



REPUBLIC OF KENYA



KENYA LAW
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Ndirangu & another v Equity Bank (Kenya) Limited (Civil Appeal E182 of 2023) [2025] KEHC 9235 (KLR) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9235 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E182 OF 2023
DO CHEPKWONY, J
JUNE 12, 2025**

BETWEEN

ANTONY MUTUA NDIRANGU 1ST APPLICANT

EUNICE WAMBUI WANJOGO 2ND APPLICANT

AND

EQUITY BANK (KENYA) LIMITED RESPONDENT

RULING

1. Before the court for determination is the Appellant's Notice of Motion application dated 28th May, 2023 which has been filed pursuant to Articles 10, 40 and 159 of *the Constitution*, Sections 1A, 1B, 1C, 3A, and 63 (e) all of the *Civil Procedure Act* and Order 42 and 51, both of the Civil Procedure Rules. In this application, the Applicant seeks the following orders:-
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That a temporary injunction do issue barring the Respondent whether jointly or severally either by itself, agents, servants, employees or persons acting under their direction, control or supervision from selling, by way of public auction or private treaty disposing, subdividing, alienating, or in any way registering any instrument of disposition arising from intended the sale of the properties known as Tigoni /Mabrouke Block 1/215 and Limuru /Bibirioni/4475 and further be barred from interfering with the quiet possession, usage and utilization of the properties by the appellants jointly and severally or their assigns pending the hearing and determination of this appeal.



- e. That an order do issue barring the registration of any transfer instrument arising from the successful sale of the properties known as Tigon Mabrouke Block 1/215 and Limuru / Bibirioni/4475 pending the hearing and determination of this appeal.
 - f. That costs of this application be provided for.
2. The Application is based on the following grounds as contained on its face and reiterated in the Supporting Affidavit of Antony Mutua Ndirangu sworn on the even date.
 - a. That arising from this indebtedness, the applicants are ready to pay the loan amount as he has continuously done but the Respondent has been persistent and insistent that it shall auction his properties.
 - b. That, the Respondent is mandated in law to strictly comply with the mandatory provisions of the law when exercising the statutory power of sale as a chargee but in this instance this has been disregarded and the court can only intervene to remedy a wrong.
 - c. That it is upon the dismissal of the suit that the Respondent is now at liberty to sell the suit properties by auction since the injunctive orders issued stood vacated.
 - d. That the Appellants are apprehensive that despite their case before the lower court raising triable issues that would have necessitated the issuance of an injunction, the Honourable Magistrate ruled otherwise. The Memorandum of Appeal filed herewith evidences the grounds leading to these appellate proceedings.
 - e. That it raises an arguable appeal particularly on the Respondent exercising the statutory power of sale in that it has placed reliance and issued notices based on a disputed valuation of the suit properties. This was not considered by the lower court.
 - f. That, although the Respondent has not advertised th suit properties for sale, without injunctive orders in place, there is imminent threat risk and a possibility to dispose and or sell the same by way of public auction thus leading to forceful eviction from his family/ matrimonial home and loss of investment and source of livelihood which would in turn render the appeal nugatory.
 - g. That if the suit properties are sold, then the issues in this case would be convoluted by the entry of innocent third parties
3. The crux of the Applicant's case is that the 1st Applicant/Appellant is the registered proprietor of the two suit properties which he offered as security to obtain credit facilities from the Respondent. That they filed a suit before the trial court seeking injunctive orders after the Respondent had advertised the properties intending to sell them but the trial court dismissed the said application. That being aggrieved with the trial court's decision. they have lodged the present appeal contemporaneously with the present application seeking injunctive reliefs against the sale of the said properties.
4. The Applicants avers that the appeal is arguable with high chances of success since it revolves around the fact that the intended sale was not being conducted within the confines of the law especially taking into account that valuation was not done and the requisite notices were not issued and/or served upon the Applicants thereby making the intended sale irregular. Consequently, the Applicants avers that they stand to lose the suit properties which are their family and matrimonial home. It is their contention that if the court does not intervene, the Applicants will possibly be evicted or forceful chased from the properties together with their family. For those reasons, the Applicants have urged the court to grant the orders sought stating that doing so would be in the interest of justice.



5. The Respondent opposed the application through the Replying Affidavit sworn by Rogers Karugu on 25th July, 2023, wherein it describes the application as vexatious, frivolous and lacking in merit to the extent that it should be dismissed with costs to the Respondents. According to the Respondent, the Applicant has not met the threshold set out under Order 42 Rule 6 (2) of the Civil Procedure Rules in that they have not demonstrated that they are likely to suffer substantial loss beyond pecuniary compensation and neither have they provided security for due performance to warrant the grant of interim orders of stay. The Respondent further asserts that the Applicants are only aimed at causing prolonged delay in the matter such that it is not able to realize the security over the loan facility notwithstanding that they have been in arrears and the facility continues to accrue interests. For these reasons, the Respondent has urged the court to find the Application is without merit and proceed to dismiss it with costs.
6. The Applicants filed a Further Affidavit sworn on 27th July 2023, in rebuttal of the averments made by the Respondent counsel. They have emphasized that the suit properties are adequate security for the amount in issue which can be easily realized if the Respondents sell the properties in compliance with the law. It is their contention that in this case that it is them who are likely to suffer substantial loss in the event the Appeal does not succeed and add that the Respondent still retains the original title to the suit properties hence has the upper hand and shall therefore suffer no prejudice if the prayers sought are granted pending the determination of the Appeal. For these reasons, the Applicants reiterate that they will be driven from the seat of justice if the orders sought are not granted.
7. By consent of the parties, this court directed that the Application be canvassed by way of written submissions and the record shows that both parties complied.

