Case Number:	Civil Application 270 of 2009
Date Delivered:	11 Dec 2009
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Philip Kiptoo Tunoi, John walter Onyango Otieno, Erastus Mwaniki Githinji
Citation:	Peter G. N. Nganga v Daniel Gichanga Kariuki t/a Watts Enterprises (A Firm) & another [2009] eKLR
Advocates:	Mr. Ngoge, the learned counsel for the applicant Mr. Kenia, the learned counsel for the respondents
Case Summary:	[Ruling] Civil Practice and Procedure – application for injunction pending determination of appeal - material factors to be considered before the court can issue injunctive orders– whether applicant had an arguable appeal –whether the applicant had demonstrated that the appeal will be rendered nugatory if the orders sought were not granted - the Court of Appeal Rules rule 5(2) (b)
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	H.C.C. C. 40 of 2003
Case Outcome:	Application dismissed
History County:	Nairobi
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-

Sum Awarded:	-

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLI 270 OF 2009 (UR 187/2009

PETER G. N. NGANGA.....APPLICANT

AND

1. DANIEL GICHANGA KARIUKI T/A WATTS ENTERPRISES (A FIRM).....1ST RESPONDENT

2. NATIONAL BANK OF KENYA LTD.....2ND RESPONDENT

(An applicaton for an injunction pending the outcome of applicant's appeal, herein C.A. No. 140 of 2007, Nairobi against the order and ruling of the High Court of Kenya at Milimani (Kasango, J) dated 5th February, 2007

in

H.C.C. C. NO. 40 OF 2003)

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RULING OF THE COURT

A full perusal of the record of this notice of motion dated 31st August, 2009 and filed on 9th September 2009, in conjunction with the records of both Civil Appeal Number 1 of 2006 and 140 of 2007 reveals a sad and unfortunate scenario. Sad in that the records present a history of a matter where attempts to abuse the court process consistently have been made by both parties at one time or the other and unfortunate in that when all that permeates the records are

considered, the parties are the ones that have suffered in that the second respondent the National Bank has not been able to realize the monies advanced to Olympic Fruit Processors Ltd way back in March 1994 and which was guaranteed by the applicant Peter N. Ng'ang'a for which the suit property was charged as security vide charge registered on 3rd March 1994 and may not be able to do so in the near future; and the appellant may very well, as a result of the interest piling up while the battle is still raging along the court corridors, be eventually unable even after the subject property is sold if it is at all sold, to pay the entire loan and may indeed be rendered destitute.

The brief history of the entire matter may be summed up so that what we have stated above may be understood. The second respondent, National Bank of Kenya Ltd, allegedly granted a loan to a company then known as Olympic Fruit Processors Ltd. The exact amount of that loan is disputed but that loan was guaranteed by the applicant who was then known as Gidraph Njunge Ng'ang'a alias Peter Njunge Ng'ang'a and his wife Keziah W. Nganga both of who were directors of that company. Their property, land parcel Number KAJIADO/KITENGELA/2913, later KAJIADO/OLOOLOITIKOSHI/KITENGELA 2913 was used as a security and the charge was registered on it on 3rd March 1994 against the applicant. The company defaulted in servicing the loan and the second respondent (hereinafter known as the bank) after attempts to realize its security with no success, as it alleged public auctions could not attract any sufficient bids, filed a plaint against the company, and the two guarantors on 8th April 1999 i.e. five years after the registration of the charge. That was HC.C.C. No. 390 of 1999. The bank was seeking in that plaint Ksh.10,777,650/=, interest and costs. The applicant, his wife and the company filed defence to that suit. However, the bank did not prosecute that suit despite notices to show cause why it should not be dismissed for want of prosecution. Consequently, in a ruling dated and delivered on 7th March 2003, Ondeyo J. (as she then was) dismissed that suit under ***Order XV1 rule 2 (1)*** of the Civil Procedure Rules. In the course of doing so, the learned Judge stated that such dismissal did not in any way prejudice the bank's right to exercise its statutory power of sale of the charged property. No appeal was preferred against that decision. Meanwhile, and before that suit was dismissed, the applicant herein filed a suit HCCC No. 40 of 2003 against the bank and one Daniel Gichanga Kariuki t/a Watts Enterprises seeking a declaration that the bank's power of sale never crystalised and thus seeking injunctive orders against the bank to stop it from in any way disposing of the suit property KAJIADO/OLOOLOITIKOSHI/KITENGELA/2913. Together with that plaint a chamber summons under certificate of urgency was also filed by the applicant seeking temporary injunctive orders against the bank and the auctioneer. That chamber summons which was also dated 24th January 2003, was placed before Ringera J (as he then was) on 27th January 2003 for inter parties hearing. On that date, the respondents' counsel applied for adjournment and though the applicant's counsel did not object to the same he sought interim orders. The learned Judge nonetheless rejected the adjournment and proceeded to dismiss the entire application on the grounds that there was delay in bringing the application, and applying equitable principles, he rejected the application. The applicant was aggrieved by the decision. He came to this Court, filed notice of appeal and an application for injunction pending the hearing and determination of that appeal which was Civil Appeal Number 55 of 2003. This Court, differently constituted, in a ruling dated and delivered on 15th August 2003, allowed that application and granted the injunctive orders sought till

