



**Equip Agencies Limited & 3 others v Diamond Trust Bank Limited & another
(Civil Application E579 of 2023) [2024] KECA 3 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KECA 3 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E579 OF 2023
MA WARSAME, SG KAIRU & JW LESSIT, JJA
JANUARY 19, 2024**

BETWEEN

**EQUIP AGENCIES LIMITED 1ST APPLICANT
ASHIITE CHANDRAKANT PATEL 2ND APPLICANT
GRISHMA ASHITE PATEL 3RD APPLICANT
CORN PRODUCTS (EPZ) LTD 4TH APPLICANT**

AND

**DIAMOND TRUST BANK LIMITED 1ST RESPONDENT
DALALI TRADERS AUCTIONEERS 2ND RESPONDENT**

(Being an application for an order of injunction pending the hearing and determination of the intended appeal against the ruling and order of the High Court of Kenya at Nairobi (E.C. Mwita, J.) dated 27th October, 2023 in HCCC No. E316 of 2022)

RULING

1. Before the court is a notice of motion of application dated December 8, 2023, brought under rule 5(2) (b) of the Rules of this Court. The applicants seek, *inter alia*, an order of injunction, restraining the respondents from selling or interfering in any way with the applicants' ownership or possession thereof, of land reference Number Eldoret Municipality Block 10/34 and land reference Number 209/3477 Dar es Salaam Road, Industrial Area, Nairobi (hereinafter 'suit properties'), pending hearing and determination of their appeal. The application is supported by grounds on its body and a supporting affidavit sworn by the 3rd applicant on December 8, 2023, together with annexures thereto.
2. The background of the application is that the 1st respondent extended facilities to the 1st and 4th applicants as the principal borrowers, which facilities were guaranteed by the 2nd and 3rd applicants,



- who are the registered owners of the 2nd suit property. The facilities were secured by way of several charges over the suit properties. Upon default of payment by the applicants, the 1st respondent moved to exercise its statutory power of sale. This prompted the applicants to file an application before the superior court, seeking injunctive reliefs to prevent the sale of the suit properties, which application was dismissed by a ruling of the court (Mwita J.), dated October 27, 2023. The applicants' intended appeal seeks to challenge this ruling of the superior court.
3. The applicants, in support of the instant application, contended that the two suit properties are at risk of being illegally and fraudulently sold by the respondents, despite clear evidence on record, that the loan facilities advanced to the applicants by the 1st respondent have been re-paid in full. They contended that their intended appeal is arguable, and shall be rendered nugatory, if injunctive orders sought are not granted, as they stand to lose the suit properties, which are of unique character, peculiar location and acreage, which will in turn paralyze their business operations.
 4. In opposition to the application, the 1st respondent filed a replying affidavit sworn on January 9, 2024. The 1st respondent deponed that the applicants failed to make the scheduled payments with respect to the facilities advanced to them by the 1st respondent, and the 1st respondent thereby moved to exercise its statutory power of sale over the suit properties. The 1st respondent averred that the applicants failed to respond to the statutory notices issued by the 1st respondent pursuant to section 90 of the [Land Act](#). Consequently, the 1st respondent instructed the 2nd respondent to sell the suit properties by way of public auction. The 1st respondent deponed that after discussions with the applicants, the parties entered into a Deed of Settlement and Satisfaction dated April 22, 2021, which directed the terms of payment by applicants of the sums which were due and owing to the 1st respondent. The 1st respondent asserted that the applicants paid the first installment amounting to Kes 68,000,000, but defaulted in settling the balance amounting to Kes 272,000,000. The 1st respondent contended that the applicants have no arguable appeal, and termed the application as an abuse of the court process.
 5. We have considered the application, the grounds in support thereof, the replying affidavit, the applicant's submissions, the authorities cited and the law. The principles for granting injunctive reliefs under rule 5(2)(b) of this [Court's Rules](#) are well settled. The applicants are required to show that their appeal is arguable, and that unless the injunctive reliefs sought are not granted, the applicant's intended appeal, if successful, will be rendered nugatory. (See [Trust Bank Limited and another v Investech Bank Limited and 3 others](#) [2000] eKLR.)
 6. Applying the above threshold, and being mindful not prejudice the hearing of the intended appeal, we are of the view that the grounds of appeal set out in the draft memorandum of appeal annexed to the application are arguable. The applicant contends that the superior court misapprehended the law with respect to the principle of *res judicata*, and erred by upholding the Deed of Settlement, in disregard of the law. An arguable ground is not necessarily one that must succeed, but merely one that is deserving of consideration by the court.
 7. Turning to the second principle, will the intended appeal, if successful, be rendered nugatory if we decline to issue the orders sought? It's the applicants' case that they face the threat of being dispossessed of the suit properties, if the orders sought are not granted. It is our considered view that the applicants willingly offered the suit properties as securities over the facilities advanced to them by the 1st respondent, being fully aware that the said suit properties would be sold in case of a default. We find that, in the circumstances of this case, damages would be an adequate remedy, in the event the applicants' appeal succeeds. The 1st respondent is a reputable bank, and in a position to compensate the applicants, should their appeal succeed.



8. From the foregoing, it is our finding that the instant application, though arguable, will not be rendered nugatory, if the order sought is not granted. The position in law is the twin principles must both be satisfied before a party can be granted relief under rule 5(2)(b) of the *Court of Appeal Rules*. Since only one prerequisite has been satisfied, the application fails.
9. The upshot therefore is that the applicants' notice of motion application is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JANUARY, 2024.

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

