



**Peckers Wood Limited v Bank of Africa Kenya Limited (Civil Appeal
(Application) E185 of 2022) [2024] KECA 441 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 441 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E185 OF 2022
MSA MAKHANDIA, K M'INOTI & S OLE KANTAL, JJA
APRIL 12, 2024**

BETWEEN

PECKERS WOOD LIMITED APPLICANT

AND

BANK OF AFRICA KENYA LIMITED RESPONDENT

(Being an application for injunction pending the hearing and determination of Civil Appeal No. 252 of 2021 from the Ruling and Order of the High Court of Kenya at Kiambu (M. Kasango, J.) dated 18th March 2021 in HCCC No. 28 of 2018)

RULING

1. Before us is a motion on notice dated May 31, 2022, in which Pecker Woods Limited, (the applicant), seeks an order of injunction to restrain the respondent, its officers, its agents, employee, functionaries, or officials by whatever name called from dealing, advertising for sale, offering for sale, selling, transferring and or dealing in any way whatsoever with the property known as LR No. Kiambu/ Municipality Block III/167 Runda Mumwe Estate, (the suit property) pending the hearing and determination of Civil Appeal No. 252 of 2021. The application is brought pursuant to a plethora of cited rules on the face of the motion but mainly, under rules 3, 3A, 3B, 5(2)(b) & rules 41, 42, and 43(1) of the Court of Appeal Rules, (this Court's Rules).
2. The background to the application is that, on August 20, 2018, the applicant filed suit against the respondent in the High Court of Kenya at Kiambu seeking orders of an injunction with respect to the suit property when the respondent attempted to exercise its statutory power of sale following the applicant's failure to honour the terms of the loan advanced to it by the respondent. The loan totalled in excess of Kshs.35 Million and was advanced in two tranches. The applicant had offered the suit property as security for the loan.



3. Simultaneously with the suit, the applicant filed an application for orders of injunction which were at the first instance granted ex parte. When the application came up for inter partes hearing on September 12, 2018, it was stood over generally to enable parties to negotiate an out-of-court settlement. There being no progress in the negotiations, the respondent on February 5, 2020 filed an application for the dismissal of the application and the main suit for want of prosecution and failure by the applicant to obtain and serve summons to enter appearance upon the respondent. The suit and the application had in the circumstances abated by operation of the law. On March 18, 2021, both the application and the suit were dismissed on the aforesaid grounds.
4. Being dissatisfied with the said ruling and order, the applicant filed an appeal to this Court, which is pending hearing and determination. In the meantime, the respondent in the exercise of its statutory power of sale instructed Garam Auctioneers to sell the suit property on June 14, 2022, hence the instant application.
5. The application is grounded on the fact that the applicant has an arguable appeal, and secondly, that if the auction is allowed to proceed, the pending appeal will be rendered nugatory as the suit property would be sold and transferred to a third party thereby putting it beyond the reach of the applicant should the appeal succeed.
6. The application was supported by the affidavit of Simon Wagacha Kanai, the Director of the applicant in which he deposed: that the applicant has a meritorious appeal with a high probability of success as it raises serious and arguable factual, evidentiary, and legal issues; that he is reasonably apprehensive that unless the orders sought are granted, the respondent may dispose of the suit property before the appeal is heard and determined, rendering the eventual orders of the Court nugatory and an academic exercise; that the disposal of the suit property by the respondent before the appeal is heard and determined will occasion irreparable harm to the applicant; and, that the respondent contravened article 35(1)(b) of the Constitution when it concealed the valuation report in respect the suit property and failed to avail the statement of loan account to the applicant.
7. The respondent opposed the application through a replying affidavit sworn on June 10, 2022 by Victor Keitany, its Senior Recoveries Officer. He deposed that the suit in the High Court having been dismissed for want of prosecution, there is no basis upon which this Court can grant the orders sought. That the applicant had obtained a loan facility from the respondent and failed to honour the terms thereof and was in arrears in the sum of 37 million Shillings. This necessitated the respondent to exercise its statutory power of sale. The redemption and notification of sale notices were duly issued and served on the applicant. However, when the sale was imminent, the applicant obtained an injunction from the High Court and went into deep slumber, necessitating the successful application for the dismissal of the suit and application. That the applicant had further frustrated the respondent by denying it access to the suit property in order to carry out the valuation for purposes of the auction despite continuing to be indebted to the respondent. That in the circumstances the appeal was not arguable and had no prospect of success.
8. The application was heard by way of written submissions. Mr. Ayenda, learned counsel appeared for the applicant, whereas Mr. Maondo, learned counsel appeared for the respondent. Both counsel relied on their respective written submissions dated 9th and June 13, 2022. The applicant submitted that it had an arguable appeal as regards whether the trial court erred in finding that failure to obtain and serve summons on the respondent on time would automatically lead to the abatement of the suit and, whether in dismissing the suit for want of prosecution, the applicant was denied the right to be heard as enshrined in the Constitution . It also faults the trial court for wrong exercise of discretion when it allowed the respondent's application.



9. On the nugatory aspect, it was the applicant's contention that the suit property would be sold to third parties on the strength of an undisclosed current valuation report and convoluted outstanding loan amounts. That the applicant had extensively developed the suit property which is also situate in a prime area. That the sale of the suit property will put it beyond the reach of the applicant in the event that the appeal succeeds. The appeal will in those circumstances be rendered nugatory.
10. The respondent in its submissions contended that the applicant had not proved that the appeal was arguable. That it was not in dispute that the respondent advanced to the applicant a loan facility currently standing at Kshs. 37 Million and the interest is still accruing. It is also not contested that the applicant had not fully repaid the loan and accordingly, the respondent was within the law when it exercised its statutory power of sale. In the premises, it cannot be said that the applicant has an arguable appeal. On the nugatory aspect, it was submitted that the respondent being a reputable bank, will be in a position to compensate the applicant should its appeal succeed. The appeal shall therefore not be rendered nugatory.
11. We have considered the application, the grounds, and the affidavits in support of and in opposition thereto, the submissions, the authorities cited, and the law and this is our take. The jurisdiction exercised by this Court on an application 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 limbs, which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will have been rendered nugatory.
12. Reiterating the aforesaid this Court in the case of Trust Bank Limited and another v Investech Bank Limited and 3 others [2000] eKLR stated 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...”
13. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction. On the first limb, we have to consider whether there is at least a single *bona fide* arguable ground that has been raised by the applicant to warrant ventilation before this Court. In the case of Stanley Kang'ethe Kinyanjui v 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.
 - viii) In considering an application brought under rule 5 (2) (b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”
14. We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our view, the appeal is arguable, inter alia, whether the Court erred in finding that failure to obtain and serve summons on the respondent in time automatically led to the abatement of the suit and whether by dismissing the suit for want of prosecution, the applicant was denied the right to be heard enshrined in the Constitution . Lastly, is the issue of the exercise of discretion by the trial court in allowing the application. On the basis of the foregoing, the appeal is no doubt arguable.



15. On the nugatory aspect, we note that the trial court dismissed the suit with costs on the grounds already stated. The suit property was offered as security for a loan advanced by the respondent to the applicant, which the applicant does not deny. The only dispute the applicant has is that it had not been supplied with the valuation report of the suit property and that the figures of the outstanding loan do not add up. We are not at all convinced that if the orders sought are not granted the applicant will suffer loss, which cannot be compensated by award of damages.
16. It is not contested that the respondent is a reputable bank and can easily compensate the applicant for the loss it may have incurred in the event that the auction goes on and the applicant eventually succeeds in the appeal. On the other hand, the outstanding loan is in excess of Kshs. 37 million, which keeps accruing interest. It may reach a level where the applicant may not be able to repay the loan to the prejudice and disadvantage of the respondent. This fact has not been countered by the applicant. In any event, by offering the suit property as security, the applicant was exposing itself to the prospect of the suit property being sold by the respondent in its exercise of its statutory power of sale. That being the case we do not see how the appeal will be rendered nugatory.
17. Ultimately, the applicant has failed to prove the second limb required of an application brought under rule 5(2)(b). As the applicant is required to establish both limbs for the application to be successful, it follows, that the notice of motion dated May 31, 2022 is devoid of merit and is accordingly dismissed with costs to the respondent.
18. Before we pen off, we wish to unreservedly apologize to the parties to this application for the time that has been taken to deliver this ruling. The delay was occasioned by circumstances beyond the court's control.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

