



Economy Network Limited & 2 others v Equity Bank & 2 others (Civil Application E007 of 2025) [2025] KECA 1051 (KLR) (13 June 2025) (Ruling)

Neutral citation: [2025] KECA 1051 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E007 OF 2025
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
JUNE 13, 2025**

BETWEEN

**ECONOMY NETWORK LIMITED 1ST APPELLANT
MARTHA JOSEPH 2ND APPELLANT
PERES OSEWE OKUMU 3RD APPELLANT**

AND

**EQUITY BANK 1ST RESPONDENT
NYALUONYO AUCTIONEERS 2ND RESPONDENT
LEAH ADDA GWIYO 3RD RESPONDENT**

(Being an application for injunction pending appeal from the Judgment and Decree of the High Court of Kenya at Kisumu (R.E. Aburili, J.) dated 31st December, 2024 in Commercial Case No. 63 of 2018)

RULING

1. Before the Court is the applicant's Notice of Motion dated 28th January 2025 made under rule 5(2) (b) of the Court of Appeal Rules. It seeks inter alia:
 - a. Spent;
 - b. That pending the hearing and determination of this application inter-parties, the Honourable Court be pleased to grant an interim injunction restraining the respondents by itself or anybody claiming through them from in any way dealing with land parcel Kisumu Koru 1279;
 - c. That pending the hearing and determination of the applicant's appeal, the Honourable Court be pleased to issue an order of temporary injunction restraining the respondent by itself or



anybody claiming through them from in any way dealing with land parcel Kisumu Koru 1279[suit property];

- d. That costs be in the cause.
2. The application is supported by the grounds on the face of it and further by the annexed affidavit of Martha Joseph sworn on 28th January 2025. The main grounds raised by the applicants are: that the applicant applied for an overdraft facility of Kshs.500,000/= and a further advance payment guarantee facility of Kshs.1,000,000/= from the 1st respondent which offer was accepted. As security, the applicant offered the suit property and a legal charge was executed and registered on the title. The applicants were not successful in their case before the High Court hence this application.
 3. The learned judge is faulted for failing to note that when the applicants fell into arrears, the 1st respondent fraudulently sold the suit land by public auction and without serving statutory notices, no certificate of sale was issued, the sale was in contravention of section 99[3] of the *Land Act*, the suit property was undervalued and, failing to find that the 3rd respondent accepted a cheque that was less than 25% of the bid price and was drawn two days before the auction.
 4. The applicants asserted that the trial court's decision was erroneous, both in fact and in law, and that their intended appeal raises arguable issues with high chances of success. The applicant contends that unless the temporary injunction is granted, the respondents may proceed to execute the judgment, which would render its appeal nugatory and cause irreparable harm to them.
 5. The application is opposed through a replying affidavit sworn on 14th February, 2025 by Steve Biko, the Credit Manager of the 1st respondent and the grounds that the 2nd respondent was an agent in so far as realization of security was concerned.
 6. The respondents contend that the application is frivolous and does not meet the threshold for the grant of the orders sought as the appellant sought and was granted a loan facility by the bank and when the loan fell into arrears, the 1st and 2nd respondents issued notices as required by the law of its intention to exercise its statutory power of sale.
 7. Thereafter, the suit property was sold by public auction to the highest bidder Leah Adda Gwiyo, the 3rd (third) respondent herein as such the sale cannot be challenged except on the grounds of fraud to which it is proved that the purchaser was a party.
 8. It is deponed that since no fraud was proved, the only cause available to the applicants is to sue for damages and not to invalidate the concluded sale. Further, that the appeal is not arguable as there is nothing in the memorandum of appeal to suggest how the court erred and, in any event, the applicants have a right to pursue damages and therefore it cannot be said that the appeal will be rendered nugatory.
 9. On her part, the 3rd respondent opposed the application through a replying affidavit sworn on 24th February, 2025 and the grounds that by an advertisement in the daily of 26th June, 2017, the suit property was advertised for sale. The advertisement scheduled for the sale of the suit property on 18th July, 2017 at the offices of Nyaluonyo Auctioneers at Kisumu.
 10. At the public auction, the 3rd respondent was declared the highest bidder at Kshs.4,600, 000/= and emerged the winner at the fall of the hammer. Having purchased the suit property and having paid the purchase price of Kshs.4,600,000/= her acquisition of the title cannot be faulted.
 11. The 3rd respondent has been prejudiced for the past 8 years as the applicants continues to utilize the suit property and any further delay in her registering of the title and obtaining vacant possession of the



suit property for the period of the appeal will aggregate her loss which the applicants are not willing to further bear.

12. It is further deponed that section 99 of the Land Act does not vitiate a sale by public auction where no fraud has been pleaded and proved against her, and if such fraud is proved, the applicants can sue the chargee for damages as such the intended appeal will not be rendered nugatory.
13. In their submissions in support of the application, the applicants submitted that due process was not followed before the auction was conducted as no statutory notices were served upon the applicants. It is submitted further that there was collusion between the respondents as the bankers' cheque issued by the 3rd respondent was dated two days before the auction date and was not 25% as required at the fall of the hammer. The applicants contended that the 1st respondent intentionally did not provide the charge document which was relied upon and why they sought to enjoin the contractual interest between the parties.
14. In their submissions, the 1st and 2nd respondent contends that the applicants have not satisfied the provisions under Rule 5(2)(b) of this Court's Rules as such the orders sought cannot be granted.
15. The 3rd respondent submits that the intended appeal is not arguable as the breach of section 99 of the Land Act was neither pleaded nor proved. Further, the applicants have not demonstrated how the intended appeal will be rendered nugatory as the applicants can be remedied through damages and further, by charging the title, the applicants accepted the risk of sale in the event of default. Reliance is laid on the case of *Jacob Ochieng Muganda vs. Housing Finance Company Kenya Limited Nairobi CACA No. 453 of 2001 [UR 241/2001]*, where the court found that having issued the statutory three months' notice, the validity of the sale cannot be challenged. If there was any irregularity in the conduct of the auction, the applicants would be entitled to damages against the auctioneer.
16. Having considered the application, the grounds in support thereof, the submissions, the authorities cited and the law, the jurisdiction under Rule 5(2) (b) of this Court's Rules is discretionary. 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 orders sought are not granted and the appeal succeeds, the intended appeal will be rendered nugatory.
17. This Court in *Trust Bank Limited and Another vs. Investech Bank Limited and 3 Others [2000] eKLR* delineated the jurisdiction of this Court in such an application 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...”
18. To succeed in an application under rule 5(2) (b) of the Court of Appeal Rules, an applicant has to satisfy the twin principles to the Court's satisfaction. See *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [****2013] eKLR*.
19. On the first limb of this twin principle, this Court held in *David Morton Silversein vs. Atsango Chesoni [2002] eKLR* that, for an order of stay to issue, the applicant must first demonstrate that the appeal or intended appeal is arguable; that is, it is not frivolous and that the appeal or intended appeal, would in the absence of stay, be rendered nugatory.



20. Regarding the sufficiency of the pleaded grounds of appeal to warrant a grant of the orders of injunction sought, of the orders sought, this Court in *Yellow Horse Inns Ltd vs. A.A Kawir Transporters and 4 Others* [2014] eKLR observed that an applicant need not to show a multiplicity of arguable points as one arguable point would suffice. Neither is the applicant required to show that the arguable point would succeed, see *Kenya Commercial Bank Limited vs. Nicholas Ombija* [2009] eKLR.
21. On the arguability of the appeal, the applicants have raised 10 grounds in their memorandum of appeal dated 28th January 2025, faulting the learned judge for finding that statutory notices were served, failing to properly analyse the oral and documentary evidence on record, shifting the burden of proof to the appellant, failing to find that the suit property was undervalued, failing to find that the provisions of section 99[3] of the *Land Act* were flouted and failing to find that the whole process of the public auction was fraudulently conducted.
22. It is trite that even one bona fide arguable ground is enough for a party to satisfy the first limb on arguability. However, where an application is on the face of it outrightly frivolous, the Court should not shy in saying so. In the case of *Dennis Mogambi Mang'are v Attorney General & 3 Others* [2012] eKLR, this Court held that when determining the arguability of an appeal, it must consider whether there are grounds of appeal that can be supported by the law or the evidence. The 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.”
23. On whether or not the applicant has established a valid basis for an arguable appeal, having considered the applicant’s draft memorandum of appeal, one of the main issues raised by the applicant is that the sale of the suit land by public auction was fraudulent and that the impugned sale violated the provisions of Section 99[3] of the *Land Act*.
24. The intended appeal is arguable inter alia whether the correct procedures for sale in a public auction were followed. The position in law is that an arguable appeal is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court and a response from the opposite party. The applicants have satisfied the Court that the intended appeal is arguable.
25. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if the orders sought are not granted, in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* (supra) this Court stated that:
- “ ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- x). 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 reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
26. In determining whether or not an appeal will be rendered nugatory the Court has to consider the conflicting claims of both parties and each case has to be considered on its merits. In the circumstances of the instant application, the suit property will be transferred to the 3rd respondent who might in turn sell to third parties thus rendering it impossible to recover the same if the applicants were to succeed in their appeal. Further, her financial capability has not been disclosed and she has not demonstrated whether she will be capable of compensating the applicants should the appeal succeed. In the circumstances, the intended appeal will be rendered nugatory if the orders sought are not granted.



27. The position in law is that for a party to succeed under Rule 5(2)(b) of this Court's Rules both prerequisites for granting relief under the said provision must be satisfied. Herein the applicant has succeeded in establishing the twin limbs necessary for granting relief in an application under Rule 5(2) (b) of the Court of Appeal Rules. The upshot is that the application dated 28th January 2025 is with merit and is allowed. Costs shall abide the appeal.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF JUNE, 2025.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

H. A. OMONDI

JUDGE OF APPEAL

L. KIMARU

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

