herein.

2. That the applicant be and is hereby given 90 days from today’s date to liquidate the outstanding balances with the respondent.

3. That Lloyd Masika Limited do pay all proceeds of sale to the respondent through the applicant’s advocates, all the monies equivalent to liquidate the outstanding balances with the respondent from the sale of the following properties.

(a) *30 acres of the land located at Juja along Thika Nairobi highway and that the applicant shall provide to the respondent copy of an official search within 7 days from today.*

(b) *Two plots at Muthaiga North estate L.R Numbers and certified copies of the searches to be availed to the respondent within the next 7 days.*

(c) *L.R No. 209/2889/47 at Pangani in Nairobi, certified copy of official search to be provided within 7 days.*

(d) *The list of the motor vehicles to be sold and copies of the logbooks to be served on the respondent within the next 7 days.*

4. That failure to comply with one (1) above, the respondent be at liberty to sell the charged property forthwith and the charger and the applicant herein are deemed to have notice that the statutory period of sale begins to run from today.

5. That the applicant to meet the auctioneer charges, which shall be agreed upon or to be taxed by the court. The applicant to also meet the costs of the application to be agreed or taxed by court”.

The company failed to comply with the consent order as regards payment of the loan within 90 days, and on 16th May 2008 the company applied to court to vary the terms of the consent, particularly regarding payment within the 90 days period.

The affidavit in support of that application was sworn by Vanessa, the director of the company. The court allowed the application for variation and granted the company a further 60 days within which to repay the outstanding loan amount, but once more the company failed to pay the loan.

The learned Judge addressed this issue in his ruling when he said:-

“It is apparent that the company did not settle or repay the outstanding loan due to the defendant as it had undertaken in the consent recorded in Nairobi HCCC No. 54 of 2008 and varied by this court on 18th June 2008. Now the plaintiff has filed suit in her personal capacity seeking to restrain the defendant from exercising its statutory power of sale by disposing of the suit property i.e. L.R. NO. NAIROBI BLOCK 91/50. The plaintiff claims that she was not served with the requisite statutory notice before the defendant purported to exercise the said statutory power of sale. She further asserted that the defendant was barred by law from seeking to exercise the said statutory power of sale without first exhausting all the remedies available in the debenture between itself and the principal debtor, Urban Village Enterprises Limited (the company). The plaintiff argued that since she had offered the suit property as a guarantor, the right of defendant to call on the guarantee by selling the suit property had not accrued since the remedies provided in the instrument of debenture with the debtor company had not been exhausted. She further argued that by varying the terms of the loan agreement (by allowing the debtor to repay the loan beyond the stipulated 36 months that was provided in the said agreement), the plaintiff was entitled to seek a declaration from the court that she was not bound to honour the guarantee”.

About the issues presented in the two suits the learned Judge said,

“I have carefully considered the rival arguments made by the parties to this application. I deliberately set out the litigation history between the company and the defendant so that the decision this court will hereto render will be appreciated in the said context. It was clear that the issues presented to the court in Nairobi HCCC No. 54 of 2008 related to whether the defendant had the legal right to exercise a statutory power of sale in respect of Parcel L.R No. NAIROBI BLOCK 91/50 (the suit property). As stated earlier in this ruling, the said suit was compromised by consent. Indeed, the consent provided that in the event that the company failed to settle the outstanding loan, the defendant would be at liberty to sell the suit property”.

Commenting on Vanessa’s conduct in the two suits herein referred to, the learned Judge said:-

“The plaintiff cannot therefore approbate and reprobate. It is clear that the issues raised by the plaintiff in the present suit were substantially and conclusively determined by the court in the suit filed by the company. The present suit is therefore *res judicata*”.

Mr. Phillip Nyachoti, learned counsel for the applicant submitted that the applicant has an arguable appeal as shown in her draft Memorandum of Appeal. He submitted further that the applicant has not been issued with a demand notice under **section 65(2)** of the Registered Land Act. That being so no right of sale has accrued under **section 74** of the same Act.

Mr. Nyachoti recalled the submission in the superior court that the borrower company had paid a total sum of about Kshs. 29 million out of the demanded sum of Kshs. 36 million. That, in the circumstances, the respondent bank should have given notice to the applicant to redeem the property if she so wished.

According to Mr. Nyachoti, the applicant’s appeal is arguable as the respondent bank and the borrower company reached a compromise without the knowledge of the applicant who had charged her property to the bank.

A further point put forth by him to urge the court that the appeal is arguable was that the bank has not exhausted its remedies against the borrower, so it cannot go for the guarantor. That in the circumstances, it was not open to the learned Judge to pierce the corporate veil and reach the applicant.

On the nugatory aspect, Mr. Nyachoti submitted that the applicant's property, charged to the bank may be sold if the stay order is not granted, so her intended appeal will be rendered nugatory.

Mr. Havi, learned counsel for the respondent submitted that the applicant does not have an arguable appeal as the learned Judge found that the applicant's suit is *res judicata*, as defined in **section 7** of the Civil Procedure Act. That further, the applicant knows that the loan has not been paid in full or the unpaid sum tendered in court, so there cannot be an arguable appeal.

Mr. Havi referred to the various clauses of the charge instrument, and submitted that under it, the applicant is the principal debtor. That she swore an affidavit in support of an application in **HCCC No. 54 of 2008**, filed by the company against the bank, in which the court granted an injunction order, but the company failed to pay the debt within a specified period, and soon after that, the applicant filed a new suit to seek an injunction order to stop the bank from selling the same property. Mr. Havi posed the question, **"Does the conduct of the applicant entitle her to an injunction order?"** and answered it thus, **"I submit that the scenario here is an abuse of the process of court"**, to which Mr. Nyachoti retorted that under **Rule 5(2)(b)** of the Court of Appeal Rules, good conduct or otherwise of an applicant is not a requirement.

Mr. Havi submitted finally that the applicant's intended appeal will not be rendered nugatory as compensation can be an adequate remedy in the circumstances.

This Court has dealt with applications filed under **Rule 5(2)(b)** of the Court of Appeal Rules in many cases, one of them being **EUSTARINE ESTATES LTD vs LEONARD INVESTMENTS LTD, CIVIL APPLICATION NO. NAI. 59 OF 2007** (unreported), where the court said:-

"The applicant has incorporated in the record a draft memorandum of appeal. We have perused the grounds enumerated thereon and we would assume in favour of the applicant that it has an arguable appeal. However, it must always be remembered that an arguable appeal does not necessarily and cannot mean an appeal that is bound to succeed. Also, the fact that an appeal or intended appeal is arguable does not, by itself, entitle a party to an order of stay or a mandatory injunction as the case may be, such as is sought herein. Such a party must go further and show that apart from its appeal being an arguable one, unless an order of stay, or a mandatory injunction is granted pending the determination of the appeal, if the appeal were to succeed, that success would have been rendered nugatory by the earlier refusal to grant stay".

The applicant herein is seeking an order of injunction to restrain the respondent bank from selling her property known as **NAIROBI BLOCK 91/50** (*herein after the suit premises*) situated at Gigiri Nairobi, pending the filing, hearing and determination of an intended appeal. A draft memorandum of appeal containing 19 proposed grounds of appeal against the order of the superior court, is annexed. We have considered the grounds together with the submissions of Mr. Philip Nyachoti, learned counsel for the applicant, and are satisfied that the intended appeal is indeed arguable.

The applicant is also seeking a stay of proceedings **Milimani HCCC No. 491 of 2008**, a suit in which the company filed an injunction application, supported by her affidavit as already stated. The injunction order was granted when the parties recorded a consent but the company failed to pay the debt within the time agreed and the orders in that suit have remained unsatisfied and are still valid including the default clause to the effect that:-

"The default clause of the consent entered on 11th February 2008 shall apply in the event that the applicant shall fail to comply with the order of this Court regarding the mode of payment....."

The applicant must be aware of this and hence her prayer to have that suit stayed plus a further prayer that

her appeal if successful will be rendered nugatory if a stay is not granted. However, according to the materials placed before us, the applicant appears to be the prime mover of the two suits as she has sworn the relevant affidavits in both. Furthermore, the suit premises is the same in both suits, and a substantial part of the money borrowed from the respondent bank is still owing. Over and above that, the applicant has not shown that any ensuing damages would not be compensated if the intended appeal was successful, or that the respondent bank would be rendered impecunious in the near future, and would not be a viable entity capable of meeting damages that may be ordered against it.

Given these circumstances we are not persuaded that the intended appeal would be rendered nugatory if the appeal succeeds. Accordingly, we find no grounds to grant any of the orders sought in the Notice of Motion dated 25th September, 2008. In the result, we order that the application be and is hereby dismissed. The temporary order of stay of sale of the suit premises (**L.R. No. NAIROBI/91/50**) we granted on 2nd October, 2008 is hereby discharged. We make no orders as to costs.

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

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR