REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civ Appli 153 of 2006 (UR 87/2006)

ABDUL KASSIM HASSANALI GULAMHUSSEIN KHAKI …….....……
APPLICANT

AND

SOUTHERN CREDIT BANKING CORPORATION LIMITED ….....…
RESPONDENT

(Application for injunction pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Mombasa (Sergon, J) dated 23rd May, 2006

in

H.C.C.C No. 270 of 2005)

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RULING OF ONYANGO OTIENO, J.A

The application before us is dated 2nd June, 2006. It is by way of a notice of motion brought under **rules 5(2) (b)** and **42** of the Court of Appeal Rules. It seeks two main orders which are that:

"**1. This Honourable Court be pleased to issue an injunction directed at the respondent whether by themselves, their servants or agents, Advocates, Auctioneers or otherwise whatsoever from interfering with the applicant's rights of possession, advertising for sale, disposing off, selling by public auction or otherwise howsoever at any other time or by completing by transfer or otherwise of any sale concluded howsoever of (sic) in any way interfering with the applicant's ownership over Mombasa/Block X/211 the property subject matter of the suit in the superior court pending the filing, hearing and determination of the intended appeal.**

2. The applicant be at liberty to apply for any such further orders and or directions as it will deem fit."

The last order sought is that the costs of the application abide the intended appeal. The reasons for the application are in a nutshell, first that the intended appeal is arguable in that the applicant is a joint owner of the subject property L.R. No. Mombasa/Block X/211; that the same property was charged to the respondent without his knowledge and/or consent as his consent on the charge was forged and consequently the charge is a nullity; that he admits that there was a prior suit filed jointly by all the

owners of the property but by the time that suit was filed, he had not discovered that his signature on the charge was forged and so that plea was at the time not available to him; that the superior court erred in considering objection that was before it and which was on grounds of *res judicata* as application on grounds of stay; that the learned Judge erred in finding that a suit could be stayed merely because there was an intended appeal; that the superior court failed to consider the issues raised in the two separate suits it was considering; that the judge considered evidence in a preliminary objection matter, and that the previously instituted injunction application was not pending in the superior court or in any other court. The second main reason for the application was that unless the court granted the injunction sought, the intended appeal, if it eventually succeeds, will be rendered nugatory on the grounds that the property, the subject matter of the intended appeal, will have been sold, transferred and alienated and thus the applicant will have been deprived of the only property he has in Kenya and hence the injury to him cannot be compensated in damages. There was a lengthy affidavit in support of the application sworn by the applicant which mainly emphasizes the reasons set out hereinabove. It is however important, for what I will state later, to set out paragraph 3 of the same affidavit. It states:

"**THAT, sometime in the year 2004, Sajjad informed me while I was in England that the property was under threat of sale by the respondent and he had filed suit to restrain the sale in the name of all the registered owners being High Court Civil Case No. 199 of 2004 at Mombasa High Court."**

At paragraphs 5 and 6 of that affidavit, the applicant states that it was after the interlocutory application in that suit was dismissed and an application for stay was filed before this Court, that he saw, on reading the respondent's affidavit and the annexed charge, that his alleged signature on that charge was forged and that is what necessitated the said suit in the superior court which is the genesis of this application. The respondent opposed the application and filed a replying affidavit sworn by its manager, Legal Services, Mr. Wilfred Oroko, in which the applicant's position is that the application in the superior court which was stayed giving rise to this application was a duplication of an earlier application filed in H.C.C.C No. 199 of 2004 and the allegation of forgery of the applicant's signature on the subject charge is not valid, as in any case, the applicant, despite being asked to avail himself for examination by forensic expert appointed by the respondent, avoided the same examination.

I think a brief background to this application would be necessary for appreciation of the issues that were before the superior court (Sergon, J) and which are now before us.

The applicant, together with two others, are the owners and registered proprietors of property L.R. No. Mombasa/Block X/211, the subject matter of this application. One of the registered owners, together with another person, were directors of a company called Nema Enterprises Limited. Nema Enterprises Limited approached the respondent for and obtained credit facilities for an aggregate sum of Ksh.26,000,000/=. The agreement for the same facility was made on 8th November, 2001. The facility was secured by a charge over the subject property. Further agreements were made varying the agreement of 8th November, 2001 and the same property together with others were used as securities for those other further agreements for other facilities. Later there arose some misunderstanding as the applicant together with others felt they had fully repaid the money advanced and that the respondent was in breach of the various agreements. The respondent, on the other hand, threatened to sell the securities and indeed advertised the subject property for sale on 24th September, 2004. The applicant, together with four others including Nema Enterprises Limited, filed H.C.C.C No. 119 of 2004 in the superior court at Mombasa on 20th August, 2004. Together with that application, they filed another application by way of chamber summons dated 20th August, 2004 in which they sought one prayer, namely, that the respondent be restrained by way of temporary injunction from disposing off and/or in any other manner advertising, alienating or selling the property L.R. No. Mombasa/Block X/211 pending the hearing and determination of the suit. That application went before the superior court under certificate of urgency and an ex-parte interim injunction order was granted to the applicants pending the hearing of the application. When the application came up for interparte hearing, the superior court (Mwera, J) declined to confirm the ex-parte injunction and the application was dismissed with costs on 6th October, 2004. The applicant together with the others felt aggrieved and moved to this Court on appeal and at the same time filed Civil Application Number 262 of 2004 under **rule 5(2) (b)** seeking orders to restrain the respondent from

exercising its statutory right of sale. That application was dated 27th October, 2004. This Court granted interim temporary orders but the same were lifted on 18th January, 2006. About one month before the lifting of the temporary orders by this Court, the applicant moved to the superior court and filed H.C.C.C No. 270 of 2005 on 14th December, 2005 which is the genesis of the application before us. In that suit, he sought among others, injunctive orders to restrain the present respondent from foreclosing on, selling, or in any other way alienating or dealing with or interfering with the applicant's ownership and quiet possession and enjoyment of the property L.R. No. Mombasa/Block X/211 pending the determination of the suit (whatever that means as this was a prayer in a plaint). Together with that plaint, the applicant also filed chamber summons dated 14th December, 2005 in which he prayed for only one order of injunction and that prayer was coached in exactly the same words as the prayer in the plaint I have referred to hereinabove. When that application was served upon the respondent, it raised a preliminary objection dated 2nd February, 2006. That preliminary objection was premised on the ground that the summons dated 14th December, 2005 was *res judicata* and was also *res subjudice* as a similar application had been filed, heard and rejected by the superior court and an appeal against the same rejection was still pending in the Court of Appeal. When the chamber summons came up for hearing before the superior court (Sergon, J) the preliminary objection was, as is the proper procedure, heard first. After considering the preliminary objection, the learned Judge upheld it stating *inter alia* as follows:-

"**I have carefully considered the intricate and inter-related issues raised in the preliminary objection. Whichever angle one takes, the truth is that the two doctrines of res judicata and res subjudice are applicable in this dispute. After critically weighing the scales of arguments, I am satisfied that the most appropriate principle to apply in this ruling that of res-subjudice (sic). The principle of res judicata will only be applicable upon the outcome of the decision of the Court of Appeal over the appeal against the ruling of 6th October, 2004.**

In the end I find the preliminary objection well founded. The same is upheld with the result that the application by summons dated 14th December 2005 is stayed pursuant to section 5 of the Civil Procedure Act pending the outcome of the appeal against the decision of Justice Mwera dated 6th October 2004."

It is against the above ruling that the applicant intends to appeal. Both the learned counsel for the applicant, Mr. Oraro, and for the respondent, Prof. Githu Muigai, addressed us at length on the mater and I have considered the same together with authorities filed by them. For what will be apparent later in this ruling, I will not go into details on their submissions for fear of prejudicing the intended appeal.

The application is brought, as I have stated above, under **rule 5(2) (b)** of this Court's Rules. The Court, in considering an application brought under that rule exercises unfettered judicial discretionary powers. However, like all judicial discretions, the same must be applied upon reason and not compassionably. It is now well established through several decided cases, one of them being the case of **Githunguri vs. Jimba Credit Corporation Ltd**. **(No. 2) (1988) KLR 838**, that the principles on which the Court should base its unfettered discretion are first, that the applicant must show that he has an arguable appeal. In other words, that the appeal or intended appeal, like in this matter before us, is not frivolous. Second, he must demonstrate that unless the order of injunction is granted, the appeal, if successful, would be rendered nugatory - see also the case of **Isaac Iruaku Kioi vs. Phillis Waithera Kinyugu & three others** – **Civil Application No. Nai. 58 of 2004 (unreported)**.

In this case, all that the learned Judge did was to stay the hearing of the chamber summons dated 14th December, 2005 on the ground that an appeal on a decision that was having the same effect upon the same property between more or less the same parties is pending before the Court of Appeal in respect of another case. All the facts were before the superior court. Much as it is not our duty at this stage to state whether or not the intended appeal will succeed, as that must await the full hearing of the intended appeal should it be filed, I feel however that based purely on what is before us and nothing more, I am unable to agree that an arguable point or arguable points have been demonstrated.

That being my view of the matter as far as the application before us is concerned, I do not see any

ground to injunct the respondent. In any event, on the question as to whether the intended appeal would be rendered nugatory if it succeeds and this application is refused, I note that all that the superior court did was to stay the application by chamber summons dated 14th December, 2005. The application was not dismissed. The success of the appeal against the same decision will mean that the summons of 14th December, 2005 will be set down for hearing with the result of the same hearing going either way. That being the case, I am unable to appreciate how the success of the intended appeal will be rendered nugatory if this application is not granted.

For the above reasons, I would dismiss the application with costs to the respondent.

Dated and delivered at Nairobi this 13th day of October, 2006.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

RULING OF BOSIRE JA

I have had the advantage of reading in draft the ruling of my brother Onyango Otieno JA. I agree with the conclusion that the application dated 2nd June, 2006 should be dismissed with costs.

In the result, the application dated 2nd June, 2006 is hereby dismissed with costs.

Dated and delivered at Nairobi this 13th day of October, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

RULING OF GITHINJI, J.A.

I have had the advantage of reading the respective rulings of my brethren Bosire and Onyango Otieno, JJ.A. in draft and I agree that the application should be dismissed with costs.

Dated and delivered at Nairobi this 13th day of October, 2006.

E. M. GITHINJI

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JUDGE OF APPEAL