that appeal was heard and determined. Later, that appeal – Civil Appeal No. 55 of 2003 was withdrawn by the applicant as the notice of appeal upon which it was based was defective as it referred to a decision made on a date when no such decision was made. Undeterred, the applicant went back to the superior court. This time he filed a notice of motion dated 27th September 2005, under ***section 3A*** of the Civil Procedure Act, ***Orders 44*** and ***50*** of the Civil Procedure Rules, ***section 3*** of the Judicature Act, and ***sections 10, 70, 75, 77*** and ***82*** of the Constitution and all other enabling provisions of the law. The first prayer in that application was for the respondents to be restrained from selling or disposing of the subject property. The other prayers were for several declarations to be made against the ruling of Ringera J. on the grounds that that decision violated applicant's constitutional rights. Prayer 4 sought:-

"4. An order that the defendants by themselves, their servants or agents be restrained by a mandatory or a permanent injunction from selling disposing of transferring alienating or offering for sale charging or howsoever interfering with the applicants right to ownership and possession of property Title Number Kajiado/Olooloitikoshi/Kitengela/2913 or from demanding any payment which is now barred by the provisions of limitation of actions Act and the order of this Honourable Court given on the 7th day March 2003 in Milimani HCCC to 390 of 1999 by the Hon. Lady Justice Sarah Ondeyo."

The application was opposed. It was fully heard by Ochieng J. who in a ruling dated and delivered on 25th October 2005 dismissed it holding that it was without merit. Costs were given to the respondents. The appellant through his advocates filed notice of appeal against that ruling and have since then filed in this Court Civil Appeal Number 1 of 2006 which is still pending. The notice of appeal in that appeal was filed on the same date 25th October 2005 and the record of appeal was filed on 6th January 2006. As if that was not enough, on 9th November 2006, the applicant filed a notice of motion in the same case dated 31st October 2006. In that notice of motion, the applicant sought certification of the application in first prayer and in the second prayer he sought orders:-

"That the Honourable Court be pleased to grant interim orders to stay unlawful transfer of the plaintiffs property/title number Kajiado/Olooloitikoshi/Kitengela/2913 to third parties pending the hearing and determination of this application or until further orders of this Honourable Court."

That application further sought judgment on admission pursuant to provisions of ***Order 12 rule 6,*** against the first respondent Daniel Gichanga, and striking out of the bank's defence on grounds that it was not served and also sought judgment to be entered for the applicant in terms of the amended plaint. That application was heard by Kasango J. In a ruling dated and delivered on 5th February 2007, the learned Judge dismissed that notice of motion with costs to the bank.

That is the decision that triggered the application now before us. The applicant felt aggrieved. He filed notice of appeal against that ruling on 15th February 2007 and Civil Appeal No. 140 of 2007 on 24th July 2007. Over two years later, on 9th September 2009, he brought this notice of motion in which he is praying for an order of injunction restraining the respondents from selling, disposing, transferring, alienating, offering for sale, charging or howsoever interfering with his right to ownership of the subject property until the outcome of the appeal. There is alternative relief sought but it is also for injunction till the Civil Appeal No. 140 of 2007 is heard and determined. The grounds advanced in the application for seeking the same orders are two and these are:-

"(a) That the dispute between the applicant and the respondents has already been resolved by the High Court vide a decree issued in Milimani HCCC No. 390 of 1999 and which decree the respondents have not appealed against.

(b) That unless restrained by an injunction the applicant stands to suffer irreparable loss and the applicant's Civil Appeal No. 140 of 2007 which is arguable will be rendered nugatory and reduced to a mere academic exercise."

There is an affidavit in support of the application. The bank opposed the application and in its replying affidavit sworn by one Damaris W. Gitonga, it stated in part, that the grounds upon which the application is based are not for consideration in the main appeal – i.e. Civil Appeal No. 140 of 2007; that applicant has come to court with unclean hands and cited six grounds to buttress that allegation.

Mr. Ngoge, the learned counsel for the applicant submitted before us that the appeal already filed i.e. Civil Appeal No. 140 of 2007 is arguable as to him, the applicant had been discharged in the ruling given by Ondeyo J. in Civil Case No. 390 of 1999; that the first respondent had not filed defence; that the applicant had filed appeal against decision of Ochieng' J; that the bank filed defence but he has not been served and that the bank waived its right to the recovery of the alleged debt when it went to the Court and its case was dismissed. On the nugatory aspects, Mr. Ngoge submitted that if the application is not granted, the applicant will lose everything as the subject property will be sold and the success of the appeal will be of no consequence to him. Mr. Kenia, the learned counsel for the respondents was of a different view. He submitted that the decision by Ondeyo J. never determined the dispute and moreover the learned Judge had actually stated the same in her ruling. He further urged that that ground is not in fact in the grounds of appeal in this matter and is therefore irrelevant. The superior court had found that the pleadings, including the statement of defence were all properly before the court. Lastly, he submitted that the results of the appeal will not be rendered nugatory as the bank will be able to pay damages should the applicant succeed in his appeal.

