



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLI NO. 287 OF 2007**

1. PENELOPE COMBO
2. ANTHONY COMBOS.....APPLICANTS

**AND**

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

***(An application for an injunction and stay of proceedings pending the filing, hearing and determination of an intended appeal from the ruling of the High Court of Kenya at Nairobi, Milimani Commercial Courts (Lady Justice Lesiit) dated 26<sup>th</sup> October, 2007***

**in**

**H.C.C.C. NO. 440 OF 2003)**

**\*\*\*\*\***

**RULING OF THE COURT**

This is an application by Notice of Motion dated 22<sup>nd</sup> November 2007 for an injunction and stay of proceedings pending the filing, hearing and determination of an intended appeal against the ruling and order of Lesiit J. dated 26<sup>th</sup> October 2007, under **rule 5(2) (b)** of the Court of Appeal Rules (hereinafter "**The Rules**")

The applicants are **Penelope Combos** (hereinafter "**Penelope**") and her husband **Anthony Combos** (hereinafter "**Anthony**") being the first and second plaintiffs in civil suit No. 440 of 2003 in the High Court of Kenya, Milimani Commercial Courts. The respondent to the application and the defendant in the suit is the **National Bank of Kenya Ltd.** (hereinafter "**NBK**").

The **orders** sought in the Motion are:-

***"1. THAT this Honourable Court be pleased to grant an injunction restraining the respondent whether by itself or by its servants, or agents or Advocates, auctioneers or any of them from the following acts, that is to say from advertising for sale, selling by public auction or private treaty or otherwise howsoever completing by conveyance or transfer or any sale concluded by auction or leasing, letting or otherwise howsoever interfering with the ownership of title to and/or interest in that parcel of land known as L.R. No 7741/71 situated in Kitisuru within the city of Nairobi pending the filing and determination of the intended appeal against the ruling and order of the Honourable Lady Justice Lesiit delivered on 26<sup>th</sup> October 2007.***

2. ***THAT this Honourable Court be pleased to order a stay of any further proceedings in the superior court in Milimani HCCC No 440 of 2003 pending the hearing and determination of the intended appeal against the ruling and order of the Honourable Lady Justice Lesiit dated 26<sup>th</sup> October 2007.***
3. ***THAT this Honourable Court be pleased to order a stay of registration of any transfer, conveyance, Lease or any dealing of (sic) the property known as LR No. 7741/71, Nairobi which may take place pending the hearing and determination of this application.***
4. ***The costs of and incidental to this application abide the result of the intended appeal.”***

The salient facts relied on by the applicants as set out in the affidavit of **Anthony** in support were as follows:-

**Penelope** and **Anthony** are the joint registered owners of the property known as LR No. 7741/71 situated in Kitisuru within the Nairobi area which property is hereinafter referred to as the “**Kitisuru Property**”. In 1997 a company called Olerai Nurseries Ltd. (**ONL**) of which Anthony was a director and shareholder applied for a loan of USD 1,000,000 from the European Investment Bank (**EIB**) to start a flower project. The application was submitted through the **NBK** being one of the institutions nominated by the Central Bank of Kenya (**CBK**) to participate in the implementation and disbursement of funds under the “*Global Private Enterprise III Programme.*”

**Anthony** claimed that it was the duty and obligation of the **NBK** to pursue and secure the **EIB** Funds and generally to observe all the terms and conditions set by the **CBK** to regulate the processing and disbursement of the funds. **Anthony** further claimed that the **NBK**, in breach of its fiduciary/contractual duty, failed, inter alia, to pursue diligently the loan application by **ONL** to the **EIB** and/or failed to accord the application priority.

On or about 21<sup>st</sup> January 1998, in anticipation of the delayed **EIB** funding, **ONL applied for and NBK agreed to advance to ONL, a short term loan in the sum of US Dollars 500,000** to finance the proposed flower project pending the approval of the **EIB** funding and a letter of offer was duly executed.

**Penelope** and **Anthony** were required by **NBK** to sign a legal Charge dated February 1998 in favour of **NBK** to secure the bridging finance of USD 500,000. **Penelope** agreed to execute the demanded charge upon, she claims, receiving express representations from **NBK** and her husband, **Anthony**, that the flower project intended to be undertaken by **ONL** under the direct supervision of **Anthony** and **NBK** was a viable project, and further on the assurance that **EIB** would adequately fund the project to the tune of US dollars one million to ensure its success.

**Penelope** further claimed that it was represented by the **NBK** that it would at all times observe the terms of the Contract of lending as per the terms of the Letter of Offer dated 21<sup>st</sup> January 1998 as well as the terms of the Charge document dated 19<sup>th</sup> February 1998.

The applicants are aggrieved by the fact that, according to them, the **NBK** thereafter breached the agreed terms of the contract of lending as incorporated in the letter of offer and the Charge document and advanced the principal debtor only **USD 305,000** in staggered installments hence varying the terms of the lending.

Furthermore, according to the applicants, **NBK** “*failed to diligently pursue the EIB funding as a result of which ONL’s project suffered due to under capitalisation and as a consequence of which it finally collapsed.*”

In addition to the above, the applicants claim, *inter alia*, that the Statutory Notice served by **NBK** is fatally defective, null and void and the **statutory power of sale** has not accrued to the defendant/respondent for the following main reasons:-

1. No valid **Statutory Notice** was sent or served on **Penelope** who was a guarantor of the loan by the **bank**. She was entitled to such notice before the statutory power of sale could be exercised. Miss Njiru learned counsel for the respondent **NBK** referred the court to exhibits **ZKM 3A and C** to the defendant's replying affidavit which documents, counsel submitted, were the Statutory Notices sent to both guarantors.

2. The Charge document was not properly executed.

The principles applicable to applications of this nature were recently summarised in the ruling of this Court in **Civil Application No. NAI 157 2006 between Ishmael Kagunyi Thande and 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 v. Jimba Credit Corporation Ltd. No 2 [1988] KLR 838. J.K. Industries Ltd. v. Kenya Commercial Bank Ltd [1982-88].)***

We have come to the conclusion that, if no stay is granted, there is a very real risk that the **Kitisuru property**, which is the matrimonial home of the two elderly applicants, will be sold by the respondent Bank before the appeal can be heard.

However before we grant the stay sought we also need to be satisfied that the intended appeal, against the decision of **Lesiit J.** in the superior court, is arguable and not frivolous. The application before **Lesiit J** was brought under **Order XXXIX** of the Civil Procedure Rules and filed by **Penelope** and **Anthony** seeking in short that **NBK** be restrained from selling the **Kitisuru property**. **Lesiit J** found that the applicants' loss, if any, could be adequately compensated by an award of damages and that the scales of convenience were tilted in favour of the **NBK** and she dismissed the application before her by **Penelope** and **Anthony** in its entirety.

We are satisfied that the learned Judge was right in finding that *“the applicant's loss, if any, resulting from a sale of the **Kitisuru property** could be adequately compensated by an award of damages.”*

This being the position we find that the case for granting the stay sought has not been established.

We therefore dismiss the application by Penelope Combos and Anthony Combos by Motion dated 22<sup>nd</sup> November 2007 with costs to the respondent National Bank of Kenya.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of February, 2008.**

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**W. S. DEVERELL**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**