IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI NO. 134 OF 2008 (UR 86/2008)

MUKUA TUTUMA …….. APPLICANT

AND

CO-OPERATIVE BANK OF KENYA LTD ……..…….. RESPONDENT

(Application for injunction pending the filing, hearing and determination of an intended appeal from a ruling and order of the High Court of Kenya at Milimani Commercial Courts (Warsame, J) dated 23rd April, 2008

in

H.C.C.C No. 263 of 2007)

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RULING OF THE COURT

Mukua Tutuma, the applicant in this application, by way of notice of motion dated 19th June 2008, was together with his two brothers, Alex Munene Tutuma and Raphael Kibiru Tutuma, trading under the firm name of Tutuma General Stores. Vide a letter dated 15th February 2001, addressed to Co-operative Merchant Bank Ltd, they applied for a loan of Ksh.10,000,000/= (ten million) from the same bank to enable them expand their business by building a new business premises and expanding their stock. They explained in subsequent letters to the same bank how they were going to repay the loan if granted. In a letter dated 2nd March 2001, the Bank made an offer of banking facilities limited to Kshs.10,000,000/= at interest rate of 6% above base rate, which base rate was then 20% p.a. The loan was guaranteed by the three brothers and the applicant's land L.R. No. 209/9692 was charged as security for the loan. There is evidence on record that the entire loan was disbursed. In the month of November 2006, Alex Munene Tutuma and Raphael Kibiru Tutuma pulled out as guarantors for the loan. The bank, in a letter dated 13th November, 2006 threatened to recall the entire loan. That was resisted by the applicant. Thereafter, the applicant was servicing the loan on his own without the help from his brothers. He however failed to service it as required by the respondent despite several concessions granted by the respondent to enable him pay up the loan. On 21st March 2006, the respondent demanded a sum of Ksh.6,333,888/80 from the applicant, being the total outstanding amount of the loan facility as at that date. This demand was contained in a statutory notice dated 21st March 2006. It gave the applicant three (3) months' notice from the date of service of the notice upon the applicant to pay that amount or else the respondent would exercise its statutory power of sale over the property L.R. No. 209/9692 Nairobi which was charged to secure the loan. That notice was issued pursuant to the provisions of section 69(1) and section 100 A of

the Transfer of Property Act (1882) of India. The applicant in response to that notice moved to the superior court by way of a plaint together with chamber summons both dated 25th May 2007. In the chamber summons, he sought three main orders which were first an order for temporary injunction to restrain the respondent from advertising, disposing of, selling by public auction, or private treaty or howsoever at any time completing by conveyance or transfer the subject property namely L.R. No. 209/9692 Nairobi until the hearing and determination of the chamber summons. The second order sought was an order of injunction to restrain the respondent from in any way interfering with the applicant's occupation and ownership of the same piece of land, and the third order sought was that an order be made under section 52 of the Indian Transfer of Property (Amendment) Act 1959 that during the dependency of that suit, all further registration or change of registration in the ownership, leasing, allotment, user or possession or of any kind of interest in respect of land parcel L.R No. 209/9692, Nairobi be prohibited. He also sought costs of the application. That application was based on grounds, *inter alia*, that the charge obtained over the suit property, land parcel L.R. No. 209/9692 Nairobi is null and void in law and of no consequence for want of compliance with the mandatory provisions of Indian Transfer of Property Act 1882 as applied under the laws of Kenya (particulars giving rise to that allegation were given); that the applicant had made substantial repayment in respect of the loan facility as he had paid Ksh.12,515,000/= towards the liquidation of the loan; that the balance demanded by the respondent is not legitimately due and the respondent's statutory power of sale had not arisen; that the respondent had illegally and fraudulently varied rates of interest to the prejudice of the applicant and that the respondent could not claim any benefit under the relevant lending contract as it was not privy to the same contract. There was an affidavit sworn by the applicant in support of the alleged grounds for the chamber summons. The respondent opposed that application through a replying affidavit sworn by Mercy W. Buku, its Senior Legal Officer, in which the respondent averred that the respondent's rights to vary interest rates were reserved in the charge; that the applicant had in his letter and particularly in a letter dated 25th July 2006 acknowledged his indebtedness to the bank and made an offer which the respondent rejected, and that the application had no merit.

That application was heard by the superior court (M.A. Warsame J.). In a ruling delivered on 23rd April 2008, the learned Judge of the superior court dismissed it stating, *inter alia*,

"Having considered the applications (sic) and the issues therein, I have come to the conclusion that the applicant does not meet the test laid down in Giella vs. Cassman Brown. In essence, there is no prima facie case capable of allowing the plaintiff to get an order of injunction. On damages, the material available shows that the defendant having extended several indulgences to the plaintiff, cannot be restricted in the exercise of its statutory power of sale. In any event, the plaintiff having knowingly given out his property as a security for a loan and having failed to repay the loan, the consequences is (sic) that the said property is susceptible to the statutory power of the bank. In my humble opinion, the bank is in a position to compensate the plaintiff in the event the plaintiff succeeds in its claim against the bank. The last limb of Giella case is also in favour of the bank."

The above, in brief, is the genesis of this application before us which, as we have stated, is dated 19th June 2008 and was filed on 24th June 2008. The applicant feels aggrieved by the decision of the superior court on its chamber summons application cited above and he intends to appeal against it. He has filed a notice of appeal to that effect. In the meantime, by this notice of motion, he is seeking two orders as follows:

"1. That this Honourable Court be pleased to grant an order of injunction restraining the respondent by themselves, their agents, servants, Advocates, or any of them from advertising, disposing off (sic), selling by public action or private treaty, leasing, selling or otherwise howsoever from interfering with the applicant's occupation and ownership of land known as L.R. No. 209/9692 Nairobi until the hearing and determination of the intended appeal.

2. That costs of and incidental to this application do abide the result of the intended appeal."

The application is based on two grounds namely that the intended appeal is arguable in that whereas the

loan was offered to three brothers, the respondent now purports to enforce the defaulting clause against the applicant alone; and that the charge documents upon which the respondent seeks to exercise its statutory power of sale is defective as it does not comply with the provisions of section 46 of the Registration of Titles Act Chapter 281 Laws of Kenya, section 3(3) of the Law of Contract Act Chapter 23 Laws of Kenya and section 69(1) and 100A of the Indian Transfer of Property Act (1882) as amended and that the respondent purports to charge interest rates outside that stipulated in the letter of offer and the charge. Secondly, it is based on grounds that, were the intended appeal to succeed, the results of the success would be rendered nugatory by the refusal of the Court to grant the application as the suit property is used by the applicant for business and is his and his family's only source of livelihood, and that the respondent frustrated the applicant's efforts to redeem the property by charging excessive interest rates. The application is opposed.

Before us, Mr. King'ara, the learned counsel for the applicant, submitted that the intended appeal is arguable as the loan granted to the applicant and his brothers was Ksh.10,000,000/= and whereas the applicant has paid a sum in excess of Ksh.12,000,000/=, the respondent is still demanding over Ksh.6,000,000/= which he attributes to excessive interest rates applied by the respondent. While conceding that that is a dispute on the amount, which cannot stop a mortgagee from exercising its power of sale, it is his argument that the rates are oppressive and that being so, he is asking the Court to find that the loan is already paid in full and there is nothing due to the respondent. The second arguable point he raises is that the respondent, not being the chargee in the charge instrument, had no business exercising power of sale in respect of the contract between the applicant and the Co-operative Merchant Bank Ltd. as there was no valid transfer of the rights of Co-operative Merchant Bank Ltd. to the respondent in respect of the transaction; and the last ground was that the learned Judge of the superior court did not consider the fourth prayer of his application before the superior court in which he sought an order to be made under section 52 of the Indian Transfer of Property Act as amended that any further registration of any transaction on the suit land be prohibited during the dependency of the suit.

Mr. Maondo, the learned counsel for the respondent, in response argued that the intended appeal is not arguable as the loan in question was secured by a charge on the applicant's property and the applicant offered his property to secure the loan fully knowing the consequences. That being the case, and the loan having been granted to the brothers under business name, the bank could proceed against any of them but as the applicant's property was charged to secure the loan, the bank was entitled to exercise its power of sale over it. He further contended that the interest rates applied were in compliance with the provisions in the charge documents which allowed the bank to make variations as necessary and, lastly, that the applicant cannot rely on the alleged defects in the charge as he benefited from the loan covered by the charge. He was of the view that the results of the intended appeal, were it to succeed, would not be rendered nugatory.

The notice of motion is brought pursuant to rule 5(2) (b) of the Court of Appeal Rules. The principles guiding the Court when considering such an application are now well settled in several decisions of this Court one of which is the case of Githunguri vs. Jimba Credit Corporation (No. 2) [1988] KLR 838. An applicant seeking injunction or stay of execution under that rule must demonstrate first, that his appeal or intended appeal, as the case may be, is arguable, i.e. that it is not frivolous. Secondly, he must show that were the appeal or intended appeal to succeed, the success would be rendered nugatory were the application to be refused. In this application, we have carefully and anxiously perused and considered the record and the ruling of the superior court. We have also considered the rival submissions by the learned counsel and the law. Whereas we need not give full reasons for our views in this ruling for fear of prejudicing the entire hearing of the intended appeal, we find it difficult on the material availed before us in the application to appreciate that the intended appeal is arguable. We make it clear that this decision is only based on what is before us in this application and on what is so far available in the arguments at this stage of the matter. The situation may very well be different at the time of hearing the entire appeal. However, even if we were to assume, for the sake of argument, that the intended appeal is arguable, still, we cannot see how the outcome of the same, were it to succeed, would be rendered nugatory by our refusing the application. As the superior court rightly stated, the subject property was a business premises offered by the applicant as a security for a loan. The applicant, in doing so, knew very well that he was turning the premises into a commercial commodity and he knew the possible consequences of the same,

one of which was that on his being unable to service the loan, the property could be put on sale to recover the balance. This is what happened and he cannot turn around to read any ill in that. The appellant has not persuaded us in any way to accept that the respondent would not be able to refund the proceeds of the sale plus damages if any should the applicant succeed in his intended appeal after the sale of the property. We, on our own, have no reason to believe that the bank cannot make good whatever loss the applicant will incur through sale of his property, should the applicant eventually succeed in his intended appeal.

The above, being our view of the matter, on the second principle that the applicant needed to demonstrate, this application cannot succeed. It is dismissed with costs to the respondent. Order accordingly.

Dated and delivered at Nairobi this 17th day of October, 2008.

R.S.C OMOLO

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

D.K.S AGANYANYA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR