



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KWACH, OWUOR & O'KUBASU, J.J.A.

CIVIL APPLICATION NO. NAI. 305 OF 2001 (162/2001 UR)

BETWEEN

MILESTONE ENGINEERING LIMITED

FRANCIS KARUGU NJOROGEAPPLICANTS

AND

CO-OPERATIVE MERCHANT BANK OF KENYA LIMITED

WATTS ENTERPRISESRESPONDENTS

(An application for an injunction in an intended appeal from the order and ruling of the High Court of Kenya at Nairobi Milimani Commercial Courts (Late Hon. Mr. Justice P.J.S Hewett) dated 23rd May, 2001

in

H.C.C.C. NO. 851 OF 2001)

RULING OF THE COURT

This is an application under **rule 5(2)(b)** of the Court of Appeal Rules by which the applicants, Milestone Engineering Ltd (*the Company*), and Francis Karugu Njoroge (*Njoroge*), seek an order of temporary injunction to restrain Cooperative Merchant Bank of Kenya Ltd (*the Bank*) and Watts Enterprises (Watts) from selling or alienating two parcels of land namely, *Dagoretti/Ruthimitu/812* and *814*, pending the hearing and determination of an intended appeal against the decision of Hewett J given on 23rd May, 2001. By that decision the learned Judge dismissed, with costs, an application by the applicants for a temporary injunction under **Order XXXIX** of the Civil Procedure Rules.

In 1995 the Bank lent the Company shs 1.5m which was secured by a charge over land parcel No *Dagoretti/Ruthimitu/644* owned by Njoroge. In December that year it was agreed between the Bank, the Company and Njoroge that parcel No. 644 would be subdivided into three pieces which would be sold and the proceeds paid to the Bank to pay off the debt. This was done and parcel No 644 was subdivided into three parcels *Dagoretti/Ruthimitu/812, 813 & 814*. The title documents for these parcels were kept by the Bank.

In September 1997, Njoroge found a buyer for parcel No 813 and asked the Bank to release the title document, but the Bank delayed with the result that the sale transaction was not concluded until July 1998. The entire purchase price of shs 1,100,000/- was paid directly to the Bank. In September 1998 Njoroge found a buyer for parcel *No 812 for shs 250,000/-*, with the consent of the Bank. This sale did not go through because the title documents for parcels *No 812* and *No 814* apparently got lost in the bomb blast of 7th August, 1998 which destroyed the *United States Embassy* complex and other buildings in the vicinity, including Cooperative House, where the Bank had its offices. The Bank undertook to obtain replacement titles for these parcels but to date has not done so. The result is that *Njoroge* cannot sell the two parcels and pay off the debt owed to the Bank which in the meantime continues to attract interest and penalty charges.

Notwithstanding these developments for which neither *Njoroge* nor the Company can be held responsible, and in flagrant breach of the agreement as to the mode of repayment, the Bank has gone ahead and given notice to the Company and *Njoroge* of its intention to exercise its statutory power of sale and has appointed Watts, a firm of auctioneers, to sell the two parcels by public auction. It was to forestall this sale that the applicants filed proceedings against the Bank and Watts. And they also applied for a temporary injunction which application was dismissed by *Hewett J* on 23rd May, 2001.

In a very short ruling the learned Judge held that the applicants had not established a prima facie case with a probability of success. He also observed that the original charge and replacement charges were not exhibited. He did not comment on the Bank's delay of over 10 months in releasing the title document to parcel No 813 nor did he consider the fact that the delay in selling parcels Nos 812 and 814 was attributable to factors beyond the control of the applicants.

The applicants' complaint is that the Bank is exercising its power of sale illegally and fraudulently. As evidence of this they rely on the agreement on the mode of repayment; delay by the Bank to produce the deeds when asked to do so; and the Bank's insistence on charging interest. They say interest should not be charged for the 10 months when the Bank failed to release the title to parcel No 813, and for the period from August 7th 1998 when the title documents for parcels Nos 812 and 814 got lost in the bomb blast.

Mr Ohaga, for the *Bank and Watts*, submitted that the applicants did not make out a case for a temporary injunction because they are only complaining about accounts. In his view penalty and interest are not an issue. We realise that the circumstances in which a mortgagee can be restrained from exercising its statutory power of sale are strictly limited and even a dispute on accounts is not a ground for doing so. We think though that this case is one of the exceptions to the general rule. The parties agreed on a mode of payment and unless the Bank can show that the applicants failed to comply with the terms of that agreement, it has no right to disregard it and proceed to exercise its statutory power of sale. On the evidence before us it would appear prima facie, that the Bank was to blame for the delay in the sale of parcel No 813 and in obtaining replacement titles for *parcels Nos 812 and 814*. Njoroge has been cooperative throughout and cannot be blamed for what happened. The title documents for *parcels 812 and 814* were in the custody of the Bank when its premises were damaged by the bomb blast. The point the applicants have taken that interest and penalties should not be charged during the periods covered by those delays is a substantial one and cannot be said to be frivolous. They should be allowed to canvass it in an appeal.

It goes without saying that the appeal, if successful, would be rendered nugatory unless an injunction is granted, because the Bank would in all probability dispose of the parcels and apply the proceeds without taking into account the applicants' claim in respect of interest and penalty charges. Accordingly, we grant the application and issue an injunction restraining the Bank, its servants and agents, from selling or disposing of *parcels Nos 812 and 814* pending the hearing and determination of the intended appeal or further order. Costs of the application to be in the appeal.

Dated and delivered at Nairobi this 14th day of September, 2001.

R. O. KWACH

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR