



**REPUBLIC OF KENYA**

**Court of Appeal at Nairobi**

**Civil Application 224 of 2011**

**JAMES JUMA MUCHEMI & PARTNERS LIMITED ..... APPLICANT**

**AND**

**BARCLAYS BANK OF KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**TUSKER MATTRESSES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(An application for an injunction pending filing, hearing and determination of an intended appeal against the entire Ruling of the High Court of Kenya at Nairobi (Commercial & Tax Division) (Njagi, J) dated 8<sup>th</sup> September, 2011*

*in*

***H. C. C. No. 339 of 2011)***

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**RULING OF THE COURT**

This application is brought by way of Notice of Motion dated 16<sup>th</sup> September, 2011 under **Rule 5 (2) (b)** of the Court of Appeal Rules (the Rules) for an injunction pending the hearing and determination of an intended appeal. The appeal intended herein arises from the decision of the High Court (Njagi, J) dated 8<sup>th</sup> September, 2011. Briefly the material facts are as follows:

The applicant company is the registered owner of L. R. No. Nakuru Municipality Block 11/649 and L. R. No. Nakuru Municipality Block 11/650 (“the suit properties”) which are located in Nakuru town. The applicant borrowed funds from Barclays Bank of Kenya, the 1<sup>st</sup> respondent to develop a shopping mall in Nakuru. The 2<sup>nd</sup> respondent, Tusker Mattresses, had agreed to lease the property on completion. Construction of the project began in 2007. There was default by the applicant in servicing the loan. It is the applicant’s case that Barclays Bank has threatened to sell the suit property by way of private treaty and instructed a firm of auctioneers who have advertised the property for sale. It is also the applicant’s case that Barclays Bank is unlawfully using threats to sell the property thus exerting pressure on the applicant to pay unrealistic and unjustified sums thereby clogging the applicant’s equity of redemption and frustrating the applicant’s rights under the charges and Deed of Settlement dated 11<sup>th</sup> March, 2011. The deed also contained an arbitration clause which the respondent has ignored to submit itself for arbitration. The applicant further contends that it was not served with any statutory notice for the

sale of the property, and accordingly the intended sale was unlawful.

Barclays Bank, on the other hand, alleges that the applicant has not submitted any new material that would show a misdirection on the part of the High Court when it granted a conditional injunction on the applicant's application. It argues that there is overwhelming evidence that the applicant admitted indebtedness, in the sum of Kshs.398 million, culminating in a deed of settlement dated 7<sup>th</sup> March, 2011. Relying on the replying affidavit sworn by Nereah Okanga on 11<sup>th</sup> October, 2011 Barclays Bank submits that the applicant had not made a case for the grant of injunction orders sought and prayed that the notice of motion be dismissed with costs.

In his submissions before us, Mr. Peter King'ara, learned counsel for the applicant, argued that Barclays Bank had breached the agreement by its failure to advance the last tranche of funds resulting in the loss suffered by the applicant. Mr. King'ara submitted that if the property was to be sold his client would suffer irreparable loss.

Mr. Munyu, learned counsel for Barclays Bank, submitted that the applicant had made no payments whatsoever for more than one year and has shown no intention to repay the same. He submitted that the appeal was not arguable because the debt was admitted through the deed of settlement. He added that there was no dispute to refer to arbitration and finally that the deed allowed the bank to sell the property. He referred to the case of **Vanessa Gathoni Kamau vs Bank of India, Civil Appl. No. 264 of 2008 (UR 169/2008)**.

The principles applicable to the determination of applications under rule 5 (2) (b) of the Rules are well settled, as was observed by this Court in **Civil application No. Nai 157 of 2006 in Ishmael Kagunyi Thande vs Housing Finance of Kenya Ltd (unreported)** in these terms:

***“The Jurisdiction of the Court under rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.” (See Githunguri vs Jimba Credit Corporation Ltd, No. 2 (1988) KLR 838, J. K. Industries Ltd vs Kenya Commercial Bank Ltd (1982 – 1988).”***

Is this appeal arguable? Although it would not be appropriate for us at this interim stage to make any definitive statements as to the merits of this appeal we are highly skeptical about its success. There is overwhelming evidence that the applicant is indebted to the 1<sup>st</sup> respondent culminating in the deed of settlement dated 11<sup>th</sup> March, 2011 by which the applicant admitted indebtedness in the sum of Kshs.398 million excluding the legal fees and costs of recovery.

On the bases of the material on the record, we have our doubts about the arguability of the applicant's appeal. We of course cannot make conclusive findings at this time and all we can do is express our doubts on that point. But even assuming for a moment that the intended appeal is arguable, would that appeal be rendered nugatory if we refused to grant the orders sought? We do not think so. The dispute relates to a property which was put forth as security. This property can be easily valued. The applicant's claim is capable of being compensated by way of damages.

In the result, we dismiss the notice of motion dated 16<sup>th</sup> September, 2011 with costs to the 1<sup>st</sup> respondent.

**Dated and delivered at Nairobi this 12<sup>th</sup> day of April, 2013.**

**ALNASHIR VISRAM**  
.....  
**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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

**W. KARANJA**

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

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

**DEPUTY REGISTRAR**

/dm