REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 306 of 2005

JOHN NDUATI KARIUKI T/A JOHESTER MERCHANTS …….
……..APPLICANT

AND

NATIONAL BANK OF KENYA LTD. …….....……..……
RESPONDENT

(An application for injunction in an intended appeal against the ruling and order of the High Court of Kenya at Nairobi (Azangalala, J.) dated 27th October, 2005

in

H.C.C.C. NO. 626 OF 2003)

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RULING OF THE COURT

By his notice of motion dated 14.11.05, the applicant, ***John Nduati Kariuki*** T/A ***Johester Merchants*** seeks an order of injunction under ***Rule 5(2)(b)*** of the rules of this Court to restrain the **National Bank of Kenya Ltd** from selling, disposing or transferring properties LR Numbers: -

1) Dagoretti/Waithaka/1075.

2) Dagoretti/Waithaka/1076.

3) Dagoretti/Ruthimitu/556

pending the hearing of an intended appeal. The intended appeal is against the ruling of the superior court (Azangalala, J.) made on 27.10.05 refusing to grant a similar order. A notice of appeal has already been filed. It is thus an appeal challenging the discretion exercisable by the superior court under ***Order 39*** of the ***Civil Procedure Rules*** but this Court has independent original jurisdiction to exercise its own discretion under ***rule 5 (2) (b).*** The purpose of an injunction pending appeal is to preserve the status quo pending the hearing of the appeal. Although the jurisdiction of the court is discretionary, it would however be wrong to grant an injunction where the intended appeal is not arguable or is frivolous or where the refusal to grant the injunction would not render the intended appeal nugatory or where the order of injunction could inflict greater hardship than it would avoid. See **Madhupaper International Ltd v Kerr [1985] KLR 840**, **Githunguri v Jimba Credit Corporative Ltd (No. 2) [1988] KLR 838** and **J.K. Industries Ltd v KCB [1982-88] 1 KAR 1088.** The above principles would of course be considered against the facts and circumstances of each case. Has the applicant made out a case for preservation of the status quo in this matter? First, a brief background to the application: -

John Nduati Kariuki (the "*applicant"*) has had a long association with the National Bank of Kenya ("*the Bank"*) as its customer since 1980. He operated bank accounts under various business names, including a current account in the business name of "***Johester Merchants***". On diverse dates between 24.09.80 and 10.09.97, the applicant sought from the Bank, and the Bank advanced to him, various loans, overdrafts and other banking facilities for the business of ***Johester Merchants***, in aggregate amounting to Shs.14 million. As security for the loans and other facilities the applicant executed legal charges which were subsequently registered in favour of the Bank in respect of the applicant's property known as **Dagoretti/Ruthimitu/556** (plot 556) which is a fully developed 3.66 acres with a homestead described by the applicant as a "*palatial residence with all conveniences attached"*, a maize flour-mill factory and horticultural crops, near Dagoretti High School, Nairobi.

Initially there were no apparent difficulties in servicing the various banking facilities but the Bank started raising some concerns in 1998/99. On 19.8.98, a limited liability company "***Johester Merchants Ltd"*** *("the company")* was duly registered, with the applicant and one ***Stephen Kariuki Nduati*** as the first subscribers and directors. The Company took over several existing accounts of the applicant, with his authority, and the Bank agreed, at the applicant's request, to restructure the outstanding loans and banking facilities in January, 1999. In August 1999 the applicant executed a Guarantee and Indemnity agreement in favour of the bank in relation to facilities granted to the Company upto Shs.30 million. Owing to increased borrowing, the Bank sought and the applicant agreed to give additional security in form of two parcels of land: 1. **Dagoretti/Waithaka/1075** (plot 1075) an undeveloped plot measuring ¼ of an acre near Waithaka township.

2. **Dagoretti/Waithaka/1076** (plot 1076) an undeveloped plot measuring ¼ of an acre adjacent to plot 1075.

