



**Gathumbi v Bingwa Sacco Society Ltd (Civil Application
E059 of 2022) [2024] KECA 1042 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 1042 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E059 OF 2022
W KARANJA, J MOHAMMED & LK KIMARU, JJA
APRIL 26, 2024**

BETWEEN

GEORGE MUCHIRA GATHUMBI APPLICANT

AND

BINGWA SACCO SOCIETY LTD RESPONDENT

(An application for an order of injunction and stay of execution pending the hearing and determination of an intended appeal from the ruling and order of the Environment and Land Court of Kenya at Kerugoya (Cherono, J.) dated and delivered on 10th June, 2022 in ELC Case No. 176 of 2016)

RULING

1. The applicant filed suit against the respondent, before the Environment and Land Court (ELC) at Kerugoya, vide an amended plaint lodged in the said court on 7th November 2013. It was the respondent's case that he is the registered owner of L.R. No. Kabare/Mikarara/163 (hereinafter 'suit property'). He stated that on 19th January 2012, he assigned a power of attorney with respect to the suit property to one Ann Wanjiru Ndirangu, who went ahead and secured a loan of the sum of Kshs. 3,750,000 from the respondent, using the suit property as a security. He contended that he had secured an alternative security for the said loan, that is to say L.R. No. Gaturi/Githimu/1773 and Plot No. 375A/Kutus which the respondent declined to take.
2. It was the applicant's case that Ann Wanjiru Ndirangu defaulted in repaying the loan and the respondent, on 22nd October 2016, wrote to the applicant demanding payment of the accrued amount within seven days, failure to which the suit property would be sold to recover the loan amount. The applicant sought, inter alia, a permanent injunction against the respondent seeking to restrain them from disposing of the suit property; and an order discharging the suit property as a security for the loan amount, and substitution thereof, with L.R. No. Gaturi/Githimu/1773 and Plot No. 375A/Kutus.



3. The respondent filed a statement of defence dated 28th November 2016. The respondent averred that it discharged its duty by informing the applicant of the loan arrears and that the applicant ought to prevail upon Ann Wanjiru Ndirangu to settle the outstanding amounts, failure to which the respondent would have no choice but to exercise its legal right of sale with respect to the suit property which was offered as security.
4. Before the suit could be heard, the respondent filed a notice of preliminary objection dated 19th February 2020, challenging the ELC's jurisdiction to hear and determine the applicant's suit, and further that the amended plaint failed to disclose a cause of action. The respondent explained that by virtue of the Co operative Societies Act, any dispute between a Sacco society and its members ought to be adjudicated, in the first instance, before the Co-operative Disputes Tribunal.
5. The applicant, on his part, took the view that the commercial nature of the dispute did not take away the jurisdiction of the ELC to determine the suit as it involved a land issue. The applicant further averred that he did not, in his pleadings claim, to be a member of the respondent.
6. The ELC, after hearing the parties, determined that it lacked jurisdiction to entertain the matter, as the dispute was in essence commercial in nature, hinged on repayment of a loan advanced by the respondent, and thereby allowed the preliminary objection and declined jurisdiction.
7. The applicant, aggrieved by this decision, lodged a notice of appeal dated 14th June 2022. The applicant subsequently filed the instant application, dated 22nd July 2022, under Rule 5(2)(b) of the Court of Appeal Rules, substantively seeking that this Court grants:
 - i. an order of injunction against the respondent, restraining the respondent from advertising for sale, selling, or in any other way interfering with the applicant's quiet enjoyment/occupation of L.R. No. Kabare/Mikarara/163, and all the developments thereon, pending the hearing and determination of the intended appeal;
 - ii. an order of stay of the orders of the superior court dated 10th June 2022, that ordered the striking out of the applicant's ELC Case No. 176 of 2016 ending hearing and determination of the intended appeal; and
 - iii. costs of the application.
8. The application is supported by grounds on its body and an affidavit sworn by the applicant on the same date. The applicant stated that he is the registered owner of the suit property, and that he allowed Ann Wanjiru Ndirangu to register the suit property as security for a loan advanced to her by the respondent amounting to Kshs.3,500,000; that the said Ann Wanjiru had offered alternative parcels of land to be held as security to secure the loan amount that was advanced to her; that the respondent can at any time advertise or put up for the sale the suit property in a bid to recover the loan amount advanced to Ann Wanjiru; that the intended appeal raises arguable issues, and that if the orders sought are not granted, the respondent may dispose of the suit property which will render the appeal and the suit before the ELC nugatory.
9. The application was opposed by the respondent. A replying affidavit was sworn by the respondent's legal officer, Michael Jeff Mwaniki, on 20th November 2023. He took the view that the applicant's memorandum of appeal did not disclose any arguable issues. He deponed that the applicant had conceded that the outstanding loan amounts are owed to the respondent, and that the suit property was offered as security when the loan was advanced to Ann Wanjiru Ndirangu. He swore that no alternative security had been offered to the respondent and termed the applicant's application as an abuse of the court process. He asserted that the respondent is well within its rights to recover the unpaid loan



