



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI NO. 133 OF 2008 (UR 85/2008)

FREDERICK GATHITHI KABUE APPLICANT

AND

**CANNON ASSURANCE KENYA LIMITED
RESPONDENT**

(Application for an injunction pending the filing, hearing and determination of an intended appeal from a ruling and order of the High Court of Kenya at Milimani Commercial Courts (Warsame, J) dated 17th June, 2008

in

H.C.C.C No. 151 of 2008)

RULING OF THE COURT

Frederick Gathithi Kabue, the applicant in this notice of motion dated 20th June 2008 and filed on 23rd June 2008 was, according to the record before us, a guarantor for monies advanced to Boma Developers Limited by the respondent, **Cannon Assurance Kenya Limited**. He is the registered owner of Land Reference number 12832/6 (IR No. 43410/1). The loan he guaranteed was Ksh.5 million being the monies advanced to Boma Developers Limited. Boma Developers Limited did not service the loan and the respondent issued a statutory notice dated 24th April 1992. The applicant disputes the validity of that statutory notice, but whatever is the correct position on that aspect, the respondent moved to the superior court vide H.C.C.C No. 532 of 1996 (OS) against the applicant and obtained vacant possession of the property L.R No. 12832/6 (IR 43410/1). That decree has not been set aside and is still valid. Earlier, in 1993, the applicant had filed H.C.C.C No. 3434 of 1993 and H.C.C.C No. 1998 of 1994 both seeking an injunction to restrain the sale of the suit premises but he was apparently unsuccessful. Thus, the two cases he filed seeking injunction did not succeed whereas the case filed by the respondent seeking vacant possession succeeded and the decision therein has not been set aside. Be that as it may, in a plaint dated 25th March 2008, the applicant sought judgment against the respondent for redemption of the charge and discharge of the charge dated 10th June 1991; a permanent injunction restraining the respondent from exercising any purported statutory power of sale to sell his property; a mandatory injunction to compel the respondent to deliver to the applicant three documents namely original grant for Land Reference No. 12832, original charge and discharge of charge. He also sought, in that plaint, damages and costs. Together with that plaint, the applicant also filed an application for orders of injunction. That application was dismissed by the superior court (Warsame J.) in a ruling dated and delivered on 17th June 2008. In dismissing that application, the learned Judge had the following to say,

inter alia:

“I am therefore in agreement with Mr. Thuo, for the defendant, that this application is an abuse of the court process as the issues ought to have been raised in the previous suits. I refuse to accept the submission of the plaintiff’s advocates that the previous suits have abated and that the plaintiff is entitled to filed (sic) the present suit. To accept such a proposition would countenance the conduct of the plaintiff which amounts to an abuse of the court. In any case, the plaintiff was obliged to raise the issues raised in this suit in the three previous suits. The plaintiff should also have also (sic) raised a counter claim in the suit where the present defendant sought an order for vacant possession. On giving vacant possession to the present defendant, the court acted on the information and evidence tendered by the parties in support of their respective cases. In my humble view, the plaintiff had an opportunity to raise the issue of the validity of the statutory notice now belatedly raised in this suit in that earlier suit. He chose not to do so and it (sic) cannot be given another bite at the cherry.”

The above facts and the above ruling of the superior court are the genesis of this application before us which is brought pursuant to rule 5(2) (b) of the Court of Appeal Rules (“the Rules”). Three orders are sought and these are:

1. That the Honourable Court be pleased to order an injunction restraining the respondent whether by itself, or by its servants, agents or otherwise howsoever from offering for sale, interfering, alienating or in any manner dealing with the suit property comprised in title number L.R. 12832/6 (IR No. 43410/1) situated in Nairobi pending the filing and determination of the intended appeal against the ruling and order of the Honourable Mr. Justice Warsame delivered on 17th June 2008.
2. That this Honourable Court be pleased to order that a priority hearing date be given once the intended appeal is lodged.
3. The costs of and incidental to this application abide the results of the intended appeal.”

The application is brought on several grounds, but the summary of them all is that the intended appeal is arguable as the applicant, in his notice of motion before the superior court which was dismissed, was seeking to redeem his property but due to many preliminary objections, that application was not fully heard and hence substantial justice was not met out to the applicant as the superior court failed to appreciate that the suit was for redemption of the suit property. The second main ground is that if the application is not granted, the results of the applicant’s intended appeal, were it to succeed, would be rendered nugatory as the suit property would be sold on the strength of a defective and an invalid statutory notice, thereby subjecting the applicant to extreme suffering and loss. The application was opposed. A lengthy replying affidavit together with annexures all of which we have perused and considered was filed in that regard.

The law as regards the legal principles to be considered by the court when faced with an application such as the one before us, brought pursuant to rule 5(2) (b) of the Rules, is now well settled. An applicant seeking orders under that rule, whether for injunction, or for stay of execution, or for stay of proceedings, as the case may be, is enjoined to demonstrate, first, that the appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, the applicant must show that if the orders sought are refused and eventually the appeal or the intended appeal succeeds, the results of that success would be rendered nugatory – see the cases of Githunguri vs. Jimba Credit Corporation Ltd (No.2) (1988) KLR 838, J.K. Industries Ltd vs. Kenya Commercial Bank Limited (1982 – 88) 1 KAR 1688 and Reliance Bank Limited (In liquidation) vs. Norlake Investments Limited – Civil App. No. Nai. 98 of 2002 (unreported).

It is with the above principles in mind that we have considered this application, the salient facts of which are outlined above. The learned Judge of the superior court was faced with an application seeking leave to grant an order of injunction in respect of a matter in which two similar applications for injunction had been refused by a court of competent and contemporary jurisdiction. The matter raised before him for seeking injunction was available to the applicant when he made the previous applications and could have been raised at that time. Further, the learned Judge of the superior court was being asked to grant an

injunction to stop the respondent from dealing with a property in respect of which the respondent had obtained a decree for vacant possession issued by a court of equal jurisdiction and that order was still valid.

Mr. Gichuhi, the learned counsel for the applicant, urges us to accept that obtaining vacant possession is different from selling the property and that all the applicant is asking is that the sale and/or transfer be enjoined even if the respondent has vacant possession. Common sense demands that the respondent, being a mortgagee, could have only sought vacant possession from the court in order to sell the property and recover his money. We thus cannot appreciate the difference which, if it exists at all, must be very thin and of no consequence.

Having perused and considered the ruling delivered by the learned Judge, aforesaid, we are of the view that on the scenario that obtained before the learned Judge of the superior court, we are not persuaded that the intended appeal is arguable. We are aware that we are not hearing the appeal and that we need to avoid any comments or decisions that may inhibit the free and fair hearing of the appeal, or that may prejudice the fair hearing of the appeal, but we do feel that before us, the applicant has not demonstrated in this application that his intended appeal is arguable.

That would have disposed of the entire notice of motion, for once the appeal or the intended appeal is not arguable, the question of whether the results of that appeal or the intended appeal would be rendered nugatory does not arise. However, in this case, the applicant would not gain anything by our granting the orders sought, for already, an order granting vacant possession had been issued and is still in existence. Secondly, when the applicant mortgaged his property as a guarantor to a loan that was advanced to a third party, he knew very well the implications which were that he was in effect turning his property into a commercial property which could be sold if the loan was not paid. That is what has apparently happened.

In the result, the notice of motion is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 17th day of October, 2008.

S.E.O BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR