



**Muotia v National Bank of Kenya Limited (Civil Application
E446 of 2023) [2024] KECA 14 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KECA 14 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E446 OF 2023
MSA MAKHANDIA, M NGUGI & PM GACHOKA, JJA
JANUARY 25, 2024**

BETWEEN

GEOFFREY WAHOME MUOTIA APPLICANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

(Being an application for injunction against the ruling of the High Court of Kenya at Nairobi (D. Majanja, J.) delivered on 30th June 2023 in HCCC No. E193 of 2023)

RULING

1. Before us is a Notice of Motion dated 21st September 2023, brought under rule 5 (2) (b) of the [Court of Appeal Rules](#), seeking an order for an injunction to restrain the respondent or its servants, agents, or auctioneers from selling a property known as LR No 209/ 12544 by way of public auction or otherwise.
2. From the documents, the applicant does not dispute that the property is charged to the respondent to secure a loan that he obtained. It is also not contested that the applicant defaulted in repaying the loan and has made promises to repay the loan but failed to honour the promises. Consequently, the respondent invoked its statutory power of sale which triggered the filing of the suit in the High Court by the applicant.
3. To put this application in context, we find it necessary to quote the ruling of the learned judge who, in dismissing the application for injunction, stated as follows:

From the pleadings and depositions, the essence of the plaintiff's case is that it seeks indulgence in order to secure a buyer for the suit property. He does not deny that he is indebted to the Bank. Following the dismissal of the previous suit he had filed against the Bank to restrain it selling the suit property in exercise of its statutory power of sale, the Bank proceeded to comply with all the prerequisites necessary for doing so. It issued and served



the relevant notices under sections 90 and 96(2) of the Land Act, 2012 on the plaintiff. The plaintiff has not controverted these facts by way of a supplementary affidavit. It has also issued the 45- day auctioneers notice of redemption and proceeded to value the suit property within the period prescribed by the Auctioneer's Rules, that is within one year of the intended sale. I therefore find and hold that the Bank's statutory power of sale has arisen, and the Bank has complied with all conditions for it to sell the suit property.

Can the court issue an injunction to facilitate the plaintiff obtain a buyer for the suit property? In this case the plaintiff avers that he has obtained a serious buyer who wishes to purchase the suit property. It has annexed a sale agreement dated 11th March 2021 between himself and a purchaser, MR seeking to purchase the suit property for the sum of USD 21,472,940.00 which sale was to be completed within 120 days from the date of execution. He has also produced a letter dated 4th April 2023 from IKM Advocates confirming that it would act for him in the sale of the suit property and an email dated 3rd February 2023 in which the plaintiff informed the Bank that as he wanted to proceed for medical treatment overseas, he wished to discharge the suit property. The Bank replied by informing him that it had already agreed to accept Kshs 300,000,000.00 subject to the deposit being paid in December 2022 which deposit had not been paid.

The Bank has produced three letters dated 11th August 2017, 27th May 2020 and 9th May 2023 from the Plaintiff informing the Bank that it has secured a purchaser for the suit property and seeks the Bank's assistance to facilitate the sale. On its part, the Bank addressed a letter dated 17th October 2019 accepting the plaintiff's offer to pay Kshs 482,000,000.00 by 30th March 2020. There is also another letter dated 1st December 2022 addressed to the plaintiff by the Bank referring to a meeting held with the plaintiff. The Bank stated that it was prepared to receive the plaintiff's specific, firm and time bound commitments to settle the debt.

It is trite law that the court is bound to enforce the contractual rights and obligations of the parties hence it is inconceivable that the court could issue an injunction restraining the Bank from exercising its statutory right to sell the suit property when the plaintiff has not demonstrated any wrong or breach of the plaintiff's legal right. The court cannot force the Bank to accept the plaintiff's proposal to sell the suit property in a manner not contemplated by the agreement as this would amount to re-writing the parties' contract and bargain. In Muigai Enterprises Limited v Kenya Commercial Bank Limited ML HCOMM No 473 of 2015 [2016] eKLR, the court expressed the view that,

“[T]he court cannot compel the defendant to accept the plaintiff's proposals. I so find because it is not a matter of an entitlement bestowed upon the plaintiff, whether by statute or by contract.”

From the totality of evidence of the parties none of the plaintiff's proposals have materialized despite the Bank granting him indulgence. Even the evidence he provided is rather thin. The sale agreement he relies on was executed on 11th March 2021 and nothing appears to have come of it. Nothing shows that the completion date, which is way past, had been extended. Even accepting that the court may have jurisdiction to grant the prayers it seeks, a party who seeks the court's intervention must be candid and make full disclosure of all facts necessary for the court to make an informed decision. There is no evidence that the plaintiff has received an offer to purchase the suit property. The fact that he has instructed a



firm of advocates to act for him in a transaction whose antecedents are unknown is simply inadequate.”

4. This is the ruling that triggered the present application. In an affidavit sworn on 21st September 2023, the applicant states that the appeal is arguable and has cited many grounds, among others being: that to hoodwink the public, the auctioneers fraudulently advertised the wrong property namely LR 209/15244 instead of LR 209/12544; that the deliberate mistake is meant to mislead potential bidders who may wish to conduct a search before the auction; that the respondent has a predetermined bidder; that the property is grossly underrated at Kshs 277,200,000.00 as the forced value whereas the true market value is Kshs 1,050,000,000.00; that no proper notification of sale has been served as per the previous court orders; that the court did not consider the effect of Covid-19 on the performance of the applicant’s contractual obligations; and that damages would not be an adequate remedy considering his current status as a person living with disability.
5. The applicant has also filed written submissions dated 4th October 2023 which reiterate the grounds that he has an arguable appeal and that the appeal will be rendered nugatory unless the order for stay is granted. In support of his arguments, the applicant has cited *Bob Morgan Systems Ltd & another v Jones* [2004] 1 KLR 194; *Otieno v Ougo & another (No 2)* (1987) KLR 400; *Judicial Commission of Inquiry into the Goldenberg Affair & 3 others v Job Kilach* [2003] eKLR and *NIC Bank Limited & 2 others v Mombasa Water Products Limited* [2021] eKLR.
6. When the matter was called for hearing, the respondent was not present and had not filed any response to the application. The Court confirmed that the hearing notice was served on the respondent’s advocates, Mutua Molo Advocates, via its e-mail address (info@mutuamolo adocates.co.ke).
7. The principles that apply in applications under rule 5 (2) (b) of this Court’s Rules for stay of execution or injunction pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or appeal (if any) is arguable and not merely frivolous. Secondly, the applicant must show that the appeal or intended appeal, if successful, would be rendered nugatory absent stay. These principles have been enunciated in various judicial pronouncements of this Court, including those cited by the applicant.
8. On the first limb of the twin principles, in *Anne Wanjiku Kibeh v Clement Kungu Waibara & IEBC* [2020] eKLR, this Court held that for orders of stay to issue, the applicant must demonstrate that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.
9. This brings us to the question whether, in this case, the intended appeal is arguable. To answer that question, we shall revisit the facts as set out in the application. We note the following:
 - i. On 22nd January 2015, the applicant filed an application seeking orders of injunction hinged on several grounds, including but not limited to the alleged non-service of the notice under section 90 of *Land Act*, 2002 and lack of valuation as required under section 97 of the *Land Act*, 2012;
 - ii. The High Court (Okwang, J) in a ruling dated 31st May 2019, dismissed the application and discharged the ex parte orders that had been issued on 23rd January 2015. The court further directed that the respondent was at liberty to exercise its statutory power of sale but on condition that it does re-issue the statutory notice and conducts a valuation of the property.
 - iii. On 15th May 2023, the applicant filed the application that is the subject of this ruling. In the High Court, he sought an order of injunction to restrain the respondent from exercising its statutory power of sale. He also sought, in an alternative prayer, suspension of the exercise



of the respondent's statutory power of sale for a period of 12 months for him to rectify the default. Subsequently, the respondent served a statutory notice of sale on the applicant and upon non-compliance instructed an auctioneer to advertise the property for sale by public auction, triggering the second application in the High Court.

- iv. As already set out in the extract of the ruling of the High Court (Majanja, J), the court found that the essence of the application before it was a plea for time for the applicant to get a buyer for the suit property- the applicant did not deny his indebtedness to the respondent. The court also found, as a matter of fact, that the statutory notice had been served in accordance with sections 90 and 96 (2) of the *Land Act*, 2012. The court also found the 45-day auctioneer's notice of redemption had been served and that a valuation of the property had been done. The court cited various letters that the applicant had produced on the intended sale to an identified buyer. Thus, while the applicant does not deny his indebtedness and made proposals to repay the debt his proposals, as observed by the learned Judge, had not materialized.
10. Bearing these facts in mind, we have looked at the undated draft memorandum of appeal annexed to the application. The main issues raised are that the auctioneer's misdescribed the property in the advertisement to mislead potential buyers; that the respondent has undervalued the property and that the court ought to have considered the effects of Covid 19. From our reading of the grounds on which the application is founded, together with the draft memorandum of appeal, as well as the written and oral submissions of the learned counsel for the applicant, we are not persuaded that the applicant has an arguable appeal. The applicant has not denied the debt and as observed by the learned judge he had made numerous proposals to repay the debt. We will say no more on the merits or otherwise of those grounds. We leave that to the bench that will hear and determine the appeal.
11. We come to the unwavering conclusion that the applicant has failed to satisfy the first limb of the twin principles under rule 5(2)(b) of the *Court of Appeal Rules*. Even if we were to consider the second limb of the twin principles, which is whether the appeal will be rendered nugatory, we note that the core of the dispute is whether the respondent should exercise its statutory power of sale to recover the debt. It is trite that once the property is offered as a security, it becomes a commodity for sale and a chargor can only redeem it upon paying the debt. It is not disputed that the respondent is a reputable bank in Kenya that is capable of paying damages in the event that the intended appeal is successful. We adopt the sentiments of this Court in *Elizabeth Jerono Yator v Consolidated Bank of Kenya Limited & another* [2019] eKLR where it held as follows:
- “The 1st respondent is a reputable bank. It has not been suggested that should the intended sale found to be wanting, it may not be able to pay the applicant the damages that may be awarded. We reiterate that once a property has been given as security for financial accommodation, it becomes a commodity for sale and therefore the sentimental attachment to the same becomes inconsequential and must be sold in accordance with the law.”
12. In view of the foregoing, we find this application lacking merit and it is hereby dismissed in its entirety. As regards the costs, we note that the respondent did not participate in the hearing and, therefore, make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL



MUMBI NGUGI

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JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