amounts against the registered security and, therefore, the applicant would not suffer any prejudice if the same is realised. He further pointed out that the impugned ruling of the ELC was delivered over three years ago, and that the instant application was an afterthought.

10. The application was canvassed by way of written submissions duly filed by both parties. The applicant's counsel, Mr. Kariuki, reiterated the submissions made before the ELC with respect to the respondent's preliminary objection. He submitted that the draft memorandum of appeal raised triable issues, and that if the orders sought in this application are not granted, there is risk that the respondent will dispose of the suit property, thereby rendering the applicant's appeal nugatory. In the circumstances, he urged us to allow the application as prayed.
11. Counsel for the respondent, Mr. Asiimwe, reiterated the contents of the replying affidavit sworn by the respondent. He was of the view that the applicant had failed to demonstrate that his intended appeal is arguable, or would be rendered nugatory, in the event the appeal succeeds. He invited us to dismiss the application in its entirety.
12. We have considered the application, the grounds in support thereof, the replying affidavit, rival submissions, the authorities cited and the applicable law.
13. For this Court to grant any order under Rule 5(2)(b) of this Court's Rules, an applicant has to show, first that his intended appeal is arguable, and secondly, that unless he is granted the orders sought, the intended appeal, if successful, will be rendered nugatory. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court, and one which is not frivolous. A single bona fide arguable ground of appeal is sufficient to satisfy this prerequisite. See *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others* [2013] eKLR.
14. Applying the above threshold, and being mindful not to prejudice the hearing of the intended appeal, considering all the material placed before us, we are not persuaded as to the arguability of the intended appeal. From a perusal of the record, we are not convinced that the dispute between the parties relate to the environment, use and occupation of, and title to land, within the meaning of Article 162 (2) (b) of the Constitution, as read together with Section 13 of the Environment and Land Court Act.
15. Turning to the second principle, will the intended appeal, if successful, be rendered nugatory if we decline to issue the orders sought? It is the applicant's case that he faces the threat of being dispossessed of the suit property, if the orders sought are not granted. It is our considered view that the applicant willingly offered the suit property as security to enable the respondent advance the loan to Ann Wanjiru Ndirangu, being fully aware that the said suit property would be sold in the event of a default in repayment of the same. We find that, in the circumstances of this case, damages would be an adequate remedy, in the event the applicant's appeal succeeds.
16. The position in law is that 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 none of the prerequisites have been satisfied, the application fails.
17. The upshot therefore is that the applicants' notice of motion lacks merit and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF APRIL, 2024.

W. KARANJA

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**JUDGE OF APPEAL
JAMILA MOHAMMED**

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**JUDGE OF APPEAL
L. KIMARU**

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