The securities were perfected in July 2001 after the applicant had acknowledged in June 2001 that his existing liabilities and those of the company stood at **Shs. 23,098,138.95.**

Matters came to a head in November 2001 however when the bank served a statutory notice of its intention to sell the three charged properties within 3 months in default of payment of Shs.20,366,271.85. The notice was not acted upon immediately despite non-compliance therewith but subsequently notifications of sale were served and the properties were due for auction on 30.04.03. That auction was suspended however after negotiations and execution of a document by the applicant on 30.4.03 acknowledging the outstanding debt of Shs.29,443,697.75 and further undertaking to submit proposals for repayment after clearing the auctioneers' charges. The proposals given were apparently not acceptable to the bank whereupon further notifications of sale were served and the properties were set for auctioning on 22.10.03. That is when the applicant went before the superior court on 03.10.03 and filed suit against the bank asserting that he had already paid all sums advanced to him by the bank and that the bank had mishandled his account, *inter alia*, by charging exorbitant and illegal interest thereon, transferring deposits by the applicant to other accounts unknown to him and failing to provide him with regular statements of the accounts. He pleaded that he had indeed overpaid the bank by Shs.48,072,109. He also asserted that the bank's statutory power of sale had not arisen; that there were no valid notifications of sale served on him; and that the charges registered against the three titles given to the bank were not valid. He sought a permanent injunction to restrain the bank from selling the properties and also declarations that the statutory power of sale had not arisen due to invalidity of the charges; that the notifications of sale were invalid; and that the applicant had fully redeemed his loan account with the bank. Finally he sought orders that the bank should discharge the charges and return the titles to him, and render true and accurate account of his bank account.

With the filing of that suit, the applicant took out a chamber summons seeking a temporary injunction to stop the intended auction and for the *status quo* to be maintained pending the hearing of the suit. He obtained an *ex parte* order stopping the scheduled auction but withdrew the application before it was heard *inter partes*. The bank sought to realize the securities again in June 2004 but another application was filed and an *ex parte* injunction was obtained to stop the sale on 18.06.04. The main suit was scheduled for hearing on 3.5.04 but was dismissed for non-attendance by the applicant. It was however reinstated by consent on 26.11.04. Another auction was scheduled for 16.03.05 but the applicant obtained

an *ex parte* order stopping it on 14.03.05. The application was withdrawn at the *inter parte* hearing. When the bank tried to re-advertise the property for sale on 27.04.05, the applicant brought yet another application on 26.04.05 and obtained an *ex parte* injunction stopping the auction. That was the application determined by the superior court which provoked the intended appeal.

The issues placed before the superior court on which it expressed its *prima facie* view were: -

"**(a) The parties having agreed to proceed to hearing of the suit the Defendant was estopped from exercising its statutory power of sale.**

(b) The Defendant did not serve a valid Statutory Notice.

(c) Auctioneers' Notifications of Sale were invalid.

(d) The sums advanced under the charge of 1997 have been over paid by Kshs. 48,720,101/=.

(e) Interest charged was excessive.

Upon consideration of the facts on record, the submissions of both counsel, and the law applicable, the learned Judge made the finding that the applicant had not established a *prima facie* case with a probability of success. In his view, there was a valid statutory notice served on 23.11.01; no issue arose from the notifications of sale since the auction had been cancelled; there was no estoppel or restraining order against the exercise of the statutory power of sale; the overpayment alleged in the plaint at shs.48,720.101 was inconsistent with the pleading in the application that the applicant's "*liability, if any, is less than the amount demanded by the bank"*, and also the express acknowledgement by the applicant of the indebtedness as stated by the bank on 29.4.03, 30.4.03 and 11.6.03; interest rates and other terms were set out in the security documents which were executed by the applicant and he took full benefits thereunder. The applicant will be challenging those findings on appeal and that is why he seeks the preservation of the *status quo*.

