



**Maina & another v Equity Bank Limited & 2 others (Civil Application
E945 of 2023) [2024] KECA 881 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 881 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E945 OF 2023
S OLE KANTAI, P NYAMWEYA & JM MATIVO, JJA
JULY 26, 2024**

BETWEEN

FLORENCE WAITHERERO MAINA 1ST APPLICANT

PATRICK GITHINJI NDICHU 2ND APPLICANT

AND

EQUITY BANK LIMITED 1ST RESPONDENT

ATHI RIVER SHALOM COMMUNITY HOSPITAL LTD 2ND RESPONDENT

ROBERT WAWERU MAINA T/A ANTIQUE AUCTION 3RD RESPONDENT

(An application for an injunction pending the hearing and determination of appeal against the ruling and orders of the High Court of Kenya at Nairobi (D.S. Majanja J.) dated and delivered on 13th October 2023 in Nairobi High Court Commercial Civil Case No. E324 of 2023))

RULING

1. The principles of law that apply to the application dated 6th December 2023 by Florence Waittherero Maina and Patrick Githinji Ndichu, (hereinafter “the Applicants”), which is seeking an injunction pending appeal under Rule 5 (2) (b) of the Court of Appeal Rules of 2022, are settled. Firstly, the Applicants have to satisfy that they have an arguable appeal. Secondly, the Applicants in addition have to demonstrate that unless an order of injunction pending appeal is granted, their intended appeal will be rendered nugatory. These principles have been restated and amplified by this Court in [Stanley Kang’ethe Kinyanjui vs Tony Ketter & 5 Others](#) [2013] eKLR.
2. The Applicants’ case in this respect is that unless a temporary order of injunction pending appeal restraining the Respondents from evicting them, advertising for sale, selling, disposing of or otherwise interfering with their ownership or quiet possession of the parcel of land known as LR No. 13868/11 Karen Plains Nairobi County (hereinafter “the suit property”), is granted, their appeal will be rendered



nugatory, as transfer of title of the property may be concluded and their intended eviction undertaken. The Applicants asserted that they have demonstrated in their Memorandum of Appeal that there was a grave error of law in the impugned ruling, whose effect led to the Applicants being denied injunctive orders. They sought orders herein to preserve the suit property pending the filing, hearing, and determination of Appeal. Further, the Application was not aimed at denying the Respondents their entitlement, neither were they likely to suffer any prejudice should the orders be granted, but sought an opportunity to address grave errors of fact and the law in the impugned ruling and preservation of the suit property. The Application was brought without undue delay. The said averments were detailed in a supporting affidavit sworn on an even date by Florence Waitherero Maina, the 1st Applicant.

3. The context of the application in summary, is that the Applicants were the registered owners of the suit property, which was offered as security for a loan facility advanced to Solex Building Construction by Equity Bank Limited the 1st Respondent herein, for a cumulative sum of Kshs 75,000,000/-. Upon realisation of the security, the Applicants, while relying on various valuation reports by their valuers and by the 1st Respondent's valuers, which indicated the open market value of the suit property to be between Kshs 80,000,000.00/- and Kshs 90,000,000.00/-, and the forced sale value to be between Kshs 60,000,000.00 and Kshs 70,000,000.00/-; asserted that the suit property was illegally and fraudulently sold at an undervalue to Athi River Shalom Community Hospital Ltd, the 3rd Respondent herein, by the 1st Respondent and Robert Waweru Maina T/A Antique Auction, 2nd Respondent herein for a sum of Kshs 58,000,000.00/-.
4. The Applicants further asserted that on the auction date, their representatives attended the auction venue but did not witness any auction taking place, and following the illegalities and fraudulent actions in the events leading to the sale and the sale itself, they filed a suit seeking inter alia the nullification of the auction sale, and an application seeking injunctive orders. The application was dismissed with costs in the impugned ruling delivered on 13th October 2023 by Majanja J., and being dissatisfied with the ruling, the Applicants lodged the appeal in this Court.
5. The Applicants annexed the impugned ruling dated 13th October 2023, their Notice of Appeal dated 17th October 2023, and their memorandum of appeal dated 29th November 2023, in which they raised nine (9) grounds of Appeal namely:
 1. The learned Judge erred in law and in fact in ignoring mandatory provision of the law by holding that there can be an extension of time to pay the purchase price in an auction conducted in the exercise of a statutory power of sale.
 2. The learned Judge erred in law and in fact in holding that a proper valuation was conducted before the sale when it was apparent that:
 - a. Previous valuation by the charge demonstrates that there was fraudulent undervaluation.
 - b. Value was below the previous purchase price rejected by the charge in the exercise of statutory power of sale.
 - c. Property value was not affected by Covid 19 pandemic and the price of property has been on the rise notwithstanding. No judicial notice exists to demonstrate that Covid 19 pandemic led to downfall of property value as determined.
 - d. The learned Judge erred in law and in fact in failing to take into consideration of the Plaintiffs' valuation report which demonstrates that properties did not depreciate on



account of Covid 19 pandemic, on the contrary, the properties have appreciated and the disparity is not finite as determined.

- e. Whereas undervaluation cannot frustrate a sale in exercise of statutory power of sale, under the law, fraudulent under sale as in the case herein is adequate to nullify a sale contrary to the holding of the Learned Judge.
3. The learned Judge erred in law and in fact in making wrong conclusive findings of fact that prejudice the hearing of the suit in an interlocutory application on interalia:
 - a. whether the auction was proper.
 - b. whether the under valuation was fraudulent.
 - c. whether the sale was fraudulent.
 4. The learned Judge erred in law and in fact in ignoring the Applicants' submissions and authorities which were binding on him on:
 - a. the fact that a party can pay damages does not frustrate an application for injunction as doing so will only open the floodgates of oppression.
 - b. no extension of time to pay is permitted in a sale conducted in an auction.
 - c. fraudulent under sale based on fraudulent undervaluation is enough to frustrate a sale in exercise of statutory power of sale.
 5. The learned Judge erred in law and in facts in failing to consider the legal principles for grant of interlocutory injunction and specifically failing to consider balance of convenience.
 6. The learned Judge erred in law and in facts in disregarding the valuation by the Appellants and holding that the sale was not fraudulent undervalue.
 7. The learned Judge erred in law and in fact in holding that the Applicant did not satisfy the requirements for grant of interlocutory injunction and:
 - i. The Learned Judge erred in law and in fact in failing to consider fraudulent under sale has always been ground enough not only to frustrate a sale but also prima facie case for purposes of granting interlocutory injunction.
 - ii. The Learned Judge erred in law and in facts in failing to consider the effects of section 99 (3) and (4) of the *Land Act* which excludes fraudulent and illegal sale from protection of the law.
 - iii. The Learned Judge erred in law and in facts in holding that as long as the bank can compensate by way of damages, irrespective of illegality or fraud an application for injunction should not succeed thus condoning illegality and fraud and removing protection accorded to the chargors by the law.
 - iv. That whereas extension of time to pay in a sale by public auction is prohibited and resultant of such extension considered a sale by private treaty under the law, the Learned Judge erred in law and in fact in failing to consider the issue as a prima facie case for grant of orders sought.
 - v. The Learned Judge erred in law and in facts in sanctioning a sale by private treaty undertaken at below market prices.



8. The learned Judge erred in law and in fact in failing to determine issues raised by the Appellants raised by the Appellant and electing to only deal with the issues raised by the Respondent. Further, in failing to consider the Appellants submissions and bundle of authorities.
9. The learned Judge erred in law and in fact in considering extraneous matters that were not relevant to the issues for determination and in failing to consider relevant evidence and law.
6. The 1st and 2nd Respondents in opposing the application filed a replying affidavit sworn on 19th December 2023 by Kariuki King'ori, the 1st Respondents Legal Manager. In summary, they contend that the Applicants voluntarily and willingly executed letters of offer and charge instruments to secure the subject banking facilities to the debtor and are therefore bound by the contractual terms therein. Further, that the outstanding debt owed to the 1st Respondent was at Kshs 122,492,907.60/- as of 25th October 2022 and the same continued to grow because of interest and other charges. The debtor fell into arrears and failed to service the various loan facilities and to honour their financial obligations to the 1st Respondent bank contrary to the terms of the said letters of offer and charge instruments. The 1st Respondent's statutory power of sale as a result arose, and the 1st Respondent bank proceeded to issue the Applicants with the prerequisite notice.
7. However, that despite being served with the said notices, the Applicants have remained adamant in discharging their financial obligations to the 1st Respondent bank, despite clearly and unequivocally admitting to the said debt. The 1st and 2nd Respondents detailed the various injunctive orders obtained by the Applicants restraining them from exercising the statutory power of sale, and averred that the Applicants had denied them access to the suit property contrary to Court orders, and had frustrated attempts to sell the suit property by private treaty by constantly rejecting offers from potential buyers. The 1st Respondent consequently instructed the 2nd Respondent herein to issue a notification of the sale of the suit property on 22nd September 2022 which was served upon the Applicants, and the suit property was sold by public auction on 12th October 2022 at Kshs 58,000,000.00/- to the highest bidder, namely the 3rd Respondent, which was higher compared to the force sale value of Kshs 57,750,000.00/- as of 29th June 2021 as per the valuation report.
8. Further, that on 17th October 2022, the 1st Respondent bank received Kshs 5,800,000.00 from the 3rd Respondent which was 10% of the purchase price of Kshs 58,000,000.00/-, and the sale was yet to be finalized due to inaccessibility of the charged property by the Government valuers for assessment of stamp duty. It was their claim that the sale price only offset a miniscule amount of the total debt of Kshs 122,492,907.60/- which continued to grow while attracting interest and other charges. The Applicants were informed that the auction had taken place and were requested by the 1st Respondent bank to come up with a payment plan to clear the balance, but instead proceeded to file other applications seeking to stop the sale of the suit property.
9. The 3rd Respondent likewise opposed the application by a replying affidavit sworn on 11th December 2023 by its Director, Dr. Fredrick Aila Onyango. Therein, he detailed the proceedings leading to the impugned ruling, and it was his position that at no point did the Applicants deny that Solex Building Contractors Limited defaulted in their payment obligations to the 1st Respondent under the various facilities advanced to them and secured by various charges over the suit property. It was their contention that a cursory review of the Applicants' draft Memorandum of Appeal revealed that the proposed grounds lacked merit and did not raise any arguable point since the issue of valuation of the suit property was not a matter for granting an injunction but rather one of determining damages, if any, that would be payable to the Applicants in the event the 1st Respondent was found to have sold the suit property at an undervalue.



10. In addition, that the purchase price paid by the 3rd Respondent was the highest and best price available for the suit property. Furthermore, that the Applicants filed the injunction application 9 months after the sale by public auction had taken place and without explanation of the delay, and there was still a pending similar application before the High Court. Lastly, that the Applicants did not meet the nugatory test for the reasons that once the suit property was offered as security it became a commodity of sale upon default by the chargor of its payment and other obligations under the charge, and if the Applicants were able to demonstrate that the 1st Respondent undervalued the suit property, such difference in valuation was finite and could be refunded and or compensated. Additionally, that the Applicants had not demonstrated that the 1st and 3rd Respondents was impecunious and would not be in a position to pay the Applicants' damages which in the context of this case would be an adequate remedy. On the contrary, the 1st and 3rd Respondents stood to be greatly prejudiced if the orders sought by the Applicants were granted as the 1st Respondent would be unfairly deprived of its right to recover the debt due and owing to it from the Applicants and the debt continued to accrue, while the 3rd Respondent would similarly lose the suit property which they had obtained beneficial interest upon the successful bid at the auction.
11. We heard the application on this Court's virtual platform on 24th April 2024. Learned counsel Mr. Mirie, appeared for the Applicants, learned counsel, Mr Njuguna appeared for the 1st and 2nd Respondents, while learned counsel, Mr. Okoth appeared for the 3rd Respondent, and they all highlighted their written submissions, which largely reiterated the averments made by the parties in their respective pleadings.
12. On the first limb as regards an arguable appeal, Mr. Mirie while citing various judicial decisions, submitted that they already demonstrated an arguable appeal vide the grounds contained in the Memorandum of Appeal namely that the auction never took place and mandatory provisions of the law and conditions of sale were not complied with. He detailed the applicable law on sale by public auction in the exercise of statutory power of sale. Mr. Njuguna on his part submitted that the appeal was from an interlocutory ruling, and the Applicants had failed to demonstrate the principle upon which this Court would interfere with the discretionary powers of the High Court; the Applicants had admitted their indebtedness to the 1st Respondent bank; and they came to the Court with unclean hands while seeking an equitable remedy yet they were in disobedience of the access orders granted by a Court of competent jurisdiction. Mr. Okoth's position was that the Applicants' right to redeem the suit property was extinguished when the 3rd Respondent's bid was accepted at the auction held on 12th October 2022 and a deposit of the purchase price paid, and that the issue of consideration of the Applicants' valuation report was not a matter for granting an injunction but rather one of determining damages.
13. A low threshold is set for arguability, namely that an arguable appeal is not one that must succeed but rather one which was not frivolous and an appeal that raises even one bona fide arguable issue deserves consideration by the Court.

We are therefore prepared to accept that there may be a triable issue raised by the Applicants as regards whether the procedure at the public auction at which the suit property was sold was a relevant factor that ought to have been taken into account by the trial Judge in the exercise of his discretion.
14. On the nugatory aspect, Mr. Mirie submitted that the judgement of this Court will be rendered an academic exercise if the botched sale and transfer were concluded, and the Respondents did not stand to suffer prejudice since the security that it held would still be good for the foreseeable future. Mr. Njuguna reiterated that the 1st Respondent was recognized as a top-tier bank and had the financial



muscle to compensate the Applicants for the loss of the suit property should their appeal succeed. Likewise, Mr. Okoth submitted that, damages were an adequate remedy.

15. It was held in *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others* (*supra*) that whether or not an appeal will be rendered nugatory depends on whether or not what ought to be stayed or injuncted, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. In the present case the Applicants do not dispute the debtor's indebtedness, nor that the suit property was offered as security for the loan facilities extended to the debtor. Any findings in their favour by this Court as regards any undervalue of the suit property or defects in the procedure followed during the 1st Respondent's exercise of the statutory power of sale, can adequately be compensated by way of damages in the circumstances.
16. We therefore find that the Applicants have not satisfied the nugatory limb of an application of this nature. Their application dated 6th December 2023 is found to lack merit, and is accordingly dismissed with costs to the 1st and 3rd Respondents.
17. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024

S. OLE KANTAI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