The application is brought under ***rule 5 (2) (b)*** of this Court's Rules. The law as regards such an application is now well settled. For an applicant to benefit under that rule he must demonstrate, first that the appeal or intended appeal upon which that application is premised is arguable and second, that if the orders sought are not granted, the success of that appeal, should it succeed, will be rendered nugatory. See the cases of ***Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227 (CAK)*** and ***Caltex Oil Company (Kenya) Ltd*** now renamed ***Total Marketing Kenya Ltd vs. Evanson Njiru Wanjihia Civil Application No. Nai. 190 of 2009.***

We have set out the history of the matter before us. It shows clearly that since Civil Suit No. 40 of 2003 was filed in the superior court on 24th January 2003, no attempt has been made to set it down for hearing. All that has happened is that the applicant has concentrated on interlocutory applications all essentially for restraining the bank from disposing of the property. Such applications have been brought under different provisions of the law but whatever baptism had been used, the bottom-line remained the same and that was that the orders sought in one way or the other were orders to restrain the bank from disposing of the property. Reading the application before Ringera J, the application before this Court arising from Ringera's ruling, the application before Ochieng' J, in respect of which an appeal is pending and the application before Kasango J. which has landed before us by way of this notice of motion, one gets the impression that HCCC No. 40 of 2003 was filed for the main purpose of securing injunction. Be that as it may, we have carefully perused the decision of Kasango J. and that of Ochieng' J. We have considered the submissions before us, the affidavits and the entire record of motion together with the records of appeal in Civil Appeal No. 1 of 2006 and No. 40 of 2007 both of which were made available to us at the time the notice of motion was canvassed. On our part, relying entirely on what is before us and without saying any more for fear of prejudicing the hearing of the two appeals, we are in doubt as to whether the Civil Appeal No. 140 of 2007 which is the subject of this notice of motion is arguable. We are however prepared to give the benefit of that doubt to the applicant. In short, we do take the view albeit reluctantly that the intended appeal is arguable.

That leaves the second limb which is whether by our refusal of this application, that success of Civil Appeal No. 140 of 2007 would be rendered nugatory were it to succeed. We note that when this Court granted injunction on 15th August 2003 on the pretext that the applicant's Civil Appeal No.55 of 2003 was arguable, the same appeal was later withdrawn

and the applicant went for another application on grounds that his constitutional rights were breached. In this application all that the applicant says in his affidavit as concerns that limb is at paragraph 5. He states as follows:-

"5. That the respondents have how (sic) issued me with a notice dated 13th August 2009 a copy a (sic) which is annexed hereto and marked "PG.NN2" threatening to sell my Title Number Kajiado/Olooloitikoshi/Kitengela/2913 over respondents claims which were dismissed by the High Court in Milimani HCCC No. 390 of 1999 in my favour and unless restrained I verily believe that my Civil Appeal No. 140 of 2007 lodged in this Honourable Court will be rendered nugatory and reduced to an academic exercise despite the fact that it raises arguable points of law."

The respondents' response to that allegation is found at paragraphs 8 and 9 of the replying affidavit sworn by the respondents' Legal Services Manager Mrs. Damaris W. Gitonga. She stated as follows:-

"8. That the applicant has not demonstrated that the appeal will be rendered nugatory if the orders sought are not granted.

9. That the applicant's claim if any lies in damages and in any event the applicant has not demonstrated what loss he stands to suffer in the event that the orders are not granted. The value of the property is known and the 2nd respondent is a reputable bank with vast assets."

We have anxiously considered this limb. The applicant, in using his property as security for a loan to a third party, was in effect turning it over to commercial sector. If this application is refused, the property may be sold. If the appeal eventually succeeds, the applicant will be at liberty to claim the value of the property and damages if any. He has not stated in his affidavit that the bank would not be in a position to reimburse him for the same. We note that, way back in 1999, the claim the bank made in HCCC No. 390 of 1999 was Ksh. 10,777,650 with interest at 35% p.a. By the notification of sale from the auctioneers dated 13th August 2009, the bank was claiming Ksh.17,267,754/25 as at 11th August 2009. The applicant has not in any way stated that he has sentimental attachment to the property. In the circumstances, we are not persuaded that if the application is refused, the success of the appeal will be rendered nugatory.

That being our view of the matter, this application cannot succeed. It is dismissed. However, in the circumstances of this dispute, we make no order as to costs.

Dated and delivered at Nairobi this 11th day of December, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR