



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 340 of 2005

APOLLO OTIENO NYABOLA APPLICANT

AND

1. **STANDARD CHARTERED BANK KENYA LTD.**
 2. **JULIUS MWALIMU**
 3. **EMMA AKINYI OKONDO**
 4. **PETER OCHIENG WAMBI**
5. **PAUL MATAGARO T/A PAMOMA AGENCIES RESPONDENTS**

(An application for injunction pending appeal against the ruling and order of the High Court of Kenya at Nairobi (Ransley J) dated 27th October, 2005

in

H.C.C.C. NO. 188 OF 2005)

RULING OF THE COURT

This application for an order of injunction is made under **Rule 5 (2) (b)** of the Court of Appeal Rules.

The applicant Apollo Otiemo Nyabola seeks an order of injunction to restrain the first respondent (Bank) from selling, alienating advertising for sale or offering for sale L.R. Nairobi Block 72/1421 belonging to the applicant pending the hearing and determination of the applicant's intended appeal.

By a charge dated 5th September, 2003 made under the Registered Land Act and registered at the District Lands Registry, Nairobi, the applicant charged his land L.R. Nairobi/Block 72/142 in Southlands Estate, Nairobi, to the Bank to secure a business loan of Shs.1,500,000/= to be advanced to Emma Josephine Akinyi Okondo (Emma), the third respondent. According to the letter of offer dated 8th August, 2003 Emma was required to pay the loan by 36 equal monthly instalments of Shs.42,000/= plus interest at 19.5% p.a. maturity date being 31st August, 2006. The loan was further secured by a guarantee and

indemnity executed by the applicant in favour of the Bank on 12th August, 2003. As if that was not sufficient security, the applicant assigned his Domestic Fire Policy to the Bank as further security for the loan. According to the Bank, the loan was disbursed and credited to Emma's account with the Bank on 23rd September, 2003. It was immediately utilized. Emma did not service the loan and as a result, the Bank wrote several letters to the borrower and to the applicant demanding payment and threatening to realize the security.

The applicant instructed M/s. Rachuonyo & Rachuonyo Advocates who wrote to the Bank on 28th May, 2004 intimating that the consideration for the guarantee and the charge had completely failed for reasons stated in that letter and demanded that the charge be discharged and the title be returned to the applicant. The Bank replied promising to follow Emma and her husband as principal debtors of the account for full recovery first and to follow the applicant as a last resort.

There was a lull for sometime until 6th August, 2004 when the Bank's lawyers again demanded full payment and gave the applicant a three month statutory notice of sale of the charged property if he defaulted. The applicant's lawyers replied by a letter dated 1st September, 2004 stating that the applicant had received a letter dated 5th July, 2004 from Emma contending that she was never a beneficiary of the loan and further that she never signed any documents. A copy of the alleged letter dated 5th July, 2004 was sent to the Bank. By a letter dated 27th January, 2005 addressed to Emma and copied to the applicant, the Bank informed Emma that extensive investigations had revealed that the debt is rightly and legally due from Emma and the applicant. The Bank's lawyers, thereafter, on 6th April, 2005 demanded payment from the applicant and gave him a fresh three month statutory notice of sale of the charged property. As a consequence, the applicant filed a suit – *H.C.C.C. No. 188 of 2005* mainly seeking a declaration that the loan agreement, the guarantee and the legal charge are unenforceable and a permanent injunction to restrain the Bank from selling the charged property. The applicant at the same time made an interlocutory application seeking an order of interlocutory injunction to restrain the Bank from selling the charged property until the hearing and determination of the suit. The application for the interlocutory injunction was heard on the merits and dismissed by the superior court (Ransley J) on 27th October, 2005.

The applicant being aggrieved by the decision of the superior court filed a notice of appeal on 24th October, 2005 and the present application on 23rd December, 2005.

The applicant's case as pleaded in the plaint and as stated in the affidavits, is in essence that although he had agreed to provide security for a business loan to be advanced to Emma, Emma went abroad before the loan was processed in June, 2003 and in her absence, in August, 2003 he was, through fraudulent misrepresentation, induced to execute the charge after which the Bank released the loan to the 4th and 5th respondents who were not privy to the contract of lending and who used the loan other than for the purpose for which it was secured. The applicant, therefore, averred that there was no consideration given for the charge created.

The Bank's case on the other hand is briefly as follows.

On 20th May, 2003 Emma applied for a loan facility of Shs.1,500,000/= for the purpose of expanding the business operations and diversifying into car-hire services. On 6th June, 2003, the Bank made an offer of the loan to her to be secured by a charge over Kisumu Municipality Block 5/86 registered in the name of the 5th respondent. Later the security was substituted with the applicant's property Nairobi/Block 72/1421 after it was found that the lease to the 5th respondent had expired.

Julius Mwalimu, the 2nd respondent who was the Relations Manager (Small and Medium Enterprises Banking) of the Bank was dealing with the application for the loan. In the month of June, Emma went to the Bank accompanied by Peter Ochieng Wambi (4th respondent) and introduced her as her husband. She informed the 2nd respondent that she would be going overseas in connection with her business and during her absence the 4th respondent would co-ordinate the finalization of the loan facilities. She instructed the

Bank that once the loan formalities were concluded, the loan should be credited into her account. She further instructed the Bank in writing to pay Shs.500,000/= to Paul Matagaro (5th respondent) from the account. Finally, she executed a General Procuration Mandate, authorizing her husband to operate her account and instructed the Bank to honour transactions by her husband on her account.

