



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KIAGE, J.J.A)

CIVIL APPLICATION NO. 48 OF 2018

BETWEEN

JUJA COFFEE EXPORTERS LTD.....1<sup>ST</sup> APPLICANT

TSS TRANSPORTERS LTD.....2<sup>ND</sup> APPLICANT

TSS INVESTMENT LTD.....3<sup>RD</sup> APPLICANT

AND

BANK OF AFRICA LTD.....1<sup>ST</sup> RESPONDENT

KAAB INVESTMENT LTD.....2<sup>ND</sup> RESPONDENT

TAHIR SHEIKH SAID AHMED.....3<sup>RD</sup> RESPONDENT

*(An application for injunction pending appeal from the Ruling and Orders of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) dated 5th April, 2018 in HCCC No. 57 of 2016)*

RULING OF THE COURT

By their motion dated 11th April, 2018 and brought under **Rule 5(2)(b)** of the Rules of this Court, the three applicants Juja Coffee Exporters Limited, TSS Transporters Limited and TSS Investment Limited seek, in the main, orders as against Bank of Africa Limited (the Bank) which is the 1st respondent, that;

***“3. There be a temporary injunction, pending the lodging, filing, hearing and determination of the intend appeal, restraining the 1st respondent, its servants, agents or employees from further advertising for sale, selling by public auction or private treaty, leasing or in any other way disposing all those parcels of land known as;***

***(a) Plot N. 44 section XXI Mombasa Island registered in the name of the 2nd applicant***

***(b) Plot 147 section XXI Mombasa Island;***

***(c) Plot No. 1654 section XXI Mombasa Island;***

***(d) Plot No. 526 & 527 section XXI Mombasa Island;***

***(e) Plot No. 5866 section XXI Mombasa Island;***

***(f) Title No. Mombasa/Block XXVI/381; (b) to (f) all registered in the name of the 3rd applicant.***

The motion is founded on more than a dozen grounds appearing on its face which first seem to give a chronological account of the dealings between the respondents and the bank and how as a result of the intended sale of the aforesaid properties by published auction in exercise of a statutory power of sale as donated by various charges therein executed by the applicants in its favour, the applicants sought an injunction at the High Court vide a motion on notice dated 7th March, 2018. The bank opposed that motion by way of a replying affidavit and also filed a preliminary objection thereto seeking to strike it out for being *res judicata* and an abuse of the process of the court. That court (Njoki

Mwangi, J.) upheld the objection and struck out the said motion as urged by a ruling dated 5th April, 2018.

Aggrieved, the applicants filed a notice of appeal. They additionally state in their grounds that their intended appeal is arguable with high chances of success as it will raise “*weighty legal issues*”. Moreover, the said intended appeal would be rendered nugatory unless the injunction sought is granted as the properties would have been sold rendering the appeal moot and curtailed their constitutional rights to access to justice and fair hearing. The said properties are stated in the grounds to be “*highly valuable,*” “*greatly unique*” and “*a lifelong investment of by the 2nd and 3rd applicants*” the sale of which cannot be adequately compensated for by any amount of money.

The factual support for the motion is provided by the affidavit of **Nurein Sheikh Said** sworn on the same 11th April, 2018 and which essentially repeats what is stated in the grounds.

The application is opposed by the replying affidavit sworn on behalf of the bank on 27th September, 2018 by its Senior Manager, Debt Recoveries, one **Ben Mwaura** in which he adopts and reiterates the contents of his replying affidavit as well as the notice of preliminary objection to the application that was before the learned Judge the ruling whereon is sought to be challenged on appeal. He swore that the motion is *res judicata* and an abuse of the process of the Court for reasons that;

**“(a) The Mombasa High Court’s ruling dated 5th April 2018 in respect of Civil Case Number 57 of 2016 Juja Coffee Exporters Ltd & Others vs. Bank of Africa Limited is exhibited at pages 200 to 212 of the affidavit of Nurein Sheikh Said filed in support of the notice of motion dated 11th April 2018. The court upheld the bank’s notice of preliminary objection and dismissed the notice of motion dated 7th March 2018 as it was res judicata.**

**(b) The application is an abuse of the court process as issues of fraud, pre-export finance, validity of legal charges and statutory were all in issue when the appellants’ sought an injunction in their notice of motion application dated 7th March 2018 supported by the affidavit of Nurein Sheikh Said.**

**(c) The matter was also res judicata as the Court of Appeal in Mombasa Civil appeal No. 99 of 2016 Bank of Africa v Juja Coffee Exporters Ltd & Others allowed the bank’s appeal and set aside the order of Hon. Lady Justice Njoki Mwangi dated 21st July 2016.**

**(d) The appellants failed to prosecute their appeal in Mombasa Civil Appeal No. 109 of 2016 TSS Transporters Ltd & Others v Bank of Africa Limited & Anor. This appeal had been consolidated and was dismissed with costs in favour of bank. At paragraph 14 [page 80 of Nurein’s affidavit] of the judgment the Court of Appeal ordered as follows:**

**‘As counsel for the appellants in CA 109/2016 did not urge it either in writing as directed by the court or orally after being given the opportunity to do so, the appeal stands dismissed and we so order.’**

The deponent also swore that the applicants did not have the *locus standi* to seek injunction in respect of the property of the 3rd respondent (deceased) who was the owner of Mombasa/Block XXV1/381. He went on to aver that the charges on which the statutory power of sale was founded were duly executed to secure the indebtedness of the applicants who are serial defaulters and to whom requisite statutory notices had been issued. There, therefore, was no arguable appeal and there was also no evidence that the appeal would be rendered nugatory.

The applicants advocates on record Muriu Mungai & Co. who filed written submissions and a bundle of authorities both dated 9th November, 2018 on 14th November, 2018. On their part Wamae & Allen Advocates for the bank filed theirs dated 4th October, 2018 on 11th October, 2018. Those submissions are along the lines taken by the parties in their affidavits and we have carefully considered them.

At the hearing of the motion both **Mr. Kongere**, learned counsel for the applicant and **Mr. Khagram**, learned counsel holding brief for **Mr. Gichuhi** for the bank elected to rely on the respective submissions without addressing us orally.

The principles upon which this Court grants relief under **Rule 5(2)(b)** of its Rules are well settled and they are that to succeed, an applicant must show that he has an arguable appeal and that if the orders sought, be they of stay of execution or injunction are not granted, the said appeal would be rendered nugatory or useless, illusory, academic and of no effect. By an arguable appeal is meant, not one that must necessarily succeed but one that is not trifling, and raises at least one *bona fide* point that calls for a response from the respondent and is worthy of decision by the Court hearing the

appeal. See, **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS [2013] eKLR. KIENI PLAINS CO. LTD & 2 OTHERS vs. ECOBANK KENYA LTD [2018] eKLR.**

Regarding arguability of the appeal, it is submitted on behalf of the applicants that it will be urged on appeal that the learned Judge erred by holding that the application before her was *res judicata*, that she was being called upon to sit on appeal over a decision of this Court and that issues of fraud or forgery had been dealt with in her previous ruling of 26th July, 2017. The bank’s answer to the question of arguability is that the applicants do not have an arguable appeal and so their application must fail. It is its position that the learned Judge was correct to hold the matter before her to be *res judicata* the very same issues having been dealt with in an application for injunction previously filed by the applicants. This Court’s decision in **UHURU HIGHWAY DEVELOPMENT LTD vs. CENTRAL BANK OF KENYA**, Civil Appeal No. 36 of 1996 was cited, and in particular the following passage;

**“All the relevant authorities relied upon by Mr. Sharma in regard to section 141 of the Indian Code of Civil Procedure show that the provisions of section 11 thereof (our section 7) relating to res judicata in regard to suits do not apply to applications for execution of decree. There is not one case cited to show that an execution of decrees. There is not one**

*case cited to show that application in a suit once again for a rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation.”*

We think that the intended appeal’s arguability, which it is upon the applicants to satisfy us, stands or falls on the one issue of whether or not the applicants are deserving of an injunction has been heard and determined by a court of competent jurisdiction on a previous occasion. And it has.

It is not in dispute that by an application dated 6th June, 2016, the applicants did seek orders of injunction against the bank and Kaab Investments Limited, the 2nd respondent herein, that was in terms identical to the ones that were later prayed in the motion that led to the impugned ruling herein. The application related to the same properties and for basically the same reasons. The learned Judge is the one who heard that first application and by the ruling dated 21st July, 2016 allowed it on terms. The issues therein and in the later application were therefore heard and determined and we think, on the face of it, that the learned Judge was justified to treat this matter as *res judicata* when it was presented anew before her. More critically, however, the learned Judge’s grant of the injunction sought on that occasion became the subject of an interlocutory appeal to this Court, to wit, **Mombasa Civil Appeal No. 99 of 2016** filed by the bank. The applicants herein also filed an appeal against the same decision on being aggrieved by the terms imposed, namely **Mombasa Civil Appeal No. 109 of 2016**. The two appeals were consolidated and by a judgment delivered on 25th January 2018, the one by the applicants herein, **No. 106 of 2016** was dismissed while the one by the bank, **No. 99 of 2016**, was allowed. In allowing the bank’s said appeal, this Court (Waki, Karanja & Koome, JJ.A) at paragraph 26 delivered itself as follows;

*“26. On our own evaluation, after considering the affidavit in reply together with other documents on record, there is considerable doubt that the applicants had established a prima facie case with a probability of success. Even if they had, as the trial court found, it was necessary to consider whether the injury they would suffer if the injunction is not granted, will be irreparable. The law is that if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at the stage. That principle does not, of course, apply where there is contumacious breach of the law, since a party cannot be allowed to maintain an advantageous position he has gained by flouting the law, simply because he is able to pay for it. See Aikman vs. Muchoki [1984] KLR 353. The consideration of the second principle in the Giella case was totally ignored and once again, with respect, it was a non direction which calls for interference with the discretion of the court.”*

The Court then set aside the order of injunction given by the learned Judge and substituted therefor an order dismissing the application dated 6th Jun, 2016.

That decision of the Court was placed before the learned Judge in support of the preliminary objection and we think that it was inevitable that the learned Judge would uphold the objection, as she in fact did. She was bound by the decision of this Court by the doctrine of precedent.

In those premises, and while keenly cognizant of the fact that on an interlocutory application we generally eschew the taking of concluded positions since the intended appeal is yet to be argued before the bench that will be seized of, and which will determine it as it will deem fit, we find ourselves unpersuaded that the applicants have an arguable appeal in the circumstances of this case. They fail on the first limb of arguability.

Since the requirement is for an applicant to satisfy the Court on **both** the arguability and the nugatory aspect, once the applicants fail on the one, a consideration of the other is of no consequence and we shall not venture into it as our finding on it would not alter the outcome of this application.

In the result, the application is entirely without merit and is dismissed with costs.

**Dated and delivered at Mombasa this 7<sup>th</sup> day of March, 2019**

**ALNASHIR VISRAM**

**JUDGE OF APPEAL**

**W. KARANJA**

**JUDGE OF APPEAL**

**P. O. KIAGE**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**