



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT MOMBASA

Civil Application 201 of 2008

**NYALI CONSTRUCTION AND ELECTRICALS  
SERVICES LIMITED ..... APPLICANT**

**AND**

**BARCLAYS BANK OF KENYA LIMITED ..... RESPONDENT**

*(Application for injunction pending the lodging, hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Mombasa (Sergon, J.) dated 23<sup>rd</sup> June, 2003*

**in**

**H.C.C.C. NO. 315 OF 2007)**  
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**RULING OF THE COURT**

The applicant herein, **NYALI CONSTRUCTION & ELECTRICAL SERVICE LIMITED** (as the plaintiff in the superior court) took out a summons in which it prayed for an order of injunction to restrain **BARCLAYS BANK OF KENYA LIMITED** (the respondent herein) by itself, its offices, agents and or servants for advertising for sale, selling by public auction or by private treaty, alienating, charging or in any way dealing with the property title number **Mombasa/Block 1/28** pending the hearing and determination of the suit in the superior court. The respondent bank resisted the summons by filing replying affidavits of **Pius Okello** and **Faith Obiero**. The application was heard on **11<sup>th</sup> December, 2007** and ex parte orders of injunction were given. The learned advocates for the parties filed written submissions and the matter came up before the learned judge of the superior court (Sergon, J.) on **30<sup>th</sup> April, 2008** when the respondent’s counsel raised a preliminary issue in that the applicant had been guilty of material non-disclosure and perjury. It was alleged that when the applicant filed its application there was the supporting affidavit of one, **Beatrice Obiero** sworn on **11<sup>th</sup> December, 2002** in which the deponent averred that the title **No. Block 1/28** was never charged and yet by then the applicant knew that the property had been charged with the respondent.

The issue of material non-disclosure was argued before the learned Judge who having considered all that had been urged before him came to the conclusion that the applicant was indeed guilty of material non-disclosure. In concluding his short ruling delivered on **23<sup>rd</sup> June, 2008**, the learned judge said:-  
**“It is clear that the plaintiff intended to conceal the fact that it purchased the premises subject to the charge dated 9<sup>th</sup> August, 1995. In a nutshell the plaintiff was not as innocent as it portrayed itself at the ex parte stage.**

***For the above reasons I dismiss the summons dated 11<sup>th</sup> December, 2007. I also discharge the***

**ex parte orders obtained on 11<sup>th</sup> December, 2007. Costs of the application is given to the defendant.”**

Aggrieved by that decision the applicant, through its lawyers filed a notice of appeal and pursuant to that notice of appeal the applicant filed this notice of motion under **Rule 5(2)(b)** of this Court’s Rules seeking one main relief viz:-

**“1. Pending the lodging, hearing and determination of the intended appeal, the respondent by itself, its officers agents and/or servants be restrained from in any way whatsoever and howsoever advertising for sale, selling by public auction or private treaty, alienating, charging, interfering or in any way whatsoever and howsoever dealing with the property known as Mombasa/Block 1/28.”**

There was, of course, the usual prayer for the costs of the application.

This is the application that came up for hearing before us on 27<sup>th</sup> January, 2010 when Mr. Alfred Mabeya appeared for the applicant, while Mr. Karungo appeared for the respondent. In his submissions Mr. Mabeya faulted the learned judge for deciding the application by merely dealing with what he considered to be a preliminary issue. Mr. Mabeya went on to argue that there was no charge and hence there was no issue of material non-disclosure on the part of his client.

In a bid to persuade us to grant the relief sought Mr. Mabeya submitted that the suit property is a prime property and that the applicant has been in possession. For that reason, the applicant cannot be compensated by way of damages.

In answer to the foregoing, Mr. Karungo submitted that there was non-disclosure by concealment of certain documents. It was Mr. Karungo’s contention that the applicant had no arguable appeal and that in any event the respondent would be able to pay any amount by way of damages should the applicant succeed in its intended appeal. Mr. Karungo reminded us that the applicant was yet to file the appeal.

As already stated elsewhere in this ruling, the notice of motion before us was brought pursuant to **rule 5(2)(b)** of this Court’s Rules. For an applicant to succeed under that rule, he has to demonstrate, first that the intended appeal or the appeal, if one is already filed, is arguable, that is to say, it is not frivolous and secondly, that the results of the appeal or intended appeal as the case may be, were it to succeed will be rendered nugatory by this Court’s refusal to grant the application. In **BOB MORGAN SYSTEMS LTD. & ANOTHER V. JONES [2004] 1 KLR 194** at p. 146 this Court stated:-

**“The powers of the Court under rule 5(2)(b), aforesaid, are specific. The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly, that unless a stay or injunction is granted his appeal or intended appeal, if successful, will be rendered nugatory.”**

In the present application the matter relates to a property which the applicant’s advocate has described as prime property. One of the issues to be considered in the intended appeal will be whether there was material non-disclosure by the applicant when it obtained ex parte orders which were later discharged by the learned judge.

Having considered what was placed before the learned judge leading to the discharge of the ex parte orders and the submissions by counsel appearing for the parties herein, we are of the view that as we are not hearing the appeal the less we talk about the chances of the appeal succeeding the better. It has been contended by the learned counsel for the respondent that there would be no difficulties in paying damages in event that the applicant succeeds in its appeal. We agree with that submission which answers the second principle set out above that the intended appeal will not be rendered nugatory.

The above being our view, the application dated 23<sup>rd</sup> July, 2008 is hereby dismissed with costs to the respondent.

**Dated and delivered at Mombasa this 12<sup>th</sup> day of March, 2010.**

**P.K. TUNOI**

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

**E.O. O’KUBASU**

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

**P.N. WAKI**

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

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

**DEPUTY REGISTRAR**