



**Gacheru v Family Bank Limited (Civil Application E387 of 2024)
[2024] KECA 1605 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1605 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E387 OF 2024
SG KAIRU, P NYAMWEYA & LA ACHODE, JJA
NOVEMBER 8, 2024**

BETWEEN

SIMON KARIUKI GACHERU APPLICANT

AND

FAMILY BANK LIMITED RESPONDENT

(Being an application for injunction pending the hearing and determination of an appeal, arising from the Ruling and Order of the High Court at Nairobi (P Mulwa J) delivered on 18th July, 2024 in HCCOM No. E480 of 2023)

RULING

1. The applicant, Simon Kariuki Gacheru, has moved this Court by a motion dated 30th July 2024 for substantive orders that:
 - i. An order for injunction do issue restraining the respondent, either by themselves, their authorized agents, servants, employees, workers or any other person claiming under them from proceeding to realize the security herein by way of public auction and/or taking any adverse steps towards realization of the suit property known as LR No. Ruiru/Ruiru East Block 2/28637 pending the filing, hearing and determination of the intended appeal from the ruling of the Superior Court made on 18th day of July, 2024 and or till further Orders of the Court.
 - ii. In the alternative and without prejudice to the above, this Honorable Court be pleased to grant such Orders of conservatory in nature in respect to the property known as LR No. Ruiru/Ruiru East Block 2/28637 or grant an order for status quo to be maintained pending the filing, hearing and determination of the intended appeal from the Ruling of the superior court made on the 18th day of July, 2024.



2. The application is premised on the grounds on its face and on the supporting affidavit sworn by the applicant on 30th July, 2024.
3. The grounds of the application are that on 18th July, 2024, the High Court dismissed the applicant's application for injunction pending hearing and determination of the suit. The temporary orders of injunction that were in force at the time were automatically vacated. Therefore the respondent is likely to move with speed to realize the property herein. It is deposed that the intended appeal has overwhelming chances of success and will be rendered nugatory in the event the suit property is sold prior to the hearing and determination of the said appeal.
4. The applicant avers that he and his family stand to suffer immeasurable and or irreparable damages if their home is sold. Further, that it is in the interest of justice and fairness that conservatory orders be issued to protect the subject matter of the intended appeal. Lastly, that the applicant is ready and willing to give an undertaking for damages, if this Court makes it a pre-condition to granting the orders of injunction.
5. In rebuttal to the application before us, the respondent filed a replying affidavit sworn on 7th August 2024 by Sylvia Wambani on behalf of the respondent. She deposed that the applicant has not satisfied the requirements for grant of an injunction pending appeal. That the applicant must demonstrate that it has an arguable appeal and that the appeal will be rendered nugatory should the orders of injunction sought not be granted. Also, that the learned judge in dismissing the applicant's application primarily reached the finding that the applicant had not demonstrated a prima facie case with probability of success on the material placed before him.
6. The respondent posits that in the application before the superior court, the allegations were that the respondent was exercising its statutory power of sale over a charge with respect to a loan facility that the applicant did not authorize. That the further charge was not registered over the suit property.
7. The respondent avers that it annexed the letter of offer for the impugned loan facility that bore the applicant's signature duly witnessed by an advocate. That while the applicant claimed his signature was falsified, he did not place before the trial judge proper evidence to that effect. That the police report relied upon by the applicant did not indicate against whom the complaint was made and neither did it bare particulars of the complaint. That although the applicant alleged that his signature was forged, he did not join the borrower as a party to the suit before the superior court, despite her being the ultimate beneficiary of the loan facility.
8. The respondent posits that the ruling held that fraud is a serious allegation that needs to be proved beyond a balance of probabilities and that the applicant had not provided adequate proof. Also, that the security was still charged to the respondent having secured a previous borrowing on terms thereof, and was a continuing security. Thus it could be utilized to secure further advances making it unnecessary for a further charge to be registered. That there was default in the repayment of the loan facility and the respondent issued all the necessary statutory notices in exercise of its statutory power of sale. Lastly, that the intended appeal is frivolous and is not arguable.
9. This application arises from Civil Suit No. E480 of 2024 a suit that the applicant filed upon being served with a statutory notice on account of default in payment of a loan facility. The loan facility was advanced to the borrower Mercy Njoki Kamau, by a letter of offer dated 14th January 2022. The applicant is the registered owner of the parcel of land known as LR. No. Ruiru/Ruiru East Block 2/28637. The said parcel of land was charged to the respondent on 4th September 2019 to secure a loan facility of Kshs. 2,700,000/- on the account of the borrower, Mercy Njoki Kamau, which has been repaid in full.



10. It is alleged that vide a letter of offer dated 14th January 2022, the respondent advanced to the borrower a further sum of Kshs. 3,500,000/- without the involvement or consent of the applicant; that no charge document was executed by the applicant and duly registered against the title deed. The borrower defaulted and on 29th June 2023, the respondent issued a statutory notice on account of the letter of offer dated 14th January 2022 threatening to sell the applicant's property.
11. In response, the respondent stated that it was a term of the legal charge, that the security created was not limited to the initial loan facility of Kshs. 2,700,000/-, but was a continuing security for any further loans. Also, that the applicant by his action of not discharging the security when the first loan was paid off, signified his understanding of the terms of the legal charge as a continuing security. That it also signified his concurrence to have the legal charge continue being held by the respondent as security for any further banking facilities that may be advanced to him as the charger or to the borrower.
12. The respondent also stated that the applicant duly signed the loan offer. Further, that the terms of the legal charge do not contractually bind the respondent to keep notifying or seeking the consent of the applicant, since it secured the liabilities on a continuing and from time to time basis.
13. The court considered the application, found it to have no merit and dismissed it. Subsequently, the applicant filed an appeal against the ruling of the superior court together with the present application before us.
14. This application was disposed of by way of written submissions. The firm of Mwangi Kigotho & Co Advocates filed written submissions dated 14th August 2024 on behalf of the applicant, while the firm of Mutua Waweru & Company Advocates filed written submissions dated 21st August 2024 on behalf of the respondent.
15. The applicant submits that the memorandum of appeal raises bona fide issues. He states that the learned judge erred in law and in fact: by declining to grant the injunction on the ground that the appellant failed to demonstrate the reason why he failed to discharge the title after the full payment of the first loan; by failing to appreciate that there were several triable issues that could only have been determined through a full hearing of the suit; by requiring the appellant to prove beyond reasonable doubt the issue of fraud raised in the suit; by failing to find that the purported notice of intention to sell the charged property was illegal and unlawful noting that no charge instrument was executed by the appellant and registered to secure the sum of Kshs. 3,500,000/-; and lastly, by failing to grant the injunction and dismissing the application against the weight of the evidence.
16. On whether the intended appeal is arguable, the applicant urges that the respondent gave a top up of the loan facility to the borrower without his knowledge or consent. That the respondent purported to issue a statutory notice based on a letter of offer which was unregistered against the suit land.
17. In opposition, the respondent posits that the terms of the charge created a continuing security for any further loans, advances and financial facilities that may be granted to the borrower from time to time. The respondent denies that a further loan facility was granted without the knowledge or consent of the applicant or, that the notice was issued unlawfully. The respondent asserts that it was entitled to issue the statutory notice pursuant to its right as a chargee and that the order of injunction sought is without proper basis in fact and law.
18. On the second limb on whether the appeal will be rendered nugatory if the injunction is not granted, the applicant urges that he and his family stand to suffer immeasurable and irreparable hardship if his home is sold. That it is in the interest of justice and fairness that conservatory orders be issued.



19. We have considered, the grounds in support of the application, the reply thereto, the rival submissions and the law. Our jurisdiction under Rule 5 (2) (b) is original, independent, and discretionary. It must however, be exercised judiciously and rationally, and not out of impulsiveness or sympathy.
20. In exercising our discretion in consideration of the arguability of the intended appeal, we are guided by what this Court had to say in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* (2013) eKLR , as follows:
 - ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
 - vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
 - 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. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
21. The applicant raises several issues that he says are arguable. These are that: there was no consent, knowledge or authorization by the applicant for the top up of the loan facility; that there was fraud; that no charge instrument was executed by the applicant; and, that the charge instrument was not registered to secure the additional sum of Kshs.3,500,000/-. In our considered view, these grounds are not frivolous. They deserve a chance to be ventilated on appeal. We say no more on this lest we embarrass the bench that will be seized of the matter on appeal.
22. On the second factor as to whether the appeal will be rendered nugatory if the stay of execution is not granted, the term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling as was stated in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232. Whether or not an appeal will be rendered nugatory, depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved, (see *Multimedia University & Another vs GNN* (Civil Application 225 of 2013) [2014] KECA 85 (KLR) (31 January 2014) (Ruling).
23. The respondent herein seeks to exercise its statutory power of sale which will dispossess the applicant of his family home. In the event that this sale proceeds, the property will be transferred to third parties. As such, in the circumstances of this case, the appeal will be rendered nugatory if it succeeds, as the family will have already faced hardship including eviction and relocation.
24. In the end, we find that the applicant has satisfied the twin principles as required under Rule 5 (2) (b) of this Court’s rules. We therefore allow the application and order that the costs of the application abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL



L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

