



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, GATEMBU KAIRU, OTIENO-ODEK J.J.A)**

**CIVIL APPLICATION NO. NAI 38 OF 2012 (UR 25/2012)**

**BETWEEN**

**SHIMMERS PLAZA LIMITED..... APPLICANT**

**AND**

**NATIONAL BANK OF KENYA LTD..... RESPONDENT**

***(Being an application for stay of execution pending the hearing and determination of an intended appeal against the ruling and/or order of the High Court of Kenya at Nairobi (Kimondo, J) dated 27<sup>th</sup> January 2012***

**in**

**H.C.C.C. NO. 895 of 2009)**

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**RULING OF THE COURT**

1. Before us is a Notice of Motion dated 8<sup>th</sup> February 2012 brought under **Section 3 A and 3 B** of the Appellate Jurisdiction Act and **Rule 5 (2) (b)** of the Court of Appeal Rules. The applicant seeks an order in terms of paragraph 4 of the motion, that this honourable court be pleased to order stay of execution of the superior court's ruling and/or order in HCCC No. 895 of 2009 between Shimmers Plaza Limited and National Bank of Kenya Limited, pending hearing and determination of the applicant's intended appeal. At paragraph 5, the applicant seeks that it be at liberty to apply for further orders and/or directions as this honourable court may deem fit and just to grant.

2. The gravamen of the application is that the applicant seeks to stop the respondent from advertising, disposing off, selling or offering for sale the suit property known as Title No. I.R.552525 (L.R. No. 1870/IX/128 situate in Westlands, Nairobi pending hearing and determination of the suit. The applicant at paragraph 6 (d) of the motion avers that it intends to appeal against the whole of the decision of the superior court and which appeal raises arguable points of law and facts and as such, it has high chances and probability of success. In paragraph 6 (c), the applicant avers that if the respondent disposes off the suit property, it will be subjected to great loss and damage not to mention embarrassment to be caused and that the intended appeal will be rendered nugatory. The motion was supported by the affidavit

of Mr. Raj Devani who is a director of the applicant company.

3. The respondent did not file any replying affidavit but relied on the records and authorities cited in of the superior court filed in support of the application.

4. Briefly stated, in the year 1996, a company known as Trade Wings Limited borrowed a term loan of Ksh. 150 million. The applicant guaranteed the said sum of Ksh.150 million by offering its property Title No. I.R.552525 (L.R. No. 1870/IX/128) as security for the loan. The borrower fell into arrears in repayment and the respondent took steps to realize the security. During the hearing of this application, it was submitted by counsel for the respondent that the term loan was to be repaid in thirty equal installments of Ksh. 7.5 million every three months. That, only three installments were paid by the borrower and a further ten million shillings paid pursuant to a court order. It was submitted by the applicant that the total payments made to date since 1996 is a sum of Ksh.32.5 million.

5. In an application under **rule 5(2)(b)** this Court exercises original jurisdiction. An applicant is obligated to show, firstly, that his appeal or intended appeal is arguable. And secondly, that unless he is granted an injunction or stay as the case may be, his appeal or intended appeal, if successful, will be rendered nugatory - see **RELIANCE BANK LTD (IN LIQUIDATION) V. NORLAKE INVESTMENTS LTD.** Civil Application No. Nai.93 of 2000.

6. The applicant argued that the intended appeal is not frivolous as it raises arguable points of law and fact. It was submitted that first, the instrument of charge was null and void on account that the verification certificate was not attested by an advocate. It was submitted that during trial, the applicant shall demonstrate that the certificate was not signed before the advocate named. Second, it was averred that the respondent was not candid with its statement of accounts and an arguable issue as to the accuracy of the accounts shall be canvassed at the hearing of the main appeal. Third, the applicant averred that there was a variation of the security which rendered the charge instrument null and void. We find that these are not frivolous but arguable ground that have aptly been demonstrated and will have to be determined by the trial court alongside other substantial issues that were raised by the respondent.

7. The applicant submitted a list of authorities in support of its application that an injunctive order should be granted. The applicant's counsel Mr. Billing, cited the case of **MBAABU MBUI & ANOTHER – V- LANGATA GARDENS LIMITED Civil Application NAI 73 of 2011 (UR 49/2011)**. He submitted that in the Mbaabu case, this court granted an injunction in furtherance of the overriding objective to ensure proportionate resolution of the appeal in allowance. See **Section 3A (1) of the Appellate Jurisdiction Act**. He urged this court to follow the overriding objective and grant the injunctive orders sought. We have considered this case and note that it is distinguishable from the present case. In the Mbaabu case, injunction was granted first because it was specifically prayed for in the notice of motion and second, we found that if no injunctive orders were granted, the suit property would likely remain vacant for a considerable period of time resulting into substantial loss to the respondent. In the present case, there is no express application for orders of an injunction and the suit property is not vacant. During submissions, we were informed by counsel for the respondent that the suit property is generating a monthly rent of Ksh. 2.6 million which sum the applicant receives without making any effort to repay the term loan.

8. The applicant submitted that the respondents statement of account was not accurate. The accuracy of accounts between the parties is an arguable issue. The applicant referred this Court to various statements from the respondent bank which *prima facie* demonstrated that some entries may not be correct. On its part, the respondent submitted that a term loan of Kshs.150 million as granted and out of this, a paltry Kshs.32.5 million has been repaid since 1996. The respondent stated that this Court should not exercise its discretion to grant an injunctive relief to a party who has not shown willingness to pay the debt. In the case of **PELICAN INVESTMENT LIMITED VS. NATIONAL BANK OF KENYA** (2002) 2 EA 488 (CCK) whereby it was held interalia that

***“A court, should not grant an injunction restraining a mortgagee whose power of sale has arisen from exercising his statutory power solely on the ground that there is a dispute as to the amount due under***

*the mortgage.”*

9. On the question whether the appeal would be rendered nugatory if an injunction is not granted, we have considered the submissions by both parties, the documents filed and authorities cited. In the case of **ST. ANN'S LIMITED – V- PLANFARM LIMITED & ANOTHER Civil Appeal No. 79 of 2009** this court stated that where a dispute relates to a property which has been put forth as security, the property can be valued easily and the applicant's claim is capable of being compensated by way of damages.

10. In paragraph 6 (c) of the Notice of Motion, the applicant avers that if the respondent disposes off the suit property, the applicant will be subjected to a great loss and damage not to mention embarrassment. In the case of **BANANAHILL INVESTMENT LTD – V- PAN AFRICAN BANK LTD & 2 OTHERS Civil Appeal No. 68 of 1986**, this court observed that there is need for evidence to show that if the sale was completed, the applicant might lose its premises which might be difficult to replace with another as good with any damages paid by the respondent. In the present case, the applicant has not demonstrated how damages is not an adequate remedy. In the case of **JOSEPH GITAHU GACHAU & ANOTHER – V- PIONEER HOLDINGS (A) LIMITED & OTHERS Nairobi Civil Appeal No. 124 of 2008**, this court stated that it must be realized that when a property is charged to secure a loan, it is converted into a commodity for sale available for purchase by all and sundry, if there is failure to pay the charge debt or loan and no sentimental value or attachment to the mortgaged property, however great would operate against the exercise of the statutory power of sale by the mortgagee. In the present, case, the applicant refers to great loss and embarrassment. We are inclined to follow the decision in **Joseph Gitahi** case (supra) and observe that no amount of embarrassment however great would operate against the exercise of a statutory power of sale. The respondent's statutory power of sale has arisen and cannot be stopped on account of embarrassment to be occasioned to the defaulter by virtue of realization of the security. We also refer to this court's decision in **Civil Application No. NAI 159 of 2007 DANIEL KAMITA GICHUHI & ANOTHER -V - CONSOLIDATED BANK OF KENYA** where this court stated that the applicant had not shown that in the event that the appeal succeeded, the bank (respondent) could not be financially capable of fully compensating him. In the present case, we are not satisfied that, unless the order of injunction is granted, the intended appeal would be rendered nugatory.

11. Finally, we are constrained to address ourselves to the nature of an application that is before us. The notice of motion dated 8<sup>th</sup> February 2012 is seeking an order for stay of execution. There is no specific prayer for injunctive orders. In the notice of motion, we are not being asked to grant an order of *status quo ante*. Mr. Billing, learned counsel for the applicant urged this court to rely on paragraph 5 of the notice of motion and grant an injunction in favour of the applicant. Paragraph 5 of the motion states that the applicant be at liberty to apply for further orders and/or directions as this honourable court may deem fit and just to grant.

12. We find that the dicta of this court in the case of **STANBIC BANK KENYA LIMITED – V- KENYA REVENUE AUTHORITY NAI Civil Application No. NAI 294 of 2007** is relevant. It was stated that under **Rule 5(2) (b)**, this court can only make three orders, namely an order staying proceedings, an order staying execution of the superior court's order and lastly, an injunction order. This is clearly spelt out in that rule. Our inherent powers revolve around these aspects only. We cannot extend those powers to the realm of creating a prayer not sought in the notice of motion and proceed to grant it as Mr. Billing is asking us to do. In any case, the prayer in the application does not seek that the *status quo* be maintained. In our view, to go to the extent of interpreting the prayer to include a prayer for grant of an injunction or a prayer to grant the maintenance of the *status quo* that was not prayed for is to go beyond the provisions of **Rule 5(2)(b)**. As stated in the case of **WESTERN COLLEGE OF ARTS AND APPLIED SCIENCES – V – ORANGA [1976-80] 1 KLR 78**, this court has no general inherent jurisdiction.

13. We are inclined to look at the conduct of the respondent who has only paid a mere three instalments out of an agreed total of 30 instalments. Given this conduct we are not prepared to exercise any discretion in the respondent's favour.

14. Further, we have examined the decision of the superior court made on 27<sup>th</sup> January 2012, the

subject of the intended appeal. The superior court (*Kimondo J.*) made an order which dismissed the application for injunction. In the case of **REPUBLIC – V- KENYA WILDLIFE SERVICES & 2 OTHERS Civil Application No. NAI 12 of 2007**, this court stated “the superior court has not therefore ordered any of the parties to do anything or refrain from doing anything.” There is therefore, no positive and enforceable order made by the superior court which can be the subject matter of the application for an injunction or stay. In the present case, what orders were made by the superior court on 27<sup>th</sup> January 2012 that need to be stayed? The superior court found that the applicant's chamber summons application for injunction dated 14<sup>th</sup> September 2009 lack merit and was dismissed with costs. The question before this court is can a stay order be issued for dismissal of an application? The answer is in the negative. This Court finds that the superior court made a negative order that is not capable of stay. There is nothing to stay that is before this honourable court. In the result we dismiss the application lodged in the Court on 8<sup>th</sup> February 2012, with costs to the respondent.

**Dated and delivered at Nairobi this 15<sup>th</sup> day of MARCH, 2013.**

**M.K. KOOME**

.....  
**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

.....  
**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**