IN THE COURT OF APPEAL

AT KISUMU

(CORAM: P. KIHARA KARIUKI - PCA, GATEMBU & MURGOR, JJ.A)

CIVIL APPLICATION NO. 90 OF 2016

BETWEEN

MARY ATIENO NYAMOGO……APPLICANT

AND

BARCLAYS BANK OF KENYA LTD……..RESPONDENT

(Being an application for injunction against a Judgment and Decree of the High Court at Kisumu of Kibunja, J. delivered on 26th October 2016

in

Kisumu ELC Case No. 798 of 2015)

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RULING OF THE COURT

By way of a Notice of Motion lodged on 3rd November 2016, ***the applicant, Mary Atieno Nyamogo***, sought an order of injunction restraining and/or prohibiting the respondent either by itself, agents, servants, assigns and any other person acting on its behalf from selling, alienating, transferring in any manner the applicant's property, otherwise known as Title Number Kisumu/Nyalenda B/1069 *(the suit property)* pending the hearing of an intended appeal to this Court.

The application was premised on grounds that, sometime in 2005, the respondent advanced the applicant a sum of Kshs. 2.5 million, and the applicant executed a charge over the suit property as security for the facility in favour of the respondent; that it was contended that she repaid the loan on 17th July, 2010, following which, the loan account reflected a nil balance. Later, the applicant was informed by the respondent that she had an outstanding balance of Kshs. 276,754.45 as at March, 2010. She paid a further sum of Kshs. 277,000/-, which ought to have either resulted in an overpayment of Kshs. 277,000/-, or cleared the loan facility.

It was further contended that in its judgment dated 26th October, 2016, the Environment and Land Court concluded that the balance of Kshs. 276,754.45 was reduced to Kshs. 39,362.70 after crediting Kshs. 275,501/-, but thereafter, the amount increased to Kshs. 361,456.55 after other undisclosed costs were

included, which conclusion the applicant complained was contrary to the evidence on record; that she had a substantive and arguable appeal, which raised pertinent issues of law, and that she risked loosing the suit property, which comprised her matrimonial home.

In an affidavit in support of the motion sworn on 2nd November 2016, the applicant also deponed that owing to the threat of sale of the suit property, she had sought a declaration that she had fully repaid the loan, a discharge of charge of the suit land, the rendering of accounts and a permanent injunction restraining and/or prohibiting the respondent from selling the suit property. It was further deponed that the Environment and Land Court observed that she owed the respondent other costs, amounting to Kshs. 918,030.51, which alleged costs were neither pleaded nor proved; that owing to the intended exercise of Statutory Power of Sale, she risked loosing the suit property, notwithstanding the fact that she had fully repaid and/or liquidated the loan amount, due to the respondent; and that in the event of sale, she would be unable to redeem the suit property, by virtue of the provisions of ***section 99*** of the ***Land Act, No. 6 of 2012***, which would render the applicant's intended appeal nugatory, if the injunction sought was not granted.

In a replying affidavit sworn on behalf of the respondent on 17th January 2017, ***Samuel Njuguna,*** a legal recoveries officer deponed that the suit property was charged to secure a loan advanced to the applicant by the respondent together with interest thereon; that from September 2005 the applicant defaulted in the loan repayments, which compelled the respondent to issue a redemption notice and notification of sale of the suit property on 1st October, 2010 which notification was sent to her current address by registered post.

It was further averred that the applicant operated a normal account, and a loan account with the respondent, and had made deposits into the Normal Account Number [particulars withheld], which amounts were transferred to her Loan Account Number[particulars withheld] to offset the debt owed to the respondent; that the amount outstanding of Kshs. 361,458.55/- on the loan account increased due to the accrued interests on the outstanding loan which was to have been repaid within 7 years and not 15 years as alleged; that the further increase of Kshs. 918,030.51 was due to debt collection fees, legal costs, auctioneer fees, valuation costs and court fees, being outstanding costs incurred by the respondent while pursuing recovery of the debt owed by the applicant which forms part of the recovery loan.

On behalf of the applicant, learned counsel ***Mr. B. Odeny*** holding brief for Mrs. Asunah at the hearing of the application submitted that, the appeal was arguable as the court below misapprehended the facts. The applicant had borrowed Kshs. 2.5 million and was later informed of a loan balance of Kshs. 276,754/- of which she credited an amount of Kshs. 275,501/- to the account leaving a balance of Kshs. 39,362.70. It was further submitted that the applicant was not notified of the migration of the applicant's accounts, and that the statutory notice was served on the applicant when the redemption period had already lapsed, yet the respondent had gone ahead to advertise the suit property for sale. With respect to the amount of Kshs. 918,030.51 demanded, no evidence, documentary or otherwise was made available to support this claim, and the respondent was unable to show how the amount had arisen.

On whether the appeal would be rendered nugatory in the event the appeal were to succeed, counsel submitted that the suit property was matrimonial property subject to the requirements of ***section 99*** of the ***Land Act;*** that the equity of redemption would be lost if the suit property was sold and she succeeded in her appeal. Counsel informed the court that the applicant had since deposited a sum of Kshs. 300,000/- in support of the application for an injunction.

On his part, ***Mr. Kaniaru,*** learned counsel for the respondent submitted that the appeal was not arguable

as the applicant was advanced a loan facility which she had not repaid; that the applicant was aware that the offer of matrimonial property as security converted it to a commercial property; that a charge is a contract and the court should not be hasty to interfere with such contracts; and the applicant was served with the statutory notice and the applicant's postal address was correctly indicated.

In the case of ***Malcom Bell vs Hon. Daniel Torotich Arap Moi and another Civil Application No. Nai 342 of 2005*** this Court outlined the principles to be applied in a ***rule 5 (2) (b)*** application thus;

"The jurisdiction of the court under rule 5 (2) (b) above, is not only original, but is discretionary; and as such must be exercised on the basis of sound principles. Two main principles guide the court in its exercise of that discretion, namely for the applicant to succeed, he must not only show he has an arguable appeal or that his intended appeal is not frivolous but also that unless granted an injunction, stay of decree or further proceedings, as the case may be, his appeal or intended appeal, if successful will be rendered nugatory. Several authorities were cited to us, among them, *National Irrigation Board vs Mwea Rice Growers Multi-Purpose Co-operative Society & Another, Civil Application No. NAI. 153 of 2001 (83/01 UR); Municipal Council of Kisumu vs Nella Bhanubhai Patel T/AChemhard Agencies, Civil Application No. NAI 29 of 2001 (16/2001 UR)* and the *Standard Limited vs G.N. Kagia & Co. Advocates, Civil Application No. NAI 193 of 2003*. ***We have read them all and we agree that they set out the correct principles to be applied."***

As to whether the intended appeal is arguable, the applicant's case is that the learned judge misapprehended the evidence and in so doing reached the wrong conclusion that the applicant still owed various amounts to the respondent; the applicant further contends that the respondent has not specified what sums the applicant owes, not least that with respect to the sum of Kshs. 918,030.51 demanded, there is no indication of what this sum comprised.

In our view, on the basis of the complaint that the court below misapprehended the facts regarding the unascertained amounts, we consider this ground to be an arguable, and not frivolous.

The second aspect is, whether the appeal would be rendered nugatory in the event it were to succeed. The issue at hand is that there is an impending sale of the suit property over sums that the respondent claims the applicant owes, but which sums the applicant contends she has paid, save for the sum of Kshs. 918,030.51 which was unknown to her. We consider that if indeed that be the case, and we are not saying that this is infact the position, in the event the suit property is sold by the respondent and, the applicant's claim to have paid the loan amount is true, this appeal will be rendered nugatory, as the applicant would stand to loose both the suit property, as well as all the sums paid to the respondent. Similarly, if the sums claimed as debt collection charges are determined on appeal to be unfounded, she will have lost the suit property on the basis of fictitious claims.

In any event, the record shows that the applicant deposited a sum of Kshs. 300,000/- in court on 16th November, 2011 as security for the loan sums allegedly owed to the respondent. In view of the existence of this security, we consider that adequate provision has been made to safeguard the respondent's interests.

Accordingly, we grant the order of injunction against execution of the judgment of the High Court of 26th October 2016 in terms of prayer number 2 in the Notice of Motion lodged on 3rd November 2016, and that costs be in the intended appeal. We further order the applicant to file her record of appeal within 45 days from the date of this ruling.

It is so ordered.

Dated and Delivered at Kisumu this 20th day of July, 2017

P. KIHARA KARIUKI - PCA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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