



Roimen & another v Equity Bank of Kenya Limited & another (Civil Application E290 of 2024) [2025] KECA 90 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KECA 90 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E290 OF 2024
MSA MAKHANDIA, JW LESSIT & GWN MACHARIA, JJA
JANUARY 24, 2025**

BETWEEN

CHRISTOPHER LEIYAN ROIMEN 1ST APPLICANT

ROIMEN INVESTMENT LIMITED 2ND APPLICANT

AND

EQUITY BANK OF KENYA LIMITED 1ST RESPONDENT

KEYSIAN AUCTIONEERS 2ND RESPONDENT

(An application seeking an injunction pursuant to the ruling of the High Court of Kenya (Dorah Chepkwony, J.) dated 19th February 2024 in HC Comm No. E244 of 2019)

RULING

1. The notice of motion before us for consideration is dated 5th June 2024, filed by Christopher Leiyan Roimen and Roimen Investment Limited (“the applicants”). It seeks a temporary injunction restraining Equity Bank of Kenya Limited and Keysian Auctioneers (“the respondents”) from advertising for sale, selling by public auction, disposing off or in any manner dealing with all that piece or parcel of land known as LR No. Ngong/Ngong/37097 (“the suit property”), pending the hearing and determination of the intended appeal.
2. The application is supported by the grounds on its face as well as the affidavit of the 1st applicant dated 5th June, 2024. The applicants’ case appears to be: that in 2018, the 2nd applicant applied for an Equity Release Loan of Kshs. 65,101,000.00 from the 1st respondent. The loan was secured by a charge over the suit property for Kshs.39,000,000.00 and a further charge on another property known as Ngong/Ngong/50741 for Kshs. 5,101,000.00 and personal guarantees by the 1st applicant and one, Joan Sampei Swakei. The 2nd applicant defaulted on the loan repayment, accumulating arrears of Kshs. 3,658,693.11 by February 22, 2018. Consequently, the 1st respondent issued the required notices under



the Land and Auctioneers Acts signaling its intention to exercise its statutory power of sale under the charge. The applicants then filed suit and sought a temporary injunction against the respondents. In a ruling delivered on 30th July 2020, the trial court in allowing the application directed the applicants to deposit Kshs. 20,000,000.00 into a joint interest-earning account within 40 days; failing which, the 1st respondent would be at liberty to proceed with the release of the securities. The applicants failed to meet the terms of the conditional injunction aforesaid.

3. Subsequently, the 1st respondent issued and served fresh notices again under the Land and Auctioneers Acts and had the suit property valued by Messrs. Gimco Ltd. The applicants filed once more another application on 15th November 2022, seeking to restrain the respondents from exercising the statutory power of sale. This is the application that was dismissed on 15th March 2024, provoking the filing of the notice of appeal and the instant application.
4. The applicants are apprehensive that the 1st respondent will proceed to issue fresh statutory notices and proceed to sell the suit property by way of public auction despite their proposal to have the suit property sold through private treaty and having provided proof of the would be purchasers. The applicants in their draft memorandum of appeal annexed to the application aver that the High Court failed to consider that the respondents would proceed with the public auction without having the current valuation of the suit property, that the respondents owed them a duty of care to sell the suit property at the best reasonable market price and that they had ignored the law on statutory power of sale amongst others.
5. The applicants further aver that unless the orders sought are not granted, they stand to suffer substantial loss as the respondents will proceed with an irregular public auction on the basis of a grossly undervalued report, thereby rendering the intended appeal nugatory. That they were willing to deposit Kshs. 5,000,000.00 in a joint interest-earning account given the undisputed outstanding loan balance.
6. The application was opposed by the respondent through the replying affidavit of Samuel Wamaitha, Assistant manager, Legal services of the 1st respondent, dated 3rd July 2024. It is deposed that the application was misconceived, meritless, and an abuse of the court process. That the application had not met the criteria for injunctive relief sought and that their intended appeal was frivolous, as it challenges the dismissal of an earlier injunction application. They also claim that the applicants will not suffer substantial loss if the injunction is not granted, as the suit property's value is ascertainable and compensable by an award of damages. Furthermore, the applicants' failure to comply with previous court order goes to show that they had not approached the court with clean hands and therefore not entitled to the equitable relief sought. That it is not in doubt, that the applicants owe the respondents Kshs. 53,674,794.26. The appellants' proposal to deposit Kshs. 5,000,000.00 into a joint interest-earning account is unreasonable given the outstanding loan balance. The respondents also aver that the applicants had not provided evidence that they intend to use an outdated valuation report of the suit property or that the suit property will be sold at a gross undervalue, calling such claims speculative. That the applicants' desire to sell the suit property privately is not a new proposal, as similar proposals have been made in the past without fruition. They finally, contend that the appellants' application is an abuse of the court process, aimed at delaying the respondents' lawful rights under the charge instrument.
7. The application was canvassed by way of written submissions. The applicants' submissions reiterated the depositions in the affidavit save citing the cases of *Giella vs. Cassman Brown* (1973) EA 358 and *Charter House Investment Ltd vs. Simon K. Sang & 3 Others - CA No. 315 of 2004* (2010) eKLR, on what the courts should consider in determining whether or not to grant an injunction. The respondents on the other hand submitted that the intended appeal lacks merit and is merely a



gimmick intended to delay the respondents' exercise of its statutory power of sale. That the appeal by the applicants is against the dismissal of its injunction application dated 15th November, 2022 which application was dismissed for being res judicata. That therefore the intended appeal cannot be arguable nor will it be rendered nugatory.

8. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction of this Court on applications under rule 5 (2) (b) of this Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the application is not granted and the appeal succeeds, the appeal will have been rendered nugatory.

9. In the case of *Trust Bank Limited and Another vs. Investech Bank Limited and 3 Others* [2000] eKLR, this Court delineated the jurisdiction of this Court as follows:

“The jurisdiction of the Court under rule 5 (2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

10. On the first limb, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicants to warrant ventilation before this Court. In *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR, this Court described an arguable appeal in the following terms:

“vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.”

11. Considering the possible grounds of appeal set out elsewhere in this ruling, we do not perceive or discern anything arguable in them. The applicants do not dispute their default nor the respondents' right to exercise their statutory power of sale. Their beef is the mode that the respondents will adopt in doing so, whether by public auction or private treaty. We do not think that it's within the applicants' reach to make a determination as to how the respondents will exercise their statutory power of sale. It is also not lost on us that the applicants had been granted a conditional injunction in the High Court on a similar application and which condition they were unable to fulfil. Without saying much, we do not think the grounds set out in the draft memorandum of appeal are arguable. Having reached the above conclusion, we do not think that it is necessary to consider the other limb given that the twin limbs are co-joined and none can move without the other. The upshot is that the notice of motion dated 5th June 2024 is dismissed with costs to the respondents.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA



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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

