

**IN THE COURT OF
APPEAL AT NAIROBI**

**(CORAM: GATEMBU, MUMBI NGUGI, & KORIR,
JJ.A) CIVIL APPLICATION NO. E194 OF 2025**

BETWEEN

AMARJEET KAUR BARYAN.....APPLICANT

AND

BANK OF INDIA LIMITED.....RESPONDENT

*(Being an appeal against the Ruling of the High Court of Kenya at
Nairobi (Mulwa, J.) dated and delivered on 29th April 2025*

in

HC Com & Tax Division No.E.299 of 2024)

**RULING OF THE
COURT**

1. In the application dated 21st March 2025 brought under rule 5(2)(b) of this Court's Rules, the applicant, **Amarjeet Kaur Baryan**, seeks a temporary injunction to restrain the respondent, **Bank of India Limited**, from exercising its statutory power of sale over the property known as **Land Reference No. 1870/III/194** ("the suit property") pending the hearing and determination of her appeal, being **Civil Appeal No. E194 of 2025**. In the appeal, the applicant seeks to challenge the ruling of the High Court (Mulwa J) dated 13th February 2025 in Nairobi HCCC No. E299 of 2024 in which the trial court dismissed her

application dated 30th May 2024

seeking an interim injunction to restrain the respondent from exercising its statutory power of sale over the charged property.

2. The grounds forming the basis of the application are that the applicant instituted a suit in the High Court against the respondent for, among others, a declaration that the respondent had clogged her equity of redemption. She also filed an application seeking an interim injunction restraining the respondent from selling the suit property pending the determination of the suit.
3. She avers that she had acted as a guarantor of **Multiple Hauliers (EA) Limited** (the borrower) to secure payment of a loan of USD 3,200,000 advanced to the borrower, the security for which was the suit property. She contends that the respondent has clogged her equity of redemption in the period between 2022 and 2023 by refusing to have the loan facilities taken over by SBM Bank Limited. It is her case that this refusal has denied her the right to redeem the suit property and get it discharged.
4. The applicant states that by the ruling dated 13th February 2025, the High Court dismissed her application for injunction

but granted her a 30-day injunction to allow her file an appeal against the ruling before this Court.

5. She contends that the respondent served her with only the 40-day notice of intention to sell, contrary to the Land Act. She further contends that the intended sale of the suit property is unlawful as the respondent did not serve her with any demand or the statutory notices contemplated under sections 90 and 96 of the Land Act, which automatically invalidates the sale process.
6. The applicant avers that she has an arguable appeal on, among other grounds, that the learned judge of the High Court erred in fact and law in holding that she had not established a *prima facie* case; by ignoring evidence demonstrating that the respondent clogged her equity of redemption by unreasonably declining the takeover of the loan facility by SBM Bank Limited; and by dismissing her application dated 30th May 2024 with costs to the respondent.
7. It is her contention that her appeal will be rendered nugatory as she will lose the property which is her matrimonial home and which is of great sentimental value; and that she has also spent a significant amount of time,

energy and financial

resources to develop the property, which is valued at approximately Kshs. 375,000,000.

8. The application is supported by an affidavit sworn by the applicant on 21st March 2025. While reiterating the grounds forming the basis of her application, she avers that the respondent has clogged her equity of redemption by declining to allow the loan of USD 3,200,000, which she took in 2016 on the security of the suit property, to be taken over by SBM Bank. She further avers that sometime in 2016, the respondent extended a loan of USD 3,200,000 to Multiple Hauliers (EA) Limited, secured by a charge over the suit property dated 21st September 2016 and registered on 23rd September 2016.
9. The applicant avers that the respondent declined to allow a takeover of the loan facility on the basis that the debt owed to it by a company known as Multiple Solutions Limited (MSL) also has to be settled before the respondent allowed her to exercise her equity of redemption, but she asserts that she did not charge her property to secure any loan to MSL.
10. The application is opposed by an affidavit sworn by **Linesh Veetil Chemmancheri**, the Chief Manager of the

respondent, on 7th April 2025. It is averred for the respondent that the charge dated 21st September 2016 is a third-party charge, with the applicant as the chargor; that the facility was used to secure a facility to the borrower, Multiple Hauliers (EA) Limited; and that there is a sister company of the borrower, Multiple Solutions Limited, which sought a loan facility from the respondent. According to the respondent, both these companies have the same directors and have non-performing loans with the respondent; that the director of the borrower, (Multiple Hauliers (E.A) Limited), one Rajinder Singh Baryan, is the spouse of the applicant; and that upon default by the borrower, the respondent issued statutory notices of default and notice to rectify the default, which were also served on the applicant, but were not responded to.

11. It is its case that as a result of the continuous default by the applicant, the respondent elected to sell the suit property by serving a notice to sell to the applicant, which is well protected under the charge dated 21st September 2016.
12. The respondent asserts that the applicant, being the proprietor of the suit property, is the chargor in respect of

the

loan to Multiple Hauliers (E.A) Limited; that Multiple Solutions Limited is also a borrower from the respondent, with three accounts in debt; that a corporate guarantee and indemnity dated 29th July 2020 was issued by Multiple Hauliers (E.A) Limited to Multiple Solutions Limited by virtue of a Facility Letter dated 4th May 2020 and renewed on 12th March 2021, which was acknowledged by the applicant.

13. The respondent avers that under clause 28 of the charge with the applicant dated 21st September 2016, it has the power to consolidate charges without notice or demand to the chargor or the borrower; that by clause 12 of the debenture by Multiple Solutions Limited dated 30th January 2014 as read together with the corporate guarantee dated 29th July 2020 and the charge over the suit property, all secured obligations by Multiple Hauliers (E.A) Limited; and that despite there being no requirement to notify the borrower and/or chargor on consolidation of the facilities, it had issued a notice of exercise of consolidation of the loan accounts of Multiple Hauliers (E.A) Limited and Multiple Solutions Limited.

14. It is its case that the applicant has not challenged its right to consolidate the charge or the legality in enforcing the same; that it has not clogged the applicant's equity of redemption; that the proposed takeover transaction by SBM Bank was only to cater for the outstanding loan for Multiple Hauliers (E.A) Limited, leaving out Multiple Solutions Limited; and that it is amenable to SBM Bank taking over the loan so long as both loans advanced towards the borrower and the sister company are included. It asserts that it has issued all the requisite statutory notices and the applicant's equity has not been clogged.
15. When the application came up for hearing, learned counsel, Mr. Eddy Owiti, appeared for the applicant and highlighted the applicant's submissions dated 16th April 2025. There were no submissions on record for the respondent, nor was there legal representation for it.
16. We have read and considered the application, the affidavit in support and opposition thereto, and the submissions by the applicant. The principles applicable in an application for an injunction or stay pending appeal under rule 5(2)(b) are well settled. The applicant is required to demonstrate, first, that

she has an arguable appeal, that is, that her appeal raises at least one *bona fide* issue deserving appellate consideration and, secondly, that absent the orders sought and the appeal succeeds, it will be rendered nugatory. These two principles must both be satisfied before the Court can grant the orders sought. We are also mindful that in deciding such an application, we should refrain from delving into the merits of the appeal itself, or making any definitive findings of fact or law -see **Stanley Kangethe Kinyanjui V Tony Ketter & 5 others** [2013] KECA 378 (KLR).

17. In the matter before us, the applicant argues that the respondent's conduct between 2022 and 2023 amounted to a clog on her equity of redemption, an issue which, in her view, the High Court did not adequately address in finding that she had not established a *prima facie* case. Further, that by refusing to permit a reasonable redemption of the loan through takeover by SBM Bank and attempting to lump an unrelated debt as a condition for redemption, the respondent acted unlawfully and inequitably. This, according to the applicant, is a weighty legal issue that merits full consideration on appeal. The

applicant also contends that the

process leading to the intended sale is flawed, and that the trial court failed to consider that she was not served with the notice under section 90 of the Land Act.

18. We have considered the applicant's submissions with respect to the arguability of the appeal. We agree that, on the principles set in **Tony Ketter**, the applicant has satisfied the first limb under rule 5(2)(b). The applicant challenges the exercise of discretion by the trial court as set out in **Giella v. Cassman Brown** [1973] EA 358 in determining whether or not to grant an injunction: whether the appropriate notices were issued by the respondent; and whether the respondent had clogged the applicant's equity of redemption. These are all arguable points that would merit consideration by this Court.
19. With respect to the second principle, the applicant submits that her appeal will be rendered nugatory as the respondent will proceed with the sale of the suit property, thereby rendering the appeal an academic exercise. It is her case that the suit property is her matrimonial home; that she has expended considerable resources to develop the property, valued at approximately 375,000,000; that it has deep

sentimental value; and that loss of one's matrimonial home cannot be adequately compensated by damages.

20. As we noted above, the respondent did not file any submissions. We note, however, that the applicant has not denied her indebtedness, and further, that the respondent is a bank, and its ability to compensate the applicant in damages has not been questioned.

21. It is settled law that whether or not an intended appeal shall be rendered nugatory depends on whether the applicant can be adequately compensated by way of damages should the appeal ultimately succeed. Further, as was held in **Peter Maina Waihenya v ICDC** (2011) eKLR, a charged property becomes a commodity for sale once a charge over the property is registered in favour of a lender as security for a loan. More appropriate in the circumstances of this application is the decision in **Joseph Gitahi Gachau & another v Pioneer Holdings (A) Limited & 2 Others** [2009] KECA 201 (KLR) in which this Court stated:

“On the second point of whether the appeal will be rendered nugatory unless we grant the interim injunction sought, we are satisfied that the same will not be rendered

nugatory.

However, we recognize the argument put forward by the applicants that the suit property is a matrimonial home in which they occupy in their now sunset years. But we would like to point out that couples such as the one now before us must realise that when they charge their matrimonial property to secure a loan, they are in fact converting that property into a commodity for sale available for purchase by all and sundry, if they fail to pay the charge debts or the loans and that no sentimental value or attachment to the mortgaged property, however great, per se, would operate against the exercise of statutory power of sale by the mortgagee."

(Emphasis added).

22. Taking the above matters into consideration, we are not satisfied that the applicant has established that her appeal would be rendered nugatory should the orders she seeks not be granted. She charged the suit property to secure a loan for a third party. She has not disputed that the loan is in arrears. The respondent is a bank, and no argument has been made that it would be incapable of compensating her in damages should her appeal succeed.

23. We accordingly find no merit in the application dated 21st March 2025. It is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 19th day of December, 2025

S. GATEMBU KAIRU, FCIArb, C.Arb

.....
**JUDGE OF
APPEAL MUMBI
NGUGI**

.....
**JUDGE OF APPEAL
W. K. KORIR**

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.