Analysis and Determination

8. The court has carefully read through and considered the Notice of Motion application dated 28th May, 2023, the Affidavits sworn in support and in rebuttal of the application as well as the Applicant's submissions dated 28th October, 2023, and the Respondent's submissions dated 12th October, 2023. The court finds the main issues for determination being:-
 - a. Whether temporary injunction can issue to bar the Respondent, its employees, agents, servants, or their employees from selling, disposing, alienating or subdividing the suit properties herein.
 - b. Whether the Appellant's appeal is arguable.
 - c. Whether the appeal will be rendered nugatory if the application is deemed.
9. For an application seeking an order of temporary injunction pending appeal, the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules apply. This provision states as follows:-

“Notwithstanding anything contained in sub rule (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.”
10. Our courts have established the principles which should guide in determining whether an order of temporary injunction pending appeal can issue. And in particular, the court in the case of Patricia Njeri & 3 Others v National Museum of Kenya [2004]eKLR, stated as follows:-



- a. An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
 - b. The discretion should be refused where it would inflict great hardship than it would avoid.
 - c. The applicant must show that to refuse the injunction would render the appeal nugatory.
 - d. The court should also be guided by the principles in *Giella v Cassman Brown* [1973] EA 358.”
11. It is therefore worth noting that the court can only grant an order for an injunction pending appeal where the appeal before it is an arguable one and if by not granting the orders, the same is rendered nugatory. The question as to what constitutes an ‘arguable appeal’ was explained by the Court of Appeal in the case of *Stanley Kang’ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR as follows:-
- “The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable”.
12. The same was also discussed in the case of *Denis Mogambi Mong’are v Attorney General & 3 Others*, Civil Appeal No. Nairobi 265 of 2011 (UR 175/2011), where the same Court stated that:-
- “An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”
13. Thus, without delving into the conditions necessary for an order of injunction to issue, this Court finds it prudent without going into merits of this Appeal, to consider if the same is arguable. The Applicant/Appellant’s main contention that the Respondent as a charge did not comply with the mandatory provisions in the *Land Act* that provide for the procedure required when exercising the statutory power of sale and in the realization of security. In particular, the Appellants submitted that the Respondent failed to issue the requisite Notices to carry out a Valuation of the suit properties and or serve the Notices before advertising them for sale. It is worth noting that the Respondent has not rebutted any of these allegations. In view of this, the court wishes to point out that the need to comply with the legally laid comply procedure by the Respondent in exercise of its statutory power of sale to realize the security goes to the roots of the legality of the process.
14. This court also finds that these allegations pointed out by the Appellant are arguable. This is because, in the event the court considered and finds them viable and upholds the appeal, it may lead to having the trial court’s decision set aside. Therefore, for the forgoing reasons, this appeal has raised issued this court finds arguable, hence triable.
15. The next question for determination is whether the appeal will be rendered nugatory in the event the application is not allowed. The description of an appeal being rendered nugatory was explained by the Court of Appeal in the case of *George Gathura Karanja v George Gathuru Thuo & 2 Others* [2019] eKLR, where it held that:-
- “[A]n appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible. See the case of *Stanley Kang’ethe Kinyanjui versus Tony Keter & 5 Others*, Civil Appeal No. 31 of 2012 where this Court stated inter alia thus:



“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is irreversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party.”

16. In the instance case, the Applicants have illustrated that the intended sale was conducted without due regard to the laid down procedure and for this reason, this Court finds that if the injunctive order sought is not granted, the appeal will be rendered nugatory. Additionally, based on the submissions made by the parties, more so the Appellants, the court notes that the balance of convenience tilts in their favour given that it is not clear as to whether the intended sale was to be conducted in line with the applicable procedure as dictated in the Land Act.
17. In the upshot, the court finds merit in the Notice of Motion application dated 28th May, 2023, and proceeds to allow the same in the following terms:-
 - a. That a temporary injunction is hereby issued barring the respondent whether jointly or severally either by itself, agents, servants, employees or persons acting under their direction, control or supervision from selling, by way of public auction or private treaty disposing, subdividing, alienating, or in any way registering any instrument of disposition arising from intended the sale of the properties known as Tigoni /Mabrouke Block 1/215 and Limuru / Bibirioni/4475 and further be barred from interfering with the quiet possession, usage and utilization of the properties by the appellants jointly and severally or their assigns pending the hearing and determination of this appeal.
 - b. Thereafter, the Appellant to file and serve a record of Appeal within thirty (30) days from the date of this ruling.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 12TH DAY OF MAY., 2025.

D. O. CHEPKWONY

JUDGE

In the Presence of:

Mr. Mathenge Counsel for Appellant

Ms. Kimachia Counsel for Respondent

Martin/Kinyua – Court Assistants

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