As stated earlier, ***rule 5(2) (b)*** requires that we apply our own minds *de novo* on the suitability or otherwise of the relief sought before us. It is not an appeal from the superior court Judge's discretion to ours. Before us, learned counsel for the applicant Mr. Letangule raised three issues in an attempt to persuade us that the intended appeal is arguable and we shall apply our minds to the submissions made. He argued firstly, that the bank introduced into the proceedings before the superior court, a limited liability company - **Johester Merchants Ltd.-** which is a different person from the applicant. The pleadings in the plaint however related only to the loans advanced to the applicant for which he gave out the three parcels of land registered in his name as securities. The bank was aware that it was wrong to introduce the Company in the case. That is why, after determination of the application before the superior court, the bank applied for amendment of the defence and for introduction of a counterclaim against the Company. Matters relating to the company should not therefore have been considered in the application before the superior court since the parties ought to have been bound by the pleadings as they then were on record. In response to that argument, learned counsel for the bank, Mr. Ojiambo, found no impropriety in introducing the Company in the bank's replying affidavit since the applicant had denied knowledge of it in the supporting affidavit and the circumstances of incorporation of the Company were intertwined with the restructuring of the applicant's indebtedness to the bank. The securities given by the applicant, including a personal guarantee affected loans advanced before and after incorporation of the Company.

It is indeed so that the applicant denied before the superior court that he knew anything about the Company or any loans advanced to it. He swore in his supporting affidavit: -

"**12. THAT the said analysis revealed that there were numerous transfers made from my said current account whose destination is unknown to me and which were made with neither my knowledge nor permission. I indeed complained to the Ministry of Justice and Constitutional Affairs of the manner in which the Defendant had handled my accounts with them. ……**

13. …… …….

14. ……**..…….**

15. THAT it has emerged from evidence previously adduced by the Defendant in this suit that the Defendant intends to exercise its statutory power of sale in respect of a debt owed to it by Johester Merchants Limited.

16. THAT I am not aware of a debt owed to the Defendant by Johester Merchants Limited.

17. THAT I have never guaranteed any loan taken from the Defendant by Johester Merchants Limited.

18. THAT the charge documents executed by myself relate to loans and credits facilities extended by the Defendant to myself trading as Johester Merchants.

19. THAT Johester Merchants Limited is a limited company and I am advised by my advocates on record (which information I verily belief to be true) that it is a distinct and separate entity from myself, I annex hereto and mark JNK 6 copies of a certificate of incorporation with articles of memorandum of association for the said Johester Merchants Limited."

In view of those denials it was incumbent on the bank to explain the Company's role in the accounts in issue, which it did, and we find no impropriety in such pleadings. We have perused the records relating to the Company's incorporation, various documents from the applicant authorising take-over by the Company of the accounts hitherto operated by the applicant as the sole proprietor and the various security documents including a personal guarantee executed by the applicant containing terms that would entitle the bank to consolidate accounts. The applicant's averments about the Company and its role in the proceedings was obviously untruthful and we express our grave doubts about the arguability of that ground of intended appeal.

Secondly, it was argued that the statutory notice issued on 23.11.01 was invalid. The notice must not only be valid but sufficient as stated by this Court in **Trust Bank Ltd v Eros Chemistry Ltd & Anor CA 133/99 (ur).** That was a case considering the provisions of ***Section 69 (A) (1)*** of the ***Transfer of Propriety Act*** and the Court stated: -

"**In our judgment, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months' period to lapse after service of notice. In our judgment, a notice seeking to sell the charged property must expressly state that the sale shall take place after the three months' period. To omit to say so or to state a period of less than three months for sale (as in the Russell case) is to deny the mortgagor a right conferred upon him by statute. That clearly must render the notice invalid."**

The relevant securities in this matter are registered under the **Registered Land Act, Cap 300** and the statutory notice therefore falls under ***Section 74*** of the Act. It also requires 3 months notice. The complaint however is not about sufficiency of the notice but the fact that the notice issued and served on that day referred to the loans advanced to **Johester Merchants Ltd.** and to a guarantee thereon by the applicant. The notice was therefore invalid, according to Mr. Letangule, and could not found the bank's statutory power of sale. For his part Mr. Ojiambo saw nothing wrong with the notice being served on the applicant when the loans had been advanced to the applicant and to the Company on the express guarantee of the applicant. He submitted that after service of the statutory notice the applicant called on the bank to negotiate settlement of the accounts and eventually accepted the amount due on 30.4.03. The challenge to the statutory notice is therefore an afterthought.

We have carefully examined the statutory notice issued and served on 23.11.01, and we express similar

doubts as we did on the first issue, that this ground is arguable. The chargor, who was the applicant, was entitled to the statutory notice under ***Section 74*** of the ***Registered Land Act*** and it is evident that upon service of the statutory notice, the applicant responded thereto by calling on the bank to negotiate settlement of the amounts due. It was not questioned until the year 2003, and on the face of it, it is a valid notice.

The third issue raised by Mr. Letangule related to the notification of sale issued and served by the auctioneers. The issue was not considered by the superior court, but in counsel's view, the notification ought to have been declared invalid. Under ***rule 15(d)*** of the ***Auctioneers Rules 1997***, the auctioneer must:

"give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction."

Any notice that is less than 45 days would therefore be invalid. In this case the auctioneer issued various demand notices and notifications of sale in February and August 2003 and in each case gave notice of "**forty five (45) days from the date of service"** to pay the amount due, which Mr. Letangule submits is less than the statutory period. We think, for ourselves, that the construction placed on that provision by Mr. Letangule is rather strained and that the wording of the notification is consonant with the provisions of the rule.

Finally Mr. Letangule urged the view that the applicant had a very clear case of having overpaid the loans by over Kshs.48 million and for wrongful amounts having been loaded onto the loan account by the bank. No decision on the correct amount can therefore be made without hearing the parties. Mr. Ojiambo stood by the bank's figures, which he said, and there is support for it, were furnished to the applicant with all the supporting statements. The intention of the applicant, he submitted, was to delay payment of the loans for as long as he can until they exceed the securities held by the bank. At all events a dispute on accounts cannot be a basis for grant of an injunction.

The applicant may well in due course make out a case to challenge the calculations of his indebtedness to the bank. He may or may not be successful. The legal issue however is whether the dispute on the outstanding loan can scuttle the exercise by a chargee of its power of sale. On that legal proposition this Court has expressed itself before and we need only refer to **J.L. Lavuna & others V. Civil Servants Housing Co. Ltd. & Another** – Civil Appl. No. NAI 14/95 where Kwach J.A. stated:-

"**I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage. The legal position on this point is to be found in Halsbury's Laws of England, Volume 32, 4th edition at paragraph 7255:**

"**725 When mortgagee may be restrained from exercising power of sale.**

The mortgagee will not be restrained form exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive." emphasis added.

Once again we doubt the arguability of that ground in view of the authorities.

In all the circumstances of this case we express the view, without being definitive or final about it at this stage, that the intended appeal is not arguable. Being of that view, we need not consider the nugatory aspect of the matter. If were to consider it however, we do not think, as argued before us, that ***Section 52*** of the ***Transfer of Property Act*** applies since the securities involved in this matter are registered under the ***Registered Land Act*** which Act excludes the application of the former under ***Section 164***. Secondly

section 77 (3) of the ***Registered Land Act*** provides for damages where the chargee irregularly exercises the power of sale and an injunction would not normally lie where damages are sufficient. Finally we have considered the factors which the court must have in mind in considering this aspect of the matter as stated **Reliance Bank Ltd. v Norlake Investments Ltd [2002] 1EA 227.** A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it. He offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents. He cannot be heard to say, as he does, that the securities are unique and special to him. We think the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capability has not been challenged.

The upshot is that the application is dismissed with costs.

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

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

……..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR