



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 171 of 2006

BAO INVESTMENTS AND OFFICE MANAGEMENT SERVICES LTD
APPLICANT

AND

HOUSING FINANCE CO. OF KENYA LTD
RESPONDENT

(Being an application under certificate of urgency for injunction arising from the ruling of Justice Mwera delivered on the 29th of May 2006

in

H.C.C.C. NO.75 OF 2005)

RULING OF THE COURT

In this application expressed to be brought under **rule 5 (2)(b)** of the **Court of Appeal Rules (the Rules)**, Bao Investments and Office Management Services Ltd (*the applicant*) prays for injunctive relief against Housing Finance Company of Kenya Ltd (*the Respondent*), to restrain it from selling property known as **Kisumu Block 8/14** pending the hearing and final determination of both **Kisumu High Court Civil Case No. 75 of 2005** and an intended civil appeal against the decision of the superior court in the above suit in which that court declined to grant it an injunction on terms as prayed in the present application.

The applicant had borrowed a sum of Kshs.5. million on the security of the aforementioned property. It, however, fell into arrears in repayment and the respondent took steps to realize its security. The applicant brought **Kisumu High Court Civil Case No.364 of 2000** praying for inter alia, an injunction to restrain the respondent from selling the said property and based its case on two main grounds. Firstly, that the instrument of charge lacked the verification certificate as required by **section 110** of the **Registered Land Act Cap 300 Laws of Kenya (RLA)**. Secondly, that the charge lacked a certificate as required by **section 74 RLA**. An interlocutory application based on those, amongst other grounds, was heard and dismissed with costs by a Commissioner of Assize, P.K.K. Arap Birech, on 14th September, 2001. A second application for injunction in the same suit was dismissed on 20th December, 2004.

On 16th June, 2005, the applicant filed **Kisumu High Court Civil Case No.75 of 2005** and an application in that suit for injunction on the same grounds as those in the application which Commissioner of Assize, Birech disallowed.

Kisumu High Court Civil Case No.364 of 2000 was withdrawn before **Civil Case No.75 of 2005**

was filed. The applicant filed a notice of withdrawal of the suit on 16th June 2005, the same day the second suit was filed. But the applicant did not disclose in the later suit that it had earlier brought the former suit and that an earlier application or applications for injunction by it had been disallowed by the superior court. This was in breach of **O.VII rule 1 (1)(e) of the Civil Procedure Rules** which provides that:

“ 1(1) The plaint shall contain the following particulars –

(a) ...

(b) ...

(c) ...

(d) ...

(e) An averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter”;

But if there had been previous proceedings, the plaintiff would be obliged to disclose the same. The applicant having failed to comply with the requirements of the aforesaid rule the respondent did not think it deserved the equitable relief of injunction. A replying affidavit sworn by Joseph Kania, the Manager Legal Services, of the respondent, was filed, and in that affidavit Joseph Kania deposed, inter alia, that because of that omission the applicant was not being candid to the court and its application for injunction was therefore an abuse of the process of the court.

Mwera, J. heard the application. On grounds of non-disclosure of the previous proceedings between the parties and **res judicata** he dismissed the injunction application with costs. The applicant was aggrieved and intends to appeal against that ruling. In the meantime he brought this application.

In his submissions before us Mr. Abongi for the applicant conceded that it was improper for the applicant's former counsel to withdraw the previous suit and to file another one. He however urged that because a serious point of law was raised the court should have dealt with it. He submitted that **res judicata** did not arise as in his view the issues raised in the earlier matter were not exhaustively dealt with. Among those issues was failure to include a certificate in the instrument of charge as to the effects of a charge over immovable property.

Mr. Issa for the respondent submitted before us that failure by the applicant to disclose that there were previous proceedings between the parties showed lack of good faith. He cited the case of **Uhuru Highway Development Ltd .v. Central Bank of Kenya, Exchange Bank Limited (in liquidation) and Kamlesh Mansukhlal Pattni**, Civil Application No. NAI. 140 of 1995 (65/95UR) in support of his submission. In that decision the Court cited with approval the holding in the case of **The Owners of The Motor Vessel “Lilian S”** then unreported but which is now reported in [1989] KLR 1 and in that case the Court adopted the holding in the old English case of **R. v. Kensington Income Tax Commissioners ex parte Princess Edmond De Polignac** [1917] 1KB 486, which is a leading authority on the matter.

Mr. Issa also submitted that the matter before Mwera J. was **res judicata** and the applicant could only either appeal or apply for review of the earlier decision of the superior court on the matter, but as the previous suit had been withdrawn, it was estopped from bringing any fresh action on the same facts.

This is only an application for injunction. We are aware that the applicant is yet to file his appeal, and care must be exercised to obviate expressing concluded views on the issues which will be canvassed in the appeal. That is not an easy task as in certain instances it may not be possible, as in the instant case, to avoid expressing certain definite views on the merits of the intended appeal. That is the more so where as here, the issue goes to the jurisdiction of the Court to handle a matter.

In an application under **rule 5(2)(b)** the Court exercises original jurisdiction. An applicant is obligated to show, firstly, that his appeal or intended appeal is arguable. And secondly, that unless he is granted an injunction or stay as the case may be, his appeal or intended appeal, if successful, will be rendered nugatory. [see **Reliance Bank Ltd (in liquidation) v. Norlake Investments Ltd**. Civil Application No. Nai.93 of 2000.

In the matter before us Mwera J. came to the conclusion that the court had been misled by the applicant with a view to obtaining an unfair advantage in the suit. The applicant knew it had unsuccessfully applied for a restraining injunction, but nonetheless applied afresh for a similar order, but without disclosing it had earlier been denied these by the same court. It was granted, ex parte, a temporary order of injunction on 17th June, 2005, which otherwise it would not have obtained were the true facts known to the court. It was in a situation such as this that in **R. v. The Kensington Tax Commissioners** (supra) that the court said:

“where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived.”

The applicant does not deny that it withheld material facts from the court relating to previous proceedings between the parties. It does not deny it obtained, ex parte, a temporary injunction on the same facts as had been relied upon in a previous withdrawn suit between the parties which facts it withheld from the Court.

In those circumstances we do not, prima facie, think any triable issue is disclosed.

Besides, it was common ground that the application before Mwera J. was on the same facts and terms as an earlier one handled by Commissioner of Assize, Hon. Birech.

In the circumstances we find no basis for holding that a triable issue is disclosed. Having come to that conclusion we do not consider it necessary to consider whether unless the injunction prayed for is granted, the applicant’s intended appeal if successful, will be rendered nugatory.

In the result we dismiss the application lodged in the Court on 21st June, 2006, with costs to the respondent in the application.

Dated and delivered at Nairobi this 14th day of July, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR