



**Rapid Catering Services Limited v Partners International Kenya
(II) Ltd & 2 others (Miscellaneous Civil Application E431 of 2021)
[2021] KEHC 371 (KLR) (Commercial and Tax) (17 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 371 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E431 OF 2021
A MSHILA, J
DECEMBER 17, 2021**

BETWEEN

RAPID CATERING SERVICES LIMITED APPLICANT

AND

PARTNERS INTERNATIONAL KENYA (II) LTD 1ST RESPONDENT

GARAM INVESTMENTS AUCTIONEERS 2ND RESPONDENT

KENYA SHIELD AUCTIONEERS 3RD RESPONDENT

RULING

1. The applicant brought the instant application under the provisions of Section 1A, 1B, 3A & 79G & 95 of the *Civil Procedure Act*, Order 45 and Order 42 Rule 6, Order 22 Rules 25 and 52, Order 50 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules 2010*, Articles 40, 50 & 159 (2) (d) of the *Constitution of Kenya*, dated 3rd June 2021, seeking the following orders:-
 2. SPENT
 3. SPENT
 4. THAT this Honourable Court do issue an order of injunction restraining the 1st Respondent by themselves and/or through Messrs. Garam Investments Auctioneers and/ or by their employees, servants, agents, auctioneers from selling the Applicant's matrimonial home situate on all that parcel of land known as L.R. No. 57/1326 (Original Number 57/32/784) Clayworks Estate Kasarani, Nairobi by way of public auction and/ or through any other means pending hearing and determination of the intended appeal.



5. THAT the Honourable Tribunal be pleased to extend the time within which the Applicant should file the appeal against the Ruling/ Orders/ Directions issued on 23rd April 2021 by the Honourable D. W. Mburu in Milimani CM COMMSU E715 of 2020.
 6. THAT this Honourable Court be pleased and/ or be at liberty to grant any other Order as it deems fit and just.
 7. THAT the costs of this Application be provided for.
2. The application is premised on the grounds on the face of it and supported by the affidavit of Jedidah Wangui Mwangi, a director of the applicant, sworn on even date. The application is opposed by the 1st respondent who filed its Replying Affidavit sworn by its Country Manager, Michael Muthengi Makau on 12th July 2021.
 3. The application was canvassed by way of written submissions filed by Wilfred and Ngugi Associates on behalf of the applicant dated 22nd July 2021 and by CM Advocates LLP on behalf of the 1st respondent dated 23rd July 2021.

APPLICANT’S CASE

4. The applicant’s case is that:-
 1. On 23rd April 2021, in the absence of the parties, the Honourable D. W. Mburu in Milimani CM COMMSU E715 of 2020 delivered a ruling dismissing the application dated 2nd October 2020 and consequently lifting the orders of injunction preserving the applicant’s matrimonial home situate on all that parcel of land known as L.R. No. 57/1326 (Original Number 57/32/784) Clayworks Estate Kasarani, Nairobi (hereinafter referred to as the “suit property”).
 2. The applicant was not made aware of the delivery of the ruling and/ or lifting of the injunctive orders in the lower court until 2nd June 2021 when it received a letter from the 2nd respondent notifying it of a sale by public auction of the suit property.
 3. The applicant’s advocates filed a Notice of Appeal and applied for a certified copy of typed proceedings.
 4. There is a real and imminent threat of execution and transfer and/ or sale of the suit property by way of public auction by the respondents against the applicants following the said ruling/ order made in favour of the respondents.
 5. The time allowed for filing of the appeal in law has lapsed with no fault of the applicant and the applicant beseeches this Honourable Court to extend the same.
5. The applicant submitted that if this application is not allowed, the intended appeal which has extremely high chances of success shall be rendered nugatory and the applicant shall suffer irreparably. In this respect, the applicant cited the case of *Reliance Bank Limited vs Norlake Investments Ltd* [2002] 1 EA 227 where the Court of Appeal outlined the factors which render an appeal nugatory that ought to be considered by the court.



6. The applicant claimed that the lower court erred in lifting the orders of injunction to preserve the suit property vide the ruling of 23rd April 2021. In this regard, the applicant relied on the case of *Virginia Edith Wambui vs Joash Ochieng Ougo*, Civil Appeal No. 3 of 1987 (1987) where the Court of Appeal held that where there are serious factual conflicts, the lower court should maintain the status quo until the dispute has been decided. Contending that it has an arguable appeal, the applicant cited the cases of *Wasike vs Swala* [1985] eKLR, *David Mogambi Mang'are vs Attorney General & 3 Others*, Civil Application No. Nai 265 of 2011 and *Ishmael Kangunyi Thande vs Housing Finance Company of Kenya Ltd*, Civil Application No. Nai 157 of 2006 (unreported).
7. The applicant submitted that since land appreciates, the value of the suit property will increase if the respondents await the hearing and determination of the matter. On the other hand, the loss of the applicant of their matrimonial home and a roof over their heads cannot be compensated by damages. The applicant asserted that in the instant matter, the parties stand to suffer almost equal hardship and for this proposition cited the case of *African Safari Club Limited vs Safe Rentals Limited*, Nairobi Civil Appeal (Application) No. 53 of 2010 (Unreported).
8. In closing, the applicant made submissions with respect to the conditions that ought to be satisfied by an applicant seeking an interlocutory injunction. First, there is a prima facie case with a probability of success as the applicant has demonstrated that the pending suit at the lower court ought to be determined on merit. In this regard, the applicant indicated that a defence was filed because the plaintiff has merit otherwise the respondents should have applied for summary dismissal. The applicant's position is that irreparable harm will be suffered by the applicant if this application is not granted as the respondents will auction the suit property to a third party. On this, the applicant relied on the cases of *Moses C. Mubia Njoroge & 2 others vs Jane W. Lesanoi and 5 others, Mrao Ltd vs First American Bank of Kenya and 2 others, Njenga vs Njenga and JM Gichange vs Cooperative Bank of Kenya* [2005].

RESPONDENTS' CASE

9. The 1st respondent's case from the averments made by its Country Manager are:
 - (1) On diverse dates in 2017, the applicant sought financing of Kshs. 15,000,000/- from the 1st respondent.
 - (2) On 2nd October 2017, the 1st respondent accepted to offer financing in respect of the amount requested under defined terms and conditions that were set out in the loan agreement dated 23rd October 2017.
 - (3) The applicant duly executed the loan agreement and agreed to repay the facility and finance charges in fifty seven installments over a period of fifty seven consecutive months from 1st March 2018 to 1st November 2022 of Kshs. 361,762.28/-.
 - (4) The 1st respondent duly registered a legal charge dated 23rd November 2017 over the suit property.
 - (5) The applicant defaulted in making repayments and as at 9th July 2021, the applicant's loan accounts no. 407519, the Technical Assistance account no. 602287 and the Royalty Account no. 703463 held with the 1st respondent were in arrears totaling the sum of Kshs.15,547,113.81/-, which amount continues to accrue late payment charges at the sum of Kshs. 5% per month until payment in full.



- (6) The applicant has on several occasions issued dishonoured cheques that were returned unpaid to the 1st respondent in an attempt to repay the facilities advanced to them by the 1st respondent. Contending that this amounts to an admission of the debt due and owing, the 1st respondent cited the case of *Equatorial Commercial Bank vs Wilfred Nyasim Orok* [2015] eKLR.
 - (7) The applicant is in breach of the agreements and in default of its obligations to the 1st respondent. This constrained the 1st respondent to exercise its crystallized power of sale, in accordance with the law. The 1st respondent has issued all the requisite 90 days' and 40 days' statutory notices to the applicant company. Subsequently, it engaged the 2nd respondent to issue the 45 days' notice under the Auctioneers Notice.
 - (8) The 1st respondent provided a valuation report showing the forced sale value of the property is Kshs. 12,000,000/-.
 - (9) The 1st respondent asserted that the instant application is misconceived, an abuse of the court process and frivolous. The 1st respondent also contends that the applicant is undeserving of the equitable orders due to its inequitable actions and perpetual default. The 1st respondent cited the case of Francis J. K. Ichatha vs. Housing Finance Company of Kenya, HCCC No. 108 of 2005 for the proposition that a party cannot be granted an injunction if he does not approach the court with clean hands. Additionally, contending that the applicant has not satisfied that it has a good and sufficient cause for not filing the appeal on time, the 1st respondent cited the case of *Dilpack Kenya Limited vs. William Muthama Kitonyi* [2018] eKLR for the proposition that failure to act does not constitute a good or sufficient cause.
10. The 1st respondent indicated that the instant application has been filed two months after the delivery of the impugned ruling; the applicant was prompted to file this application upon the 1st respondent's exercise of its lawful right over the suit property in order to recover the amounts due and owing upon the lower court's dismissal of the interim injunction; the claim that the applicant was not made aware of the impugned ruling is an attempt to mask its inaction and that there's no evidence of it following up with the court's registry to ascertain the ruling date.
 11. The 1st respondent argues that this court lacks the jurisdiction to entertain the instant application. This is because the applicant has not complied with the procedure for the institution of an appeal from the subordinate court which is a prerequisite for the grant of a temporary injunction as per Order 42 Rule 6(6) of the Civil Procedure Rules, 2010.
 12. Moreover, the 1st respondent pointed out that in the impugned ruling the lower court took into account important commercial considerations including the accumulation of interests which might not be recovered. The issues of injunction have been previously raised, substantively canvassed by the parties and determined in the impugned ruling. Hence, the application is "res judicata". Furthermore, the 1st respondent referred to the case of; *Patricia Njeri & Others vs. National Museum of Kenya* [2004] eKLR where the principles for considerations in an application for injunction pending appeal were set down.
 13. The 1st respondent further pointed out that the forced sale value of the suit property of Kshs. 12,000,000/ has outstripped the value of the security and granting an injunction would result to great



injustice. To buttress this point, the 1st respondent cited the case of *Juja Coffee Exporters Limited vs National Bank of Kenya Limited* [2021] eKLR.

14. In addition, the 1st respondent asserted that the applicant failed to satisfy the parameters for the grant of injunctive relief set out in the locus classicus case of *Giella vs. Cassman Brown* [1978] EA 358. The 1st respondent further cited the case of *Suleiman vs Amboseli Resort Limited* [2004] 2 KLR 589 for the proposition that in responding to prayers for interlocutory relief, the court should always opt for the lower than the higher risk of injustice. The applicant may recover in damages if it is aggrieved by the sale of the charged property and the 1st respondent is of great repute and significant clientele and asset base and would be able to make good the judgment debt in damages if any was to issue. On the other hand, the 1st respondent faces lower chances of recovering the mounting debt due to it should it be restrained from completing the realizing process. In support of this, the 1st respondent cited the case of *Daniel Ndege Ndirangu vs Barclays Bank of Kenya Limited & another* Nakuru High Court Civil Suit No. 8 of 2012.

ISSUES FOR DETERMINATION

15. The Court has considered the application, the supporting affidavit, the reply thereto and the parties' respective submissions and has framed the following issues for determination are:-
- a. Whether the applicant has satisfied the conditions precedent to granting of the orders for extension of time for filing an appeal;
 - b. Whether the conditions for granting the order for stay of execution pending appeal have been satisfied;

ANALYSIS

Whether the applicant has satisfied the conditions precedent to granting of the orders for extension of time for filing an appeal brought under Section 79G and 95 of the *Civil Procedure Act*;

16. Appeals from subordinate courts ought to be filed within thirty days from the date of the impugned decision. Such appeals are filed when a memorandum of appeal is filed. In this regard, Sections 79G of the *Civil Procedure Act* provide for filing of appeals from the subordinate courts. Section 79G reads as follows:-

“79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

17. Section 95 of the *Civil Procedure Act* provides as follows as regards enlargement of time:-

“95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”



18. The power to grant leave to appeal out of time is discretionary. The conditions to be satisfied for an order for leave to appeal out of time were laid down in the renowned case of *Mwangi vs. Kenya Airways Limited* [2003] KLR as follows:-
- a. The period of delay
 - b. The reason for the delay
 - c. The arguability of the appeal
 - d. The degree of prejudice which could be suffered by the Respondent if the extension is granted
 - e. The importance of compliance with time limits to the particular litigation or issue; and
 - f. The effect if any on the administration of justice or public interest if any is involved.
19. In the instant matter, the decision of the lower court was made on 23rd April 2021. This application dated 3rd June 2021 was filed on 4th June 2021. That is 42 days after the ruling. Therefore, there was a delay of 12 days. The issue is whether the delay was justified. The applicant alleges that it was not aware of the delivery of the ruling. Both parties have not specified how the ruling date was given. Therefore, the period of delay is not inordinate and is well explained.
20. As to whether the appeal is arguable, all that is required is that the appeal raises arguable points. An arguable appeal does not mean that the appeal will certainly succeed. See *Kuwinda Rurinja Co. Ltd v Kuwinda Holdings Ltd. & 13 others* [2010] eKLR
21. From the draft Memorandum of Appeal, it is clear that in the intended appeal, the applicant seeks to challenge the dismissal of its earlier application for injunctive orders. The lower court is yet to hear and determine the applicant's case in the main suit. In the impugned ruling, the lower court found that the applicant had not satisfied the conditions precedent to the granting of an injunction. The main reason for the decision is that the applicant does not dispute that it is indebted to the 1st respondent but it disputes the amount owing. Without expressing definitive conclusions, the applicant has not demonstrated that it has an arguable appeal. Therefore, the applicant has not satisfied the conditions for grant of leave to appeal out of time and for the grant of stay pending appeal.
22. On the degree of prejudice to the respondent if the extension is granted, this Court ought to balance the competing interests of the parties. On the one hand, the applicant was dissatisfied with the ruling of the lower court and seeks to appeal against the decision out of time. The applicant argues that it stands to lose its matrimonial property which was charged to the respondent to secure the loan facility. On the other hand, the respondent faces prejudice in the granting of an extension because it shall be prevented from realizing the charged property. According to the respondent, when the applicant offered the suit property as security it was equating it to a commodity which the respondent could dispose of to recover the loan.
23. This Court is inclined to agree that the respondent stands to suffer a greater inconvenience since it will continue to be kept away from the monies duly owed to it by the applicant. In *Andrew Mwanjohi vs Equity Building Society & 7 others* [2006] eKLR, the Court observed as follows:-

“Whenever the Applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off.



Therefore, in the event that it later became necessary for the suit property to be sold off, by the charge, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had had the said property evaluated in monetary terms. He had then told the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable, even if the borrower did not pay it.

Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable, on the basis of the real market value of the said property.

In a nutshell, sentimental attachment to the charged property should play no role in the matter. So that, if any person felt that he or his family attached great sentimental value to any property, he should never offer it as security.

Therefore, on the basis of the material presented by the plaintiff, I find that he has not persuaded the court that if the court declined to grant an injunction to stop the sale of the suit property, he would suffer irreparable loss." [Emphasis added]

24. Therefore, in the circumstances, the applicant has not has not satisfied the conditions for leave to appeal out of time.

Whether the conditions for granting the order for stay of execution pending appeal brought under Order 42 Rule 6 of the Civil Procedure Rules have been satisfied;

25. The guiding principles for determination of an application for orders for stay of execution pending appeal are provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules 2010. It reads as follows:-

- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under sub rule (1) unless—
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.



- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
26. One of the prerequisites for the grant of stay orders pending appeal is that the procedure for instituting an appeal from a subordinate court or tribunal has been complied with per Order 42 Rule 6 (6) of the Civil Procedure Rules, 2010, are as captioned above;
 27. Even if the applicant had satisfied the conditions for leave to appeal out of time, in order to qualify for the grant of stay of execution orders pending appeal, the applicant ought to satisfy the Court that unless the order is made it will suffer substantial loss, it made the application without unreasonable delay and that such security for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Visbaram Ravju Halai vs. Thornton & Turpin (1963) Ltd* [1990] eKLR.
 28. The applicant has not demonstrated that it will suffer substantial loss if stay is not granted. the Court in *Samvir Trustee Limited vs. Guardian Bank Limited* [2007] eKLR, observed that:-

“... It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss ...”
 29. The applicant has also not made any offer to furnish security. This is despite the requirement that an applicant show and meet the condition for payment of security for due performance of the decree. See *Gianfranco Manenthi & Another vs Africa Merchant Company Ltd* [2019] eKLR.
 30. The upshot is that the application is devoid of merit.

FINDINGS AND DETERMINATION

31. For the forgoing reasons this court makes the following findings and determinations;
 - i. This court finds the explanation given for the delay to be satisfactory and excusable; but finds that the applicant has not demonstrated that it has an arguable appeal;
 - ii. This court finds that the application for grant of leave to appeal out of time is lacking in merit and is hereby disallowed;
 - iii. This court finds that the application for stay of execution pending appeal is devoid of merit and it is hereby dismissed with costs to the respondent.

Orders accordingly.



DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

HON.LADY JUSTICE A.MSHILA

JUDGE

In the presence of;

Miss Mwangi for the Respondent

No appearance for the Applicant

Lucy-----Court Assistant

