



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA & GATEMBU, J.J.A.)

CIVIL APPLICATION NO.33 OF 2020

BETWEEN

PALMY COMPANY LIMITED.....APPLICANT

AND

CONSOLIDATED BANK OF KENYA LIMITED.....1ST RESPONDENT

JOSRICK MERCHANTS AUCTIONEERS.....2ND RESPONDENT

(Being an application for injunction pending the hearing and determination of an appeal against the

Ruling of the High Court of Kenya (Maureen A. Odero, J.) dated 29th November 2019

in

H.C.C. Case No. 527 of 2013.)

RULING OF THE COURT

1. This is an application brought under **rule 5(2)(b)** of this **Court's Rules**. The applicant sought an interlocutory injunction to restrain the 1st and 2nd respondents from disposing of a property known as **L.R. No. 209/11043** (the suit property) pending hearing and determination of an intended appeal. The applicant also sought an interlocutory order of injunction to restrain the 2nd respondent from further advertising for sale the suit property until the application is heard and determined. There are several declaratory orders that were also sought but which we have no jurisdiction to deal with in a rule 5(2)(b) application.
2. The applicant borrowed from the 1st respondent a sum of Kshs.35,000,000 to develop the suit property but defaulted in servicing the loan. As a result, the 1st respondent issued a statutory notice of sale of the suit property and the 2nd respondent advertised it for sale by public auction.
3. The applicant filed a suit in the High Court to challenge the intended sale, stating *inter alia*, that the respondent had undervalued the suit property and was likely to sell it at a throw away price, unless the court granted an interlocutory injunction to restrain the respondents from selling the suit property.
4. The said application was dismissed vide a ruling that was delivered on 29th November 2019. Being aggrieved by that ruling, the applicant preferred an appeal to this Court. In its application, the applicant argues that it has an arguable appeal; that unless the orders sought are granted the suit property will be sold at a throw away price and it will not be able to repay the loan balance and the bank will keep on pursuing it thereafter for repayment of the balance; and that unless the orders sought are granted the appeal, if successful, shall be rendered nugatory. On those grounds, the applicant urged us to grant the orders sought.
5. We have carefully considered this uncontested application, bearing in mind the principles that guide this Court in its determination of **rule 5(2)(b)** applications as summarized in ***Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR***.
6. Having perused the record of appeal and considered the applicant's submissions, we are satisfied that the intended appeal is arguable. However, the applicant has not demonstrated how the appeal, if successful, shall be rendered nugatory. There is no contention that the 1st respondent would be incapable of paying any damages that may be awarded in the event that the suit property is sold and the appeal is

decided in the applicant's favour thereafter. The 1st respondent is a bank and though it did not file any replying affidavit to the applicant's affidavit in support of the application, the applicant did not allege that the respondent would be incapable of compensating it if the appeal is successful.

7. Consequently, this application fails and is hereby dismissed in its entirety. As the application was not opposed, we make no order as to costs.

Dated and delivered at Nairobi this 6th day of November, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR