



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 50 OF 2020**

**JOHN MWASHIGADI MWAKISHA.....APPELLANT**

**VERSUS**

**HOUSING FINANCE CO LTD.....RESPONDENT**

**R U L I N G**

1. The current appeal and the application by way of notice of motion dated 14.5.2020 were provoked by a decision by the trial court, Hon CM Ndegwa, SPM, dated 8.5.2020 by which the court struck out the appellant's suit with costs on account of being an abuse to the court process essentially for being *sub-judice* Mombasa CMCC No. 34 of 2014. In the appeal the appellant sets out seven grounds against the decision which he considers merit being preserved by an order of injunction pending appeal.

2. The motion for injunction pending appeal sets out some four grounds to premise the request essentially that the appeal is arguable. In summary it contends that the dismissal order opens the door for the respondent to advertise and sell the appellant's property subject of the litigation an happening which will injure the appellant's reputation and standing and also render the appeal nugatory. The Application was supported by the affidavit of the appellant himself which reiterated the grounds and exhibited the pleadings before the trial court as well as the judgment on appeal arising out of the decision of the trial court in the previous suit, CMCC 34 of 2014 in which it was decided that the notices complained about in the previous suit were indeed defective and an interlocutory injunction was granted and upheld on appeal.

3. There was also a supplementary affidavit filed with the leave of the court whose objective appears to be limited to answer to the replying affidavit filed on behalf of the respondent. In that affidavit the appellant reiterates that a sale pending determination of the appeal would undeniably render the appeal nugatory; that the merits of the appeal must await hearing not suited for canvass by a replying affidavit and that it is not true that the debt far outstrip the security and therefore it cannot be true that the grant of injunction would cause more hardship to the respondent as compared to any benefit to the appellant.

4. The application was resisted by the respondent by the Replying Affidavit of Moses Wachira Mwangi, the respondent's Branch Manager, Mombasa. That affidavit took the very firm position that the points raised as arguable points are not arguable at all; that the appeal is incapable of being rendered nugatory even in the event of success; that ever since the injunction was granted in 2014, the appellant has not paid the loan as contracted and the loan now stands at Kshs 8,573,196.90 while the security is only valued at Kshs 6,375,000.00 and therefore every day the realisation is delayed the erosion of the security continues and is exacerbated and prayed that the application be dismissed.

5. The court directed that the application be canvassed by way of written submissions pursuant to which the respondent filed submissions on 8.6.2020 together with a list of authorities on 26.5.2020 while the applicant did so on the 11.6.2020. I have benefitted from reading the submissions whose gist from the appellant's side is that the appeal is arguable and injunction ought to be granted to give efficacy to any orders that may be made on appeal while the respondent takes the view that the appeal isn't arguable and that even in the unlikely event of the appeal succeeding, the loss, if any, is quantifiable and thus the appeal shall not have been rendered futile or nugatory.

6. Being an application for injunction pending appeal, the applicable principles are not in doubt but well established to seek the preservation of the rights of the parties in the litigation so that when the appeal is determined, the resultant order has the efficacy court orders are expected to imbue upon the litigants. In other words the sole object of injunction pending appeal, like its sibling, stay pending appeal, is to make the litigation worth the cause and to avoid the endeavour being academic or just run off the mill performance. That desire serves all including the court whose dignity and authority ought to be upheld and enforced for the rule of law, rather than free for all anarchical, status being encouraged.

7. The principles for consideration in such an application are that the substratum of the appeal ought to be preserved, so that the appellant is not exposed to suffer a loss that is so substantial as to be irreparable, say by way of damages in recompense<sup>[1]</sup>.

8. While I must discern an arguable appeal to be satisfied that the first threshold has been met, my consideration on that point must never be determinative because that final determination must await the hearing of the appeal because an arguable appeal is not an appeal that must succeed. Based on the ruling appealed from and the decisions cited to court by both sides, I entertain no doubt that the appeal is indeed arguable. Being arguable, its outcome needs to be preserved if the court gets convinced that failure to grant the order sought would make the pursuit of the appeal futile. The appreciation of the effect of failure to grant the order sought is thus critically important.

9. The suit before the trial court essentially sought to restrain the respondent from selling the security on the basis that notices under sections 90 and 96, Land Act, had not been served and that the sum sought to be recovered would demonstrate violation of the **Duplum rule**. A casual gleam though the papers filed reveal that the appellant continues to make payments into the account and that at trial it was contended that the notices had been duly issued. The goal of the appeal and the instant application is thus to stop the intended sale.

10. The second threshold question addresses whether such sale would dissipate the entire purpose of the appeal with substantial and irreparable injury to the appellant. The concomitant question one must ask is whether the benefit to be availed to the appellant by grant of injunction would outweigh any inconvenience or hardship upon the respondent.

11. It is common place that the debt now stands at over eight million while the property is valued at a forced sale value of 6,375,000. That disparity will be exacerbated every day the debt outstands and the contractual interest is applied. That would have the effect of enhancing the appellant's obligations by the bludgeoning debt and at the same time diminish the respondent's security. A grant of the injunction sought would thus be hurtful to both sides and would in that event expand the dispute. I consider such injunction not beneficial at all but injurious. If injurious, then it cannot be viewed just. I therefore find and hold that to grant an injunction in this matter would be unjust and injurious to not only the respondent but also the appellant in the long run.

12. The last consideration on the injury to be occasioned to the appellant by the sale is viewed from the angle of the nature of the foreseeable injury. In this matter, the value of the property is known and capable of being ascertained at any time by the process of valuation. In fact, the law mandates that before the sale is conducted, the respondent must have at hand a valuation report not older than twelve months<sup>[2]</sup>. The sale would have to be documented in terms of purchase and in deed we are not short of legislation governing such sale which to a very large extent seeks to protect the chargor, the equity's darling, against any impropriety by the bank.

13. The suit property was given as security with full and clear understanding that a default would attract its sale. In the event of sale before the appeal is concluded, and if the appeal succeeds, the loss will be limited to the purchase price being the value of the property, less any sums justly due to the respondent at that time. Such is certainly ascertainable in monetary terms and I consider such not to qualify as irreparable or substantial loss<sup>[3]</sup>. I therefore hold that there is no loss that awaits the appellant that merits him being granted an injunction pending appeal.

14. The upshot is that I find no merit in the application which I hereby dismiss with cost.

15. For the benefit of case management, I direct that the appeal is admitted, let the appellant file a record of appeal together with written submissions within 45 days from today. Upon service, let the respondent file and serve written submissions within 14 days thereafter for the matter to be mentioned in court on 17.09.2020

**Dated, signed and delivered at Mombasa this 10<sup>th</sup> day of July 2020.**

**P J O Otieno**

**Judge**

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<sup>[1]</sup> Francis ichatha vs HFCK (2005)eklr, citing with approval Githunguri vs Jimba credit corporation Ltd (No 2) [1988]KLR 838

<sup>[2]</sup> Rule 11(b)x, Auctioneers Rules

<sup>[3]</sup> Patrick kang'ethe Njuguna vs cooperative bank and 4 others [2017]eklr