REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civ Appli 255 of 2005

DAVID KAMAU …… APPLICANT

AND

SAVINGS & LOAN KENYA LTD. ……..…..……. RESPONDENT

(Application for injunction and stay of execution in an intended appeal from a ruling of the

High Court of Kenya at Nairobi (Azangalala J) dated 29th September, 2004

in

H.C.C.C. NO. 1566 OF 1999)

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RULING OF THE COURT

This is an application under ***Rule 5 (2) (b)*** of the Court of Appeal Rules for three main orders thus:

(i) That the execution of order of Azangalala J given on 29th September, 2004 be stayed pending the hearing and determination of the intended appeal.

(ii) That the respondents be restrained from any further advertisement of the suit property L.R. No. 3734/1142 pending the hearing and determination of the intended appeal against the said ruling.

(iii) That the respondents be restrained from selling the suit property L.R. No. 3734/1142 pending the hearing and determination of the intended appeal.

The applicant being aggrieved by the ruling of the superior court dated 29th September, 2004 dismissing an application for interlocutory injunction lodged a Notice of Appeal on 30th September, 2004.

In the dismissed application which was dated 26th May, 2004, the applicant applied for an interlocutory injunction to restrain the respondent herein from selling, transferring, disposing or otherwise alienating or dealing with L.R. No. 3734/1142 (suit property). By a charge dated 18th October, 1996, the applicant charged the suit property to the respondent to secure a loan of Shs.15,000,000/= advanced to TENDE DRIVE VILLAS LIMITED (borrower). It is apparent from the documents that the applicant is a director of the borrower.

The suit property comprises of two double-storey town houses on a plot of 0.0739 HA located at Tende Drive Lavington Nairobi which were valued at Kshs.18,000,000/= as at 16th May, 2005.

Documents on record show that the two houses are for rental and have at various times been rented to diplomatic missions.

The principles upon which this Court exercises its original jurisdiction under ***Rule 5 (2) (b)*** aforesaid, to grant a stay of execution; an injunction or stay of further proceedings are settled. The applicant should satisfy the Court, firstly, that the intended appeal or appeal is arguable, that is to say that it is not frivolous and, secondly, that the intended appeal or appeal if successful would be rendered nugatory unless the application is allowed. More particularly, the jurisdiction to grant an order for injunction pending appeal is discretionary which discretion should be exercised judicially. In ***Madhupaper International Ltd v Kerr*** [1985] KLR 840, this Court said that it would be wrong to grant an injunction pending appeal where the appeal is frivolous or where to grant it would inflict greater hardship that it would avoid.

We will deal first with the merits of the intended appeal. The application for injunction which was dismissed by the superior court was not the first application. It is common ground that when the respondent advertised the property for sale in 1999, the applicant filed *H.C.C.C. No. 156 of 1999* and thereafter also filed an application for and interlocutory injunction to restrain the respondent from selling the charged property. The ruling of the superior court, Onyango Otieno J (as he then was) is annexed to the application. The copy of the plaint and the application which gave rise to the ruling are not however in the record. It is apparent from the body of the ruling of the superior court dated 21st February, 2000 that the application for injunction was based on the grounds that the applicant had already entered into a binding sale agreement with a third party for sale of part of the suit property and that the entire proceeds of sale would be utilized in redeeming part of the loan. Although the superior court was not satisfied that the applicant had shown a prima facie case with probability of success or that he would suffer irreparable damage which could not be compensated by an award of damages unless the injunction was granted, the superior court nevertheless granted a conditional injunction on a "balance of convenience". The conditions were, firstly that, the applicant was to pay Kshs.1,000,000/= to the respondent on or before 6th March, 2000, and secondly, that the applicant would thereafter pay Kshs.450,000/= per month with effect from 31st March, 2000 till the suit is heard and determined and thirdly, that the deposit of the purchase price and any part of the purchase price would be paid to the respondent.

In allowing the application, the superior court said in part:

"***That there is debt due to the respondent is certain and the applicant admits the same in so many words. The applicant is not contending that the respondent has not served him with the necessary statutory notice and notification of sale. The respondent's statutory power of sale under section 69 (1) of the Transfer of Property Act has therefore arisen and I cannot see any authority shown to me that after the statutory power of sale has arisen and the mortgagee is seeking to exercise it, the mortgager still has a right to redeem the property as the applicant is herein claiming".***

By a letter dated 7th February, 2001, the respondent informed the applicant it had instructed its lawyers to proceed with the sale since the applicant had, among other things, failed to honour the ruling of the superior court dated 21st February, 2000. There was a lull for sometime.

The application for interlocutory injunction which was dismissed by Azangalala J was filed on 26th May, 2004 after the respondent had advertised the property for sale for 28th May, 2004 to recover Kshs.36,100,076/80 which was then outstanding.

The application was brought on the main ground that the amount outstanding had been agreed at Shs.17,000,000/= instead of the Kshs.36,100,076/80 demanded by the respondent and that the applicant had identified a bridging financier and had already made arrangements to clear the debt.

In paragraph (g) of the application, the applicant stated:

"***That the plaintiff has made arrangements to obtain the said agreed and all inclusive sum of Shs.17 million. The British American Insurance has offered to give a mortgage finance of upto Kshs.14***

million and the plaintiff will be able to raise the balance of three (3) million shillings within the agreed 90 days after the security documents are released to him. A letter of offer is to be given shortly after the relevant forms are returned to the financier".

The respondent opposed the application in the superior court and deposed that the applicant did not make payments as ordered by Onyango Otieno J in the ruling dated 21st February, 2001. The respondent denied that it agreed to accept Shs.17,000,000/= in full and final settlement and maintained that it intended to recover the outstanding amount of Kshs.36,100,076/80.

The superior court (Azangalala J) in the ruling dated 29th September, 2004 said in part:

> "***I have given the application very careful consideration. I have no hesitation in finding that the plaintiff has not shown a prima facie case with probability of success at the trial.***
>
> ***The sum due has not been agreed at 17 million. The mode of redemption has not been agreed. I have not been persuaded that the Defendant agreed to release the security documents for the Defendant to arrange re-financing. The plaintiff has freely admitted indebtedness to the defendant. The default in the payments is obvious. Indeed the proposal by the plaintiff is clear testimony that the plaintiff cannot redeem the security herein. I do not see what can in the circumstances of this case prevent the Defendant from seeking to exercise its statutory power of sale which arose a long time ago as the plaintiff has been in default of repayments for a long time".***

Regarding the compliance with the conditions previously imposed by the ruling of 21st February, 2000, Azangalala J said:

> "***I have perused the statements of account exhibited by the plaintiff. It is clear that the plaintiff did not attempt to comply with the conditions set by Onyango Otieno J. He made some payments. But not in terms of the said order.***
>
> ***In my view as the plaintiff failed to comply with the order of Onyango J the Defendant was entitled to exercise its statutory power of sale as the learned Judge had ordered".***

A subsequent application for stay of execution of the order of 29th September, 2004 was made on 23rd June, 2005 almost 9 months after the application was dismissed on 20th July, 2006.

The applicant states that he has an arguable appeal with high chances of success. He has listed several grounds of appeal both in the application and in the draft memorandum of appeal. Miss Muchiri, learned counsel for the applicant addressed us on the two main grounds of the intended appeal as contained in the draft memorandum of appeal, thus:

> ***(i) The learned Judge erred in law and fact in totally disregarding the agreement and settlement arrived at by the parties pursuant to their negotiations which in effect compromised the respondent's right to exercise its statutory power of sale and which gave the applicant the go ahead to redeem.***
>
> ***(ii) Learned Judge erred in law in ignoring the issue that the respondent had advertised the property for sale without a valuation report.***

Miss Muchiri submitted that those two issues were raised in the superior court but were not considered.

The intended appeal is against a discretionary order of Azangalala J. The principles upon which an appellate court may interfere with the exercise of discretion by a trial Judge are settled (see ***Mbogo v. Shah***, (supra); ***The Francois Vieljeux*** [1984] KLR 1 and ***Mrao Ltd v. First American Bank of Kenya***

Ltd & 2 Others [2003] KLR 125. It is sufficient to say that an appellate court does not easily interfere with the exercise of discretion by a trial court. It will only do so if the stringent conditions laid down by those authorities are fulfilled in each case.

The applicant's counsel has referred to the applicant's letter dated 19th May, 2004 to show that the parties agreed to a settlement figure of Shs.17,000,000/=. That letter is addressed to the Managing Director of the respondent and states in the relevant part:

> "***As per our discussion this afternoon between yourself, your legal officer and your Debt Recovery Manager, we confirm the agreed settlement figure of Kshs.17 million instead of our earlier request of settlement figure of Kshs.15 million and that you will release documents to the new financier".***

The respondent replied to that letter by a letter of 24th May, 2004 which states in part:

> "***We refer to your letter dated 19-5-2004 and advice that as discussed during the meeting held in our office on the same date we are not in a position to suspend the auction set for 28-5-2004 unless we see a letter from the financier that you have identified confirming that they intend to offer you finance".***

The respondent does not say in that letter that it had accepted the proposal to settle the outstanding loan at Kshs. 17 million. The respondent denied in the replying affidavit ever accepting an offer of Kshs. 17 million. Indeed, there is no letter emanating from the respondent specifically accepting the proposal. Furthermore, there is no document to contradict the findings of the superior court that the sum due had not been agreed at Shs. 17 million. To say the least, we are not satisfied that the issue merits serious consideration by the Court of Appeal.

The question of whether the parties had reached a settlement on the outstanding sum at Shs. 17 million is in any case peripheral. The core issue was whether or not the respondent's statutory power of sale had arisen. Both Onyango Otieno J and Azangalala J made a finding that the respondent's statutory power of sale had long arisen.

The applicant does not even have the means to pay the Shs. 17 million that he has proposed. The offer by British American Insurance to give the applicant a mortgage finance of Shs. 14 million that the applicant referred to in support of his application in the superior court has apparently not materialized. In any case, documents filed by the applicant show that it is the applicant's wife Gladys Njeri Kamau, and, not the applicant, who made an application to British American Insurance for a house loan of 14 million on 25th May, 2004. The loan has not been granted over 2 years since.

The complaint that the respondent intends to sell the property without a valuation report is apparently not supported by the record. The applicant denied valuers instructed by the respondent access to the suit property for purposes of valuation. However, the valuers prepared a valuation report dated 27th May, 2004 "based on the update of our previous comprehensive report and current inspection from the Kerbstone". In that report which preceded the advertisement of the property for sale for 28th May, 2004 the property was valued at Shs. 16 million. The applicant also denied valuers access to the suit property subsequent to the dismissal of the application for injunction by the superior court. As a result, the respondent applied for and obtained a mandatory order dated 7th April, 2005 ordering the applicant to grant access to the respondent. Subsequently, the property was valued and a valuation report dated 16th May, 2005 prepared wherein the property was valued at Shs. 18,000,000/=. Thus the debt outstrips the value of the property twofold.

We observe in passing that the applicant has not lodged an appeal to date, over 2 years after the impugned ruling and has not shown that he has taken any steps, other than applying for the proceedings, to lodge the appeal. Perhaps this justifies the respondent's complaint that this application was filed to forestal the public sale advertised for 20th September, 2005 (long past) and that the applicant is bent on

frustrating the efforts by the respondent to realize the security by abusing the process of the Court.

We conclude from the foregoing that the applicant has not shown that the intended appeal is arguable. Indeed, an order of injunction would in the circumstances of this case be grossly inequitable. That being our view, it is unnecessary to consider whether the appeal would be rendered nugatory if the order of injunction is not granted.

In the result, we dismiss the application with costs to the respondent.

Dated and delivered at Nairobi this 10th day of November, 2006.

S. E. O. BOSIRE

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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