Thereafter, the applicant instructed Housing Finance Company of Kenya (HFCK) who were holding the certificate of lease for his property to forward it to the Bank. HFCK informed the applicant that it did not have the certificate in its custody and advised the applicant to apply for a new certificate from Ministry of Lands. It appears that the applicant obtained a new certificate of lease, which was issued on 11th September, 2003.

All the required documents including the certificate of lease were forwarded to the Bank by the 4th respondent through a letter dated 18th August, 2003 after the Bank paid to Nairobi City Council, the rates and land rent. The 4th respondent also collected the legal charge from the Bank and later returned it to the Bank executed by the applicant. The charge was subsequently, registered at the Lands Office and the loan credited to Emma's account on 23rd September, 2003.

The charge shows that the applicant signed the charge before one Solomon Kivuva, Advocate on 3rd September, 2003. Solomon Kivuva, however, filed an affidavit in the superior court denying attesting the charge. The applicant asserts that he signed the charge and left it with the 2nd respondent.

The superior court in dismissing the application for an interlocutory injunction stated in part:

“It is clear from the documents and the application in evidence (sic) that he agreed to guarantee the loan to the 3rd Defendant and that he executed the charge

It appears that the 1st Defendant may have rued entering into the agreement to guarantee the sums paid to the 3rd Defendant by way of a loan and this is why he had his charge and guarantee replaced.

Having admitted executing the charge the allegations made by Mr. Kivuva cannot invalidate the charge at this stage. Prima facie the charge is properly executed.

From the evidence it appears that the 1st Defendant has a charge in its favour released money to the 3rd defendant's account in pursuance of this loan agreement. If the funds have been received by 4th Defendant that is not a matter for determination now. The 1st Defendant appears in good faith allocated funds to the 3rd Defendant at the request of the Applicant who guaranteed repayment”.

The principles upon which this Court exercises jurisdiction under **Rule 5 (2) (b)** are firmly settled. The discretion is unfettered. However, before the court can exercise its discretion in favour of the applicant in this case (like in others) the applicant should satisfy the court, firstly, that the intended appeal or appeal is not frivolous, that is, it is arguable and secondly, that unless, the order of injunction is granted the intended appeal, if successful, would be rendered nugatory.

We appreciate that the intended appeal is against an interlocutory and discretionary order and that before an appellate court can interfere with the exercise of a discretion by a judge, the stringent conditions enunciated in ***Mbogo v Shah*** [1968] EA 93 should be satisfied.

The applicant has stated the grounds of the intended appeal in paragraph 12 of the supporting affidavit. Mr. Amuga, learned counsel for the applicant has identified the arguable grounds in the appeal as including the grounds that, the charge is a forgery; the loan was not advanced to Emma but to third parties (4th and 5th respondents); that there was no power of attorney to authorise the husband to act for his wife and that consideration has failed.

Mr. Kairu for the 1st and 2nd respondents on the other hand submitted that the intended appeal is not arguable for several reasons including, the fact that the applicant has admitted on more than four occasions that he executed the charge; that the loan proceeds were credited to Emma’s account; that Emma’s account was operated by her husband in accordance with the mandate and that the issue of attestation which was raised late has no weight as the applicant admits due execution of the charge.

The facts in the affidavit evidence of Julius Mwalimu relating to the processing of the loan; the instructions given to the Bank by Emma, the authority given by Emma to her husband to operate the account and the disbursement of the loan by crediting it into Emma’s account were never refuted. Indeed, neither Emma nor her husband filed replying affidavits in the application.

The bank statements of Emma’s account show that the Shs.1,500,000/= was credited into the account on 23rd September, 2003. The applicant admits in several documents that the loan was credited into Emma’s account but claims that it was used by third parties who were not privy to the contract of lending without the authority of Emma. The applicant annexed a copy of a statement he allegedly made to Banking Fraud Department of Central Bank. In that statement, he reveals that Peter Ochieng Wambi – 4th respondent is his cousin. Although the applicant claimed that Emma also made a statement to the Banking Fraud Department denying authorizing her husband to use the money, she did not appear in the suit nor file a replying affidavit.

It appears that there were two separate contracts – the contract of lending between Emma and the Bank and the contract of guarantee and indemnity and charge between the Bank and the applicant. The relevant contract in this application is the contract between the Bank and the applicant. According to the charge, the consideration for the charge was the payment of shs.1,500,000/= to Emma and not the signing of the loan agreement or the utilization of the money for any particular purpose. Moreover, the claim by the applicant that it was fraudulently misrepresented to him that the loan would not be released to Emma until she returns to the country is not prima facie supported by the charge. The terms of the charge can only be determined by the charge itself and extrinsic evidence to vary, add, subtract from its terms is not admissible except in limited cases (see **section 97** and **98** of the Evidence Act). According to the terms of the charge the sum of Shs.1,500,000/= was to be paid to Emma on or before the execution of the charge. When the applicant gave the certificate of lease to the 4th respondent and executed the charge he was aware that Emma was overseas.

Lastly, the charge is *ex facie* executed and attested. The applicant admits executing the charge. He does not say that he did not understand its terms or raise the plea of “*non est factum*”. The subsequent registration of the charge raises a presumption of validity.

It appears to us from the foregoing that inspite of the general allegations of fraud made by the applicant, there are really no arguable grounds in the intended appeal.

For the foregoing reasons, the application is dismissed with costs to the 1st and 2nd respondents.

Dated and delivered at Nairobi this 17th day of March, 2006.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR