



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**

**Civil Appli Nai 343 of 2005 (UR.212/05)**

**CHURCH ROAD DEVELOPMENT CO. LTD..... APPLICANT**

**AND**

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

**DAVID MUTUKU ..... 2<sup>ND</sup> RESPONDENT**

**SAMUEL NJIHIA ..... 3<sup>RD</sup> RESPONDENT**

*(Application for injunction pending the filing, hearing and determination of an intended appeal against the Ruling of the High Court of Kenya at Nairobi (Justice Ransley) dated 25<sup>th</sup> November, 2005*

**in**

**H.C.C.C. NO. 55 OF 2005)**

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**RULING OF THE COURT**

This is an application under **rule 5(2)(b)** of the Court of Appeal Rules (the rules) in which the applicant, Church Road Development Co. Ltd., seeks the following orders:-

- “1. THAT this Honourable Court be pleased to order injunction directed to the Respondents either by themselves, jointly or singularly, servants or agents, or otherwise howsoever from selling, disposing of, transferring, putting under receivership or otherwise interfering with the applicants use, occupation and enjoyment of L.R. No. 1870/10/14 Nairobi pending the filing hearing and determination of the intended appeal against the ruling and orders of the Honourable Mr. Justice P.J. Ransley delivered on 25<sup>th</sup> November, 2005.**
- 2. THAT the applicants be at liberty to apply for further orders and/or directions as this Honourable Court may deem just and expedient to grant.**
- 3. THAT costs of and incidental to this application abide the result of the intended appeal.”**

The application before us can be traced to an application dated 31<sup>st</sup> January, 2005 filed in the superior

court under **Order XXXIX rules 1, 2, 3 and 9** of the Civil Procedure Rules in which the applicant (as the plaintiff in the superior court) sought the following orders:-

- “(1) that pending the hearing and determination of this suit, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be restrained by themselves, their agents or servants from acting and/or purporting to act as Receivers and/or Managers of the plaintiff and from interfering in any manner whatsoever with the plaintiff’s quiet possession and enjoyment of its land that is LR No. 1870/10/14, other properties, assets and all its operations and/or activities;***
- (2) that pending the hearing and determination of this suit, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and their agents, servants, or employees be restrained from entering the plaintiff’s premises and properties and the running and management of the plaintiff’s premises and operations be left to the plaintiff’s directors;***
- (3) That the defendants be restrained either by themselves jointly or serially or by their agents, servants or employees from selling, disposing of, offering for sale or alienating in any manner whatsoever the plaintiff’s land known as LR 1870/10/14, any other properties and other assets or any land whatsoever or any part thereof pending the hearing and determination of this suit.***
- (4) That the defendants be restrained either by themselves jointly or serially or by their agents, servants or employees from selling, disposing of, offering for sale or alienating in any manner whatsoever the plaintiff’s land known as LR 1870/10/14, any other properties and other assets or any land whatsoever or any part thereof pending the hearing and determination of this suit.***
- (5) That interim orders do issue in terms of prayers (i) (vi) (sic) inclusive pending the hearing and determination of this application inter partes.***
- (6) That costs of this application be provided for.”***

That application was supported by the affidavit of Francis K. Ngatia the Managing Director of the plaintiff (the applicant herein) sworn on 31<sup>st</sup> January, 2005.

In opposition to the applicant’s application in the superior court the 1<sup>st</sup> respondent (Barclays Bank of Kenya Ltd) filed a replying affidavit sworn by one, Alfonse Kisilu the 1<sup>st</sup> respondent’s Head of Corporate Recoveries. The 1<sup>st</sup> respondent also relied on the Supplementary Affidavit of the said Alfonse Kisilu sworn and filed on 25<sup>th</sup> February, 2005.

It is to be observed on the outset that the applicant’s application in the superior court was premised upon the provisions of **Order XXXIX rule 1, 2, 3 and 9** of the Civil Procedure Rules which empower the Court to grant orders of injunction if

- (a) any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree;***
- (b) the defendant threatens to breach a contract or cause other injury.”***

The learned Judge (Emukule, J.) considered the application and in his view, what emerged from the supporting documents was that the applicant had duly executed:-

- “(a) facilities letters both dated 2.05.1999 firstly in the sum of USD 625,500,000/= and a Kenya currency loan of Kshs.37,500,000/= subject to the securities therein provided for.***
- (b) A debenture dated 27.09.1996 by which the plaintiff charged its property referred to in the schedule thereto and all estates or interest in any other free hold or leasehold property, all plant machinery furniture and fittings vehicles, computers and other equipment or chattels of the plaintiff***

*company shares and stocks, fixed deposits, Treasury Bills, bills of exchange and other securities;*

*(c) The debenture was duly registered with Registrar of the Companies and a Certificate of Registration of a Mortgage was duly given on 11.10.1996.*

*(d) A charge dated 27.09.1996 duly stamped over LR NO. 1870/1V/14 was registered as No. IR 49550/12 on 3.10.1996”.*

Having set out the foregoing the learned Judge in the course of his ruling stated:-

*“On the face of those documents therefore purporting to confer upon the 1<sup>st</sup> Defendant the right to send out a statutory notice and also appoint a receiver and manager appear to be in order. Despite this, the plaintiff company says or has been advised by its legal advisers that these documents are defective in law and do not therefore confer upon the 1<sup>st</sup> defendant or its agents the 2<sup>nd</sup> and 3<sup>rd</sup> defendants any of the powers that flow from or under those documents. This therefore invites this court to examine the law by which those instruments were granted.”*

The learned Judge then examined the law relating to those instruments and came to the conclusion that the plaintiff/applicant had not established a prima facie case with a probability of success. In reaching that conclusion the learned Judge expressed himself thus:-

*“If the court were to apply the principles for injunctive relief as enunciated in the case of GIELLA V. CASSMAN BROWN & CO. [1973] E.A. 358, I would say that the plaintiff has failed the first principle in that case, that a plaintiff seeking an injunctive relief must first establish a prima facie case with a high probability of success. To establish such a case the plaintiff/applicant should show inter alia that the instrument pursuant to which the defendant seeks to enforce its right is defective in some material respect in that it does not conform to or is contrary to some provision of the law under which it is created. The plaintiff has in this case failed to show any cause of the invalidity of the charge. The plaintiff has therefore not established any prima facie case with a high probability of success under the Giella vs. Cassman Brown principle”.*

Having so stated the learned Judge dismissed the applicant’s Chamber Summons application in his ruling delivered on 28<sup>th</sup> September, 2005.

Stung by the dismissal of its application for injunctive orders the applicant sought refuge in yet another application before the superior court which application was stated to have been brought under “**Order XLI rule 4** of the Civil Procedure Rules, **Section 3 A** of the Civil Procedure Act and all enabling Provisions of the Law”. By that application dated 29<sup>th</sup> September, 2005 the applicant sought the following orders:-

*“2. THAT the Honourable court be pleased to issue an injunction restraining the defendants jointly and severally or any of them either by themselves, servants, agents, employees or otherwise howsoever from interfering with the plaintiffs enjoyment, occupation, management or other use of its LR. NO. 1870/10/14, in any manner whatsoever pending the hearing and determination of an intended appeal to the Court of Appeal.*

*3. THAT in the alternative and without prejudice to the above, limited stay orders be issued against the defendants interference with the plaintiff’s quiet possession, ownership, use and enjoyment of its land L.R. No. 1870/10/14 in any manner whatsoever pending the making of a formal application to the Court of Appeal for stay pending appeal.*

*4. THAT interim stay orders be issued in terms of prayer 2 above pending hearing and determination on this application interpartes.*

*5. THAT costs of this application be provided for.”*

That application came up for hearing before Ransley J who appeared to have initially doubted whether he had jurisdiction to entertain the application as he thought that the jurisdiction only arose where the High Court was exercising its appellate jurisdiction. He, however, was of the view that the purpose of that application was to preserve the suit premises and maintain the status quo pending the hearing of the appeal. In the course of his ruling the learned Judge observed:-

***“The jurisdiction to grant injunction relief was dealt with by Megarry J in the case of Erinford Properties Ltd vs. Cheshire County Council (1974) 2 ALL ER Page 448 in which it was held that there is jurisdiction in a judge to grant an injunction pending appeal to restrain that which the judge had refused to grant an injunction in respect of.”***

Strengthened by what Megarry, J. said in the case of *Erinford* (supra) the learned Judge proceeded to consider the submissions of counsel appearing for the parties and in his ruling concluded thus:-

***“In this case it is unjust that the respondent should not be restrained from exercising its right to recover its money. If the applicant is left in possession of the suit premises he would continue to enjoy the benefit of the suit property to the prejudice of the respondent which has a right to appoint a receiver to collect the rents and profits. I, therefore decline to issue an injunction restraining the appointment of a receiver.”***

It was that order of Ransley, J. that gave rise to this application before us.

The jurisdiction exercisable under **rule 5(2)(b)** of the Rules is now settled. It is original and discretionary. For the applicant to succeed it must satisfy the twin guiding principles that the intended appeal is not frivolous or is arguable and that unless a stay or injunction are granted the appeal or intended appeal, if successful, would 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) 1 KAR 1088, and RELIANCE BANK LIMITED (IN LIQUIDATION V. NORLAKE INVESTMENTS LIMITED** – Civil Application No. 98 of 2002 (unreported).

When this application came up for hearing on 8<sup>th</sup> February, 2006 Mr. Kingara, the learned counsel for the applicant, put forth strong arguments in a bid to show the Court that his client had an arguable appeal and that if the injunctive orders were not granted the intended appeal would be rendered nugatory as its client would be put under receivership and that the property might, indeed, be sold. Mr. Kingara cited a number of authorities to support his client’s case.

The application was vehemently opposed by Mr. Waiyaki, the learned counsel for the respondents. Mr. Waiyaki pointed out that the statutory notice was issued in 2002 which fact was acknowledged in the ruling of Emukule J. It was pointed out that the demand notice was issued when the receivers were appointed. It was further contended that the debt had never been denied nor the interest on the principal amount. We had to remind Mr. Waiyaki not to argue the intended appeal but confine himself to the application for injunction. That is when Mr. Waiyaki turned to the replying affidavit from which he demonstrated that there was serious non-disclosure of facts by the applicant.

We have considered the rival submissions of counsel who appeared before us and as we have endeavoured to show, this dispute relates to money lent to the applicant by the 1<sup>st</sup> respondent. It is not disputed that there was default in servicing of the loan which led to the usual acrimony between a borrower and the lender. Since we are not dealing with the appeal we refrain from making any remarks that might prejudice the hearing of the appeal, but sight must not be lost of what the parties will be agitating when the appeal comes up for hearing. As already stated an applicant under **rule 5(2)(b)** of the rules is seeking discretionary relief and that being the case an applicant must show utmost good faith. In the present application, we have considered what Emukule, J. said in his ruling and what was said in the ruling of Ransley, J. We cannot fail to point out that the applicant was not candid in the manner it approached this Court and the superior court. From the replying affidavit filed in this Court on 6<sup>th</sup> February, 2006, for example, the applicant obtained ex parte injunctive orders on 1<sup>st</sup> February, 2005 on

the basis that the company had not been placed under receivership. In actual fact the company had been placed under receivership on 28<sup>th</sup> January, 2005 as shown in the Notice of Motion filed on 3<sup>rd</sup> February, 2005. The applicant filed a Notice of Motion application on 29<sup>th</sup> September 2005 and obtained a stay. The application was heard by the superior court on 28<sup>th</sup> October, 2005 and interim orders were extracted by consent till the ruling was delivered on notice. While the ruling was pending and the stay in force, the applicant filed an application for injunction on 25<sup>th</sup> October, 2005. Advocates for the parties appeared before Deverell, J.A. when he declined to certify the application as urgent. While that position prevailed, the applicant's Managing Director, Francis Ngatia and its advocate, Peter Gichuki Kingara swore affidavits to the effect that there were no interim orders restraining the appointment of receivers. There were indeed other instances of serious non-disclosure on the part of the applicant.

We are not hearing the main appeal. But can it be said that a party which is guilty of such serious non-disclosures really deserves this court's discretionary orders?

We do not think so. We do appreciate that this is a case in which the applicant is trying to salvage its property from the claws of a lender but we must not lose sight of the fact that this is a matter of contractual obligations between a borrower and a lender. Justice must look both ways.

Having considered the submissions of counsel appearing, the background to this dispute and the conduct of the applicant we are unable to say that this is proper case in which to grant the orders sought. The applicant has not been candid in its conduct. Consequently the application is refused and we order that the applicant's application to this Court dated 27<sup>th</sup> December, 2005 is hereby dismissed with costs to the respondent. Ransley, J. had granted to the applicant a temporary injunction restraining the sale of the security property. That order was to last upto 31<sup>st</sup> May, 2006 and in our view, the purpose of the order was to enable the applicant pursue the motion in this Court. The motion has now been lost and there cannot be any reason for the continued existence of Ransley's order for a temporary injunction. We, therefore, set it aside.

***Dated and delivered at Nairobi this 17<sup>th</sup> day of February, 2006.***

***R.S.C. OMOLO***

.....

***JUDGE OF APPEAL***

***E.O. O'KUBASU***

.....

***JUDGE OF APPEAL***

***J.W. ONYANGO-OTIENO***

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***JUDGE OF APPEAL***

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**