



**Duncan & 2 others v Family Bank Limited (Civil Appeal (Application)
E211 of 2023) [2024] KECA 1148 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1148 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E211 OF 2023
DK MUSINGA, PO KIAGE & M NGUGI, JJA
SEPTEMBER 20, 2024**

BETWEEN

CATHERINE WAMBUI DUNCAN 1ST APPLICANT

MIKE WAKABA KIMUTHIA 2ND APPLICANT

MONICA WANJIKU KIMUTHIA 3RD APPLICANT

AND

FAMILY BANK LIMITED RESPONDENT

(Being an application for stay of execution of the ruling of the Environment and Land Court at Kajiado (M.N. Gicheru, J.) dated 27th February, 2023 in ELC E026 of 2021)

RULING

1. In the application dated 20th February 2024, the applicants, Catherine Wambui Duncan, Mike Wakaba Kimuthia and Monica Wanjiku Kimuthia (from the 1st applicant's averments, (it appears that the last name of the 2nd and 3rd applicants should be 'Kinuthia', not 'Kimuthia' as it appears in the title of the pleadings) seek a stay of execution of the orders made on 27th February 2023 by the Environment and Land Court (ELC) at Kajiado (M. N. Gicheru, J.). The applicants further pray that there be a conservatory or injunctive order stopping the respondent or its agents from auctioning or selling the suit property known as Ngong/Ngong/59914 scheduled for 28th February 2024. The application is brought under rule 5(2)(b) of the rules of this Court.
2. The application is based on the grounds set out on its face and is supported by an affidavit sworn on 20th February 2024 by Catherine Wambui Duncan, the 1st applicant. The applicants state in the grounds in support of their application that there is sufficient cause for grant of stay of execution of the impugned orders, and their interests would be best served by holding the orders in abeyance. They further aver that they have appealed from the impugned orders and have an arguable appeal with high chances of



- success; that if stay is not granted, they stand to lose property which may not be recoverable and yet they have an arguable appeal; and that unless the orders sought are granted, they stand to lose the suit property, which was that of a deceased person and no confirmed grant had been issued since section 45 of the *Law of Succession Act* had been violated.
3. In her affidavit, Catherine Wambui Duncan avers that she is the spouse of one Eric Kinuthia Wakaba, while the 2nd and 3rd applicants are his children. They reside on the suit property and her consent was not sought when a transaction was entered into with the respondent bank to obtain a loan that was secured by a charge on the title to the suit property. She further avers that the property, which was scheduled for auction on 28th February 2024, is worth more than what the respondent is asking for it.
 4. The respondent opposes the application and has filed a replying affidavit sworn by Sylvia Wambani, its Legal Manager, on 23rd February 2024. Ms. Wambani avers that the respondent had filed Miscellaneous Application No. *E012 of 2021*- Family Bank Limited vs Land Registrar Kajiado and Eric Kinuthia Wakaba on 25th February 2021 seeking removal of a caution placed on the suit property by Catherine Wambui Duncan, the 1st applicant, and a restriction registered against the suit property by the DCIO Central Nairobi. That upon hearing of the application to remove the caution and restriction, the applicants filed Kajiado ELC Case No. E026 of 2021- Catherine Wambui Duncan & 2 others vs Family Bank Limited. They also filed within the said suit an interlocutory application dated 28th April 2021 in which they challenged an intended sale of the suit property by the respondent. Ms. Wambani avers that the two matters were consolidated and the two applications heard together. In its ruling dated 27th February 2023, the ELC allowed the respondent's application and dismissed the applicants' application. Ms. Wambani further avers that the ELC dismissed the applicants' application on the ground that they had failed to prove their relationship with Eric Kinuthia Wakaba, the chargor, and they had also failed to prove that they were in occupation of the suit property.
 5. The applicants filed submissions dated 27th February 2024 in which they argue that they have met the standard for grant of orders of stay of execution. They submit that they shall not have any other matrimonial or family home unless the sale of the suit property is stayed. They further submit that there was no confirmed grant in relation to the suit property, and that spousal consent was not obtained.
 6. In its submissions dated 26th February 2024, the respondent submits that the applicants do not have an arguable appeal as the trial court acted judiciously in finding that no prima facie case supporting the applicants' relationship with the borrower had been established, and in dismissing the applicants' application for an injunction. It is its submission further that the applicants have failed to establish any substantial loss that they would suffer should the intended sale proceed, nor have they shown that the respondent would be incapable of compensating them adequately in damages should their appeal succeed.
 7. When the application came up for hearing on 4th March, 2024, there was no representation for the applicants, nor were they present in person. The respondent was represented by Ms. Ngui, learned counsel, who informed us that the application, which sought to stay an auction scheduled for 28th February 2024, had been overtaken by events; that in the absence of an order stopping the sale, it had proceeded and the respondent was able to secure a bidder and a deposit was paid after the fall of the hammer. Ms. Ngui further submitted that the impugned decision was in the negative and could not be stayed.
 8. The jurisdiction of this Court to issue orders under rule 5(2)(b) is exercised on the basis of well settled principles which were enunciated in *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] KECA 378 (KLR). Put simply, they are that an applicant has to satisfy the Court, first, that it has an



arguable appeal and, second, that the intended appeal would be rendered nugatory if the orders sought are not granted and the appeal ultimately succeeds.

9. It is perhaps telling that neither the applicants nor their counsel deigned to be present at the hearing of this application, for a consideration of the background to the application leaves no doubt that they would have been hard pressed to meet the conditions set for grant of relief under rule 5(2)(b).
10. The applicants seek an order of stay of execution of an order, issued a year earlier on 27th February 2023, dismissing their application for injunctive orders. That this Court cannot issue an order of stay of a negative order is well settled-see *Western College of Arts and Applied Sciences vs EP Oranga & 3 Others* [1976] eKLR and *Gitundu v Wathuku (Civil Application E024 of 2021)* [2022] KECA 959 (KLR) (26 August 2022) (Ruling).
11. Perhaps aware that the application for an order of stay would be a non-starter, the applicants sought an injunctive order to restrain an intended sale by public auction of the suit property, scheduled for the 28th of February 2024. Their application is dated 20th February 2024. The applicants had more than a year, from 27th February 2023, to pursue their claim in respect of the suit land, but they approached this Court one week before the intended auction. By the time it was placed before this Court on 4th March 2024, it was all over.
12. However, even had the auction not already taken place as submitted by the respondent, did the applicants have an arguable appeal? The applicants allege that they are the spouse and children of one Eric Kinuthia Wakaba. It appears from the documents before us, particularly the affidavit of Ms. Wambani and the annexures thereto, which have not been challenged, that Eric Kinuthia Wakaba had obtained a loan facility of Kshs. 10,000,000 from the respondent. The suit property, Ngong/Ngong/59914, of which he was the registered owner, was the security for the loan. Upon default, the respondent commenced the process of realizing its security. Eric Kinuthia Wakaba commenced litigation, unsuccessfully, against the respondent. The applicants were not party to that litigation, but they appear to have commenced yet another round of litigation in respect of the suit property, this time alleging a spousal interest and breaches of the *Law of Succession Act*. Whether the applicants can successfully raise such a claim on an interlocutory appeal before this Court relating to a decision by the trial court to dismiss their application for an injunction is debatable. In any event, they have not demonstrated that their appeal would be rendered nugatory, or that the respondent would be unable to compensate them in damages should their appeal succeed.
13. Accordingly, we find no merit in the application dated 20th February 2024. It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL MUMBI NGUGI

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JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR.

