



**Hunkar Trading Company Limited & another v Family Bank Limited (Commercial Case E841 of 2021) [2024] KEHC 2951 (KLR) (Commercial and Tax) (21 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2951 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E841 OF 2021**

**PM MULWA, J**

**MARCH 21, 2024**

**BETWEEN**

**HUNKAR TRADING COMPANY LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**HUNKY ENERGY LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**FAMILY BANK LIMITED ..... DEFENDANT**

**RULING**

1. Before me is a Notice of Motion application dated 9<sup>th</sup> June 2022 filed pursuant to the provisions of Order 40 Rules 1(a) & 4(2), Order 42 Rules 6(1) & 6(4), and Order 51 Rule 1 of the [Civil Procedure Rules](#), Sections 1A, 1B, & 3A of the [Civil Procedure Act](#), and all enabling provisions of the law. The plaintiffs are seeking the following orders:
  - i. Spent;
  - ii. Spent;
  - iii. That pending the hearing and determination of the intended Appeal the Honourable Court be pleased to grant an injunction stopping the sale of the suit property LR No. Unit Number 13-59 Precint No. 3 BA being a portion of LR No. 28867/1;
  - iv. Such further and/or other orders be made as the Court may deem fit and expedient; and
  - v. That the costs of this application be borne by the defendant.
2. The application is premised on the grounds on the face of the motion and supported by an affidavit sworn on the same day by Jackson Kariuki Kahungura, a Director of the plaintiffs' companies. In



opposition thereto, the defendant filed a replying affidavit sworn by Sylvia Wambani, the defendant's Legal Officer on 15<sup>th</sup> June 2022.

3. The plaintiffs' case is that they are the registered proprietors of LR No. 18111/258 comprised in a Certificate of Title registered at Nairobi as No. I.R. 81046/1. Sometime in October 2021 the plaintiffs filed this suit accompanied with a Notice of Motion application seeking orders of injunction restraining the defendant from selling by way of public auction, private treaty or otherwise, the suit property. The said application was opposed by the defendant and thereafter a ruling was delivered on 19<sup>th</sup> May 2022 dismissing the said application with costs to the defendant. Thus, the defendant is at liberty to proceed with the intended auction of the suit property as can be seen from the 14 days' courtesy notice issued to the plaintiffs by the defendant's auctioneers.
4. The plaintiffs having been aggrieved by the ruling of 19<sup>th</sup> May 2022 lodged an appeal against vide a Notice of Appeal dated 24<sup>th</sup> May 2022 which appeal, they contend has high chances of success. They averred that in view of the fact that proceedings at the Court of Appeal take substantially long to be heard and determined, they are apprehensive that if the instant application is disallowed, the suit property will be sold thus rendering the intended appeal nugatory. As a result, the plaintiffs will be subjected to irreparable substantial loss. They further averred that they are ready and willing to abide by any orders of the Court as to security for the appeal.
5. In response, the defendant deposed that the facility in question is in arrears and continues to accrue default interest to the detriment of the defendant and its depositors. The defendant averred that the plaintiffs' Notice of Appeal doesn't demonstrate high chances of success. Furthermore, even if the sale of the suit property is found to have been improper once this suit is heard and determined, the plaintiffs can always be compensated by an award in damages equivalent to the value of the suit property at the time of judgment. After all, the defendant contend that this Court had already determined the issues raised in the application herein, and the instant application does not disclose any reasons why the Court should vary its orders of 19<sup>th</sup> May 2022 and issue a fresh injunction.
6. The defendant asserted that the plaintiffs have been enjoying interim orders for a period of nine months before the ruling of 19<sup>th</sup> May 2022 but failed to remedy the default during this time. It stated that the Court's jurisdiction to issue injunctions pending appeal can only be exercised under its appellate jurisdiction, thus the orders sought herein cannot issue. Further, determining this application will amount to this Court sitting on appeal of its own decision.
7. The instant application was canvassed by way of written submissions. The plaintiffs relied on the case of *Giella v Cassman Brown* [1973] EA 358 where the Court set down the principles governing grant of an interlocutory injunction and the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR and submitted that indeed there is a validly lodged appeal against this Court's ruling dated 19<sup>th</sup> May 2022, which appeal is not only arguable but has also high chances of success. Thus, in the event the defendant is allowed to proceed with the intended auction of the suit property, the intended appeal will be rendered nugatory upon determination.
8. The plaintiffs also cited the case of *Baiba Dbidha Mjidho v Van Leer East Africa Ltd. (Greif(K) Ltd.) (A Business of Greif Bros Co-op)* [2006] eKLR where the Court addressed the question of substantial loss and further submitted that in the event the suit property is sold at a public auction, substantial loss shall be visited upon the plaintiffs since recovery of the same from the ultimate buyer would be extremely improbable. In addition, the primary offices and places of operation of the plaintiffs are on the suit property thus should it be disposed off, the plaintiffs will not have a place to carry out their businesses. The plaintiffs asserted that the application herein has been filed without any unreasonable delay having been filed approximately 15 days after the ruling of 19<sup>th</sup> May 2022 was delivered.



9. The defendant on the other hand submitted that the instant application has been brought under the wrong provisions of the law since an order for injunction pending appeal is provided for under the provisions of order 42 rule 6(6) of the Civil Procedure Rules 2010 which is not the case herein. Further an injunction pending appeal is considered by the Court in exercise of its appellate jurisdiction, however this Court is not sitting on appeal thus it cannot grant the orders sought herein. Learned Counsel for the defendant contended that other than alleging that their intended appeal has high chances of success, the plaintiffs have not demonstrated the chances of success of the said appeal by showing how the Court was wrong in arriving at its decision to dismiss its earlier application for injunction pending hearing and determination of this suit.
10. Counsel for defendant further stated that the prejudice to be suffered by it is far reaching since as at 15<sup>th</sup> June 2022, the outstanding loan due to the defendant from the plaintiffs was Kshs.98,813,946.33, and the amount in arrears is Kshs. 72,041,739.08. For this reason, the defendant runs the risk of being outstripped by the arrears hence being left with nothing to recover in consideration of the fact that the value of the suit property currently stands at Kshs.105,000,000/=.

### **Analysis and Determination.**

11. Upon consideration of the instant application, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the defendant and the written submissions by counsel for parties, the issues that arise for determination are:
  - i. Whether the instant application is properly before the Court; and
  - ii. Whether the plaintiffs have made out a case to warrant grant of an order for temporary injunction pending appeal to the Court of Appeal.

### **Whether the instant application is properly before the Court**

12. Notably, in as much as the instant application is seeking for an order of temporary injunction pending hearing and determination of an appeal at the Court of Appeal, it has been brought under the provisions of Order 40 Rules 1(a) & 4(2), Order 42 Rules 6(1) & 6(4), of the Civil Procedure Rules 2010, Sections 1A, 1B, & 3A of the Civil Procedure Act. The defendant submitted that an order of stay of execution pending hearing and determination of an appeal as provided for under Order 42 Rules 6(1) cannot issue in this case, since the order emanating from the ruling dated 19<sup>th</sup> May 2022 is a negative order incapable of staying. Order 40 Rule 1 on the other hand provides for an order of temporary injunction pending hearing and disposal of a suit which is not the case herein thus the said provisions are also not applicable to this case at this juncture.
13. The instant application has also been brought under the provisions of sections 1A, 1B & 3A of the Civil Procedure Act which not only invokes the inherent jurisdiction of this Court but also sets out the utility and need of the Oxygen Principle. The inherent jurisdiction of this Court can only be invoked where there are no clear provisions upon which the relief sought may be anchored, or where the invocation of rules of procedure will work an injustice. This is not the case in this matter since stay of execution pending appeal is very well provided for under Order 42 Rule 6(6) of the Civil Procedure Rules 2010. In addition, the plaintiffs have not cited any reasons or given any explanations why they did not cite or invoke the provisions of Order 42 Rule 6(6) when filing the present application.
14. In light of the above, I concur with Counsel for the defendant that the instant application has been filed pursuant to the wrong provisions of the law which provisions are not applicable to this matter at



this juncture. At this point, the Court would like to interrogate whether this mistake by the plaintiffs is fatal.

15. Accordingly, this Court is bound by the Court of Appeal holding in the case of [Stephen Boro Gittha v Family Finance Building Society & 3 Others](#) CA 363/2009 authoritatively cited by the Court in [John Muli & another v Thomas Nzioka Wambua & another \(suing as Administrators of the Estate of Michael Makau Nzioka \(Deceased\)\)](#) [2021] eKLR, where it was held as hereunder:

“The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.”

16. Courts are indeed called upon to do substantive justice for parties by giving effect to the overriding objective of Sections 1A and 1B of the [Civil Procedure Act](#) in the interpretation of its provisions and [Rules](#) which include; the just determination of the proceedings; efficient disposal of the dispute; efficient use of available judicial and administrative resources, and the timely disposal of the proceedings at a cost affordable to the respective parties.
17. For this reason, this Court finds that the aforementioned mistake by the plaintiffs affects the form rather than the substance of the instant application, which issue is one of procedural technicality and which can be cured by the provisions of Article 159(2)(d) of the [Constitution of Kenya](#). Consequently, I hold that the said mistake is not fatal to warrant an order for striking out of the instant application.

#### **Whether the plaintiffs have made out a case to warrant grant of an order for temporary injunction pending appeal to the Court of Appeal**

18. Temporary injunctions pending appeal are provided for under Order 42 Rule 6(6) of the [Civil Procedure](#), 2010 which states as follows: -

“Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with...”

19. From the above, it is evident that this Court’s jurisdiction to grant an order for temporary injunction pending appeal can only be invoked in instances where the Court is exercising its appellate jurisdiction which is not the case herein.
20. It is not lost that the plaintiffs have previously filed an application seeking orders for temporary injunction pending hearing and determination of this suit, but the said application was dismissed with costs to the defendant by this Court in its ruling dated 19<sup>th</sup> May 2022. Accordingly, this Court having exercised its mind and determined the said application on merit is *functus officio* on matters temporary injunction.



21. I am guided by the Court of Appeal finding in *Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited)* [2014] eKLR where it was held that:

“*functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”

22. For this reason, hearing and determining the instant application will be equivalent to this Court sitting on appeal of its ruling delivered on 19<sup>th</sup> May 2022, a practice that is not only frowned upon by law but is also not provided for by either statute or the *Constitution*.

23. In light of the foregoing, I opine that the instant application should have been filed at the Court of Appeal as it is the Court properly constituted under the law capable of granting the orders sought by the plaintiffs herein.

24. In the end, this Court finds that the Notice of Motion application dated 9<sup>th</sup> June 2022 is bereft of merit and is hereby dismissed with costs to the defendant.

It is so ordered.

**RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF MARCH 2024.**

**P. MULWA**

**JUDGE**

In the presence of:-

Mr. Kuloba – for plaintiff

Ms. Ngui h/b for Mr. Onsare for defendant

Court Assistant: Carlos

