



**}Kiu Construction Limited & 2 others v Regent Auctioneers (K) Limited & another
(Civil Application E351 of 2024) [2024] KECA 1594 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1594 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E351 OF 2024
F SICHALE, A ALI-ARONI & LA ACHODE, JJA
NOVEMBER 8, 2024**

BETWEEN

KIU CONSTRUCTION LIMITED 1ST APPLICANT

JOHN FRANCIS KARIUKI THEURI 2ND APPLICANT

JULIA WAGUTHI KARIUKI 3RD APPLICANT

AND

REGENT AUCTIONEERS (K) LIMITED 1ST RESPONDENT

CREDIT BANK PLC 2ND RESPONDENT

(Being an Application for Injunction pending the hearing and determination of an Appeal against the Ruling of Mulwa J dated 27th June 2024) in (Milimani HCCC NO. E397 OF 2023)

RULING

1. By the motion on notice dated 2nd July 2024, brought pursuant to the provisions of Article 25 (c), 48, & 50 (1) of the Constitution of Kenya 2010, rules 5 (2) (b), 20 (2), 41 & 37 of the Court of Appeal Rules 2010, Order 42 Rule 1, Order 51 of the Civil Procedure Rules 2010 & Section 3A of the Civil Procedure Act, Kiu Construction Limited, John Francis Kariuki Theuri and Julia Waguthi Kariuki (the applicants herein) have sought the following orders:

- a. Spent.
- b. Spent.
- c. Spent.
- d. That this Honourable Court be pleased to issue a temporary injunction restraining the respondents, their agents, and/or servants or otherwise from



selling, offering for sale, advertising or in any manner howsoever dealing with the appellants/applicants properties known as Title No. Ruiru/Kiu Block 3/2680 and Title No. Nairobi/Block 126/574 & 576 pending the hearing and determination of the appeal.

- e. That this Honourable Court be pleased to issue a temporary injunction restraining the respondents, their agents and/or servants or otherwise from selling, offering for sale, advertising or in any other manner howsoever dealing with the appellants /applicants motor vehicle registration numbers KBP 079Q, KBS 666Z, KHMA 609B, KCG 869F, KHMA 075J, KBS 672Z, KBT 814H, KCP 843P, KCP 435W and KCP 577Y pending the hearing and determination of the appeal
- f. That costs of this application do abide the outcome of the appeal.”

2. The motion is supported on the grounds set out on the face of the motion and an affidavit sworn by John Francis Kariuki Theuri, (the 2nd applicant herein and the Managing Director of the 1st applicant), who deposed inter alia that being dissatisfied and aggrieved by the ruling delivered by Mulwa J in Milimani HCCOMM No. E397 of 2023- *Kiu Construction Limited & 2 Others v Credit Bank PLC & Another*, they had instructed their advocates to lodge an appeal against the same.
3. That, as a consequence of the aforesaid ruling which discharged an order of temporary injunction that had been issued on 4th September 2023, the respondents had already set in motion events to sell the applicants’ properties.
4. He further deposed that the intended appeal was meritorious as it raised several issues of law and fact for determination with a high probability of success and that in the event the injunctive orders were not granted, the applicants would stand to suffer substantial loss and damage for reasons that the suit properties and the motor vehicles are their tools of trade which would be sold thus rendering the intended appeal nugatory.
5. The motion was opposed vide a replying affidavit sworn on 14th July 2024, by Wainaina Francis Ngaruiya the head of legal department of the 1st respondent. He deposed inter alia that the applicants had not demonstrated that they had an arguable appeal with high chances of success considering the only ground of appeal at paragraph 10 and 14 of the supporting affidavit that “the applicants stand to suffer substantial loss and damage for reasons that the suit properties and the motor vehicles which were their tools of trade would be sold” did not show that if injunction orders were not granted, the intended appeal would be rendered nugatory.
6. A brief background on this matter is that the 1st applicant after winning a tender for rehabilitation of Nanyuki airstrip had approached the 1st respondent who agreed to facilitate the project by issuing the 1st applicant a revolving loan of Kshs 85,000,000/= as per the offer letter dated 21st August 2020.
7. It was the applicants’ case that the 1st respondent despite the agreement between the parties withheld all the monies thus, stalling the 1st applicant’s project and later the 1st respondent issued statutory notices and instructed the 2nd respondent to proclaim the 1st applicant’s motor vehicles. This action precipitated the applicants’ filing of the applications dated 28th August 2023 and 4th September 2023 seeking an order of temporary injunction which applications were dismissed on 27th June 2024, by Mulwa J, thus provoking the instant motion.
8. When the matter came up for plenary hearing before us on 10th September 2024, Miss Wekesa learned counsel held brief for Miss Kariuki for the applicants whereas Mr. Mugisha appeared for the



respondents. Both parties relied on their written submissions dated 17th and 19th July 2024, which they briefly orally highlighted in Court.

9. It was submitted for the applicants that they had never defaulted to service the monthly interest of the loan hence the statutory notices issued by the 1st respondent was in breach of the agreement. It was further, submitted that the 1st applicants' motor vehicles registration numbers KCP 577Y and KBP 079Q were repossessed on 18th July, 2023 by the 1st respondent and held at the 2nd respondent's yard where they are likely to be sold anytime.
10. It was further submitted that unless the orders sought were granted, the applicants would stand to suffer irreparable injury which would not be compensated by an award of damages. For this proposition, reliance was placed on the case of Joseph Mbugua *Gichanga v Cooperative Bank of Kenya Limited* [2005] eKLR.
11. On the other hand, it was submitted for the respondents that the grounds in the Draft Memorandum of Appeal were not arguable and that the trial judge correctly held that the applicants did not dispute the fact that they had borrowed Kshs 85,000,000/= from the 1st respondent. The sum borrowed was to be expended towards the rehabilitation of the Nanyuki Airstrip, the contract having been awarded by the Kenya Airports Authority(KAA); that the Judge correctly held that the default by the applicants was evidenced by various correspondences including the request for renewal/extension of financial facilities to enable them complete the project; that the renewal/extension was granted in good faith; that the judge took cognizance of the fact that the applicants did not provide any evidence of repayment and correctly observed that they had blatantly diverted proceeds from KAA, contrary to their express undertaking in the letters dated 6th January 2021 and 2nd March 2022.
12. Turning to the nugatory aspect, it was submitted that the applicants had benefited from the loan and they had no basis seeking the Court's protection on the sole ground that the securities were special and unique to them being tools of trade. For this proposition, reliance was placed on the case of *Cieni Plains Company Limited & 2 Others v Ecobank Kenya Limited* [2018] eKLR.
13. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the supplementary affidavit, the replying affidavit, the rival oral and written submissions by the parties, the cited authorities and the law.
14. The applicants' motion is brought under rule (5) (2) (b) of this *Court's Rules*. The principles for our consideration in the exercise of our unfettered discretion under rule 5 (2) (b) to grant an order of stay of execution or injunction as the case maybe are now old hat. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle.
15. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. An applicant has to satisfy the Court on both limbs. These principles were summarized by this Court (differently constituted), in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR as follows:
 - i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court.
 - v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.



- vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
 - vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
 - viii. An applicant must satisfy the Court on both the twin principles.
 - ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
 - x. 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.
 - xi. 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.
 - xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
16. Turning to the first limb, that an applicant has to satisfy in an application of this nature, we have looked at the annexed Draft Memorandum of Appeal and we are not satisfied that the applicants have an arguable appeal. It would appear that whereas the applicants contend in the Draft Memorandum of Appeal that the learned judge erred in failing to appreciate that they were servicing the loan and at no point had they defaulted, it emerged during plenary hearing of the motion that the parties seemed to have been negotiating and that indeed the applicants had given an offer which they were yet to settle, a fact they did not dispute.
17. We are of course mindful to the fact that an arguable appeal is one that must not necessarily succeed and we will say no more regarding this issue at this stage, lest we embarrass the bench that will eventually be seized of the appeal. Ultimately, therefore we are not satisfied that the applicants have an arguable appeal.
18. The applicants having failed to satisfy us on the first limb in an application of this nature, it goes without saying that the applicants’ motion must suffer only one fate which is dismissal. In any event and regarding the nugatory aspect, we are alive to the fact the 1st respondent is a reputable financial institution and would pay the applicants damages in the event that their intended appeal was to be successful.
19. Ultimately therefore and the applicants having failed to satisfy us on both limbs under rule 5 (2) (b) of this *Court’s Rules* to grant an order of injunction, the applicant’s motion dated 2nd July 2024, is without merit and the same is hereby dismissed with costs to the respondents.

It is so ordered.

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



F. SICHALE

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

