



Gituma v Housing Finance Company Limited & 3 others (Civil Application E301 of 2024) [2025] KECA 1765 (KLR) (24 October 2025) (Ruling)

Neutral citation: [2025] KECA 1765 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E301 OF 2024
W KARANJA, K M'INOTI & P NYAMWEYA, JJA
OCTOBER 24, 2025**

BETWEEN

ROSEMARY KINANU GITUMA APPLICANT

AND

HOUSING FINANCE COMPANY LIMITED 1ST RESPONDENT

SAMUEL AYORA SIRINGI 2ND RESPONDENT

GARAM INVESTMENTS AUCTIONEERS 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

(Being an application for injunction, stay of execution and stay of proceedings from the Judgment of the High Court at Nairobi, Commercial Division (F. Mugambi, J.) dated 23rd September 2023 in HCCCOMM No. 034 of 2022)

RULING

1. Rosemary Kinanu Gituma, the applicant, filed a suit before the High Court at Milimani Commercial Court vide H. Com. No. 034 of 2022 in which she sought, inter alia, orders of injunction to stop the respondents from among other things, interfering with the ownership and possession of the property described as Shanzu Villas No. 8 on LR No. 1870/111/450.
2. Pending the hearing of that suit, she filed an interlocutory application seeking similar injunctive orders against the defendants/respondents. The application was heard by Frida Mugambi, J., who on 22nd September 2023 dismissed it.
3. Aggrieved by the said dismissal, the applicant filed before that court an application for stay of execution of the said ruling but the application met the same fate, prompting the applicant to file a notice of



appeal before this Court. Contemporaneously, the applicant filed the notice of motion that is now the subject of this ruling. In the application, the applicant seeks three orders in the main as follows:-

- “ a) (spent)
- b. Pending hearing and determination of this Application and the intended Appeal, this Honourable Court be pleased to issue an order of injunction restraining the 1st, 2nd and 3rd Respondents, their agents, servants, employees, assigns or otherwise howsoever from in anyway dealing with, disposing of, selling or otherwise interfering with the title of property Shanzu Villas No. 8 on L.R. No.1870/III/450 in Spring Valley.
- c. Pending hearing and determination of this Application and intended Appeal, an order of inhibition does issue restraining and inhibiting the Chief Land Registrar from registering any caveat, caution, transfer, subdivision, charge mortgage or any other transaction by the 1st, 2nd and 3rd Respondents on property Shanzu Villas No. 8 on L.R. No. 1870/III/450.
- c) An order of stay does issue staying further proceedings and consequential orders/decrees in Nairobi HCCOMM No. 034 of 2022: Rosemary Kinanu Gituma - Versus- Housing finance Corporation & 3 others, pending hearing and determination of this Application and the Intended Appeal.
- e) costs be in the cause.”
4. The notice of motion is premised on thirteen (13) grounds on its face and is supported by the affidavit of the applicant sworn on 14th June 2024. The pith and substance of the said grounds and the depositions is that the suit property was sold to the 2nd respondent through a public auction conducted by the 3rd respondent, Garam Auctioneers. This was following the 1st respondent’s exercise of its power of sale after the applicant was said to have failed to honour her obligations to settle a financial facility she had taken with the 1st respondent. The applicant’s attempts to save the house through suits filed before the Chief Magistrate’s court were unsuccessful and this streak followed the applicant to the High Court where her applications were similarly dismissed; the learned Judge having ruled the application “res judicata”.
5. The applicant’s main grievance is that her application was not res judicata as the substantive suit had not been heard. She deposed that by finding the application to be res judicata, the learned Judge unjustly curtailed the applicant’s constitutional right of access to justice which is unjust, traumatic and unreasonable. She maintains that she has an arguable appeal and if the injunction sought is not granted, her appeal, were it to succeed, will be rendered nugatory, as the Land Registrar (4th respondent) might transfer the land to a 3rd party. It is worth noting that the land has already been sold to the 2nd respondent.
6. The application is opposed by the 1st respondent through the affidavit sworn by Regina Anyika, the 1st respondent’s company secretary, on 24th June 2024.
7. Ms. Anyika gives the history of the matter. She deposes that the applicant filed the matter before the Chief Magistrate’s court seeking to challenge the sale of her property by the 3rd respondent at a public auction. Counsel states that while the matter was pending in court, the applicant and the 1st respondent entered into a consent whereby the applicant undertook to be paying Ksh.150,000.00 monthly and in



- default, the property be sold. The applicant failed to keep her part of the bargain as stipulated in the consent and did not pay the money as agreed, and so the property was sold in realization of the security.
8. According to the 1st respondent, the applicant's equity of redemption lapsed at the fall of the hammer during the public auction, and she no longer has any right that can be asserted. She continues to state that even assuming the applicant has an arguable appeal (which is vehemently denied) then her appeal would not be rendered nugatory as the 1st respondent is a liquid financial institution capable of refunding the money to the applicant in the unlikely event that her intended appeal succeeds.
 9. On his part, the 2nd respondent through an affidavit sworn on 24th June 2024 deposed that he participated in the public auction where the applicant's house was sold. He was the highest bidder at the fall of the hammer; he paid the required deposit and later settled the balance and was issued a certificate of outright purchase. He states that the applicant has no arguable appeal; and in any event, if her appeal succeeds, she can be compensated by the 1st respondent. He emphasised that he is prejudiced by the delay as he has not been able to complete the transaction, even after having paid the full purchase price. He urged us to dismiss the application.
 10. The 3rd respondent was the auctioneer. He deposes that he got instructions to conduct the auction from the 1st respondent. He prepared a redemption notice as well as a notification of sale and conducted the sale on expiry of the redemption notice, and only after sending a reminder notice to the applicant. He deposed that he followed the proper procedure and confirmed that the 2nd respondent was the highest bidder. He stated that he complied with the conditions of sale; and that the 2nd respondent paid the purchase price in full. Like the 1st respondent, he reiterated that the applicant has no arguable appeal and if the Court finds her appeal arguable, then the 1st respondent is in a position to refund the applicant's money.
 11. Parties filed written submissions in support of their rival positions.
The application came up for virtual hearing on 21st January 2025. Learned counsel Ms. Mugure appeared for the applicant, Ms Natalie appeared for 1st and 3rd respondents, while Ms. Mudeizi appeared for the 2nd respondent.
 12. Although the intended appeal is against the learned Judge's finding that the applicant's application for injunction was res-judicata, in her submissions, Ms. Mugure addressed the substantive issues raised in the suit before the High Court which issues are yet to be determined. She submitted that the property was undervalued; and that no proper statements of accounts were availed to the applicant.
 13. With respect to counsel, those issues are yet to be determined by the trial court. The question that learned counsel ought to have addressed is whether the learned Judge's finding that the application was res-judicata was proper.
 14. On the nugatory aspect, Ms. Mugure stated that unless the injunction sought was granted, the property could be transferred to other parties, and that would be prejudicial to the applicant.
 15. Counsel did not address the issue raised by the respondents to the effect that if the property is sold, the 1st respondent is capable of refunding the money.
 16. On her part, Ms. Natalie on behalf of the 1st and 3rd respondents maintained that the appeal was not arguable. The parties had signed a consent before the magistrate compromising the matter, but the applicant had failed to pay the Kshs.150,000.00 monthly as agreed, and so the default clause kicked in. She maintained that the issues that had been consented on could not be re-opened through the applications filed by the applicant and the learned Judge was, therefore, right in finding the applications



to be res-judicata. She repeated that the 1st respondent is able to pay back the money in the unlikely event that the applicant's appeal is successful.

17. To entitle the applicant to the order of stay of execution or injunction as sought here, the applicant is obliged to satisfy us that her intended appeal is arguable and that if we do not grant the injunction and the appeal succeeds, it will be rendered nugatory. (See Jaribu Holdings Ltd -vs- Kenya Commercial Bank Ltd. CA No. 314 of 2007). To say that an appeal is arguable is another way of saying that it is not frivolous and that it raises a bona fide issue deserving full consideration by the Court. Even one bona fide issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues. (See Kenya Tea Growers Association & Another -vs- Kenya Planters & Agricultural Workers Union, CA. No. Nai. 72 of 2001).
18. We have considered the notice of motion along with the rival submissions by counsel for the parties. As stated earlier, the main suit is still pending determination, and the intended appeal is only on the question whether the application (that was dismissed by the High Court) was res-judicata. We note in this regard that the applicant did not identify the errors made by the High Court in its finding that the application res-judicata, save for submitting that no court of competent jurisdiction had heard and determined the issue of the public auction held on 23rd August 2022. Unfortunately, we must eschew expounding on that question at this point, because doing so would determine the substantive appeal. We cannot either make any findings as to whether the auction was properly conducted or not.
19. Even assuming that the above issue is arguable on appeal, the nugatory aspect has not been demonstrated. The applicant has not controverted the respondents' depositions that the 1st respondent, being a reputable bank is in a position to refund the applicant's money, should her appeal succeed.
20. As the law requires an applicant to demonstrate both arguability, and the nugatory aspect, and the applicant has failed to demonstrate the nugatory aspect, her application must fail.
21. We find that this application does not meet the threshold set under Rule 5(2)(b) for it to succeed. Accordingly, we dismiss it with costs to the 1st, 2nd and 3rd respondents.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2025.

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

