



**Asumba v Wainaina & 4 others (Civil Appeal (Application)  
E411 of 2022) [2023] KECA 389 (KLR) (31 March 2023) (Reasons)**

Neutral citation: [2023] KECA 389 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E411 OF 2022  
HM OKWENGU, HA OMONDI & PM GACHOKA, JJA  
MARCH 31, 2023**

**BETWEEN**

**MABEL WAKASA ASUMBA ..... APPLICANT**

**AND**

**JOHN MWAURA WAINAINA ..... 1<sup>ST</sup> RESPONDENT**

**WAKAMO SERVICE COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**HESBON AHIRO ASUMBA ..... 3<sup>RD</sup> RESPONDENT**

**KAPTUIYA CHEIBOWO ..... 4<sup>TH</sup> RESPONDENT**

**TRUST BANK LTD (IN LIQUIDATION) ..... 5<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution pending the intended appeal against the entire Judgment and Decree of the High Court of Kenya at Nairobi(A. Mabeya, J.) dated 13th May, 2022 in H.C.C.C 93 of 2002))*

**REASONS**

**Reasons for the ruling**

1. The notice of motion dated July 1, 2022 brought under certificate of urgency pursuant to Rules 5(2) (b) of the *Court of Appeal Rules*, and supported by the affidavit dated July 1, 2022 sworn by Mabel Wakasa Asumba sought stay of execution of the entire judgment delivered on May 13, 2022 pending the hearing and determination of the appeal. We heard the contending submissions of counsel for the parties, and made a determination dismissing the application. We reserved the reasons for our ruling under Rule 34(6) of the *Court of Appeal Rules, 2022*.
2. The genesis of this matter is that the applicant and her then husband had executed various deeds of personal guarantee and indemnity in favour of the 5<sup>th</sup> respondent to secure various overdraft facilities



extended to a company known as Transrapid Express Cargo Limited ("TECL"). The facilities were also secured by various legal charges registered in favour of the 5<sup>th</sup> respondent over the applicant's property known as LR No 209/10730 Nairobi. TECL defaulted in repayments and eventually, the 5<sup>th</sup> respondent in exercise of its statutory power of sale, sold the suit property by way of private treaty to the 1<sup>st</sup> respondent.

3. The applicant then filed suit seeking declaration that the statutory notice signed by the 4<sup>th</sup> respondent on behalf of and upon instructions of the 5<sup>th</sup> respondent were a nullity; that the sale was void and of no effect as it was based on an invalid statutory notice; the contracts of guarantee she had made in favour of the 5<sup>th</sup> respondent were void as they were procured by fraud and mistake; and that the instruments of charge were void ab initio as they were contracts based on past considerations.
4. The 1<sup>st</sup> respondent's defence was that he was an innocent purchaser for value, and he had appointed the 2<sup>nd</sup> respondent to manage and undertake all the necessary improvements thereon, but when the 2<sup>nd</sup> respondent requested the occupants to vacate so as to enable him carry out his mandate, this did not happen. The 1<sup>st</sup> respondent filed a counter-claim seeking dismissal of the suit; vacant possession and mesne profits. He also raised a counter-claim against the 5<sup>th</sup> respondent for failing to give him vacant possession of the suit property yet there had been no refund of the purchase price.
5. The 5<sup>th</sup> respondent's position was that the applicant willingly charged her property in its favour to secure an overdraft and executed a legal charge; there was default in repayment, so it properly exercised its statutory power of sale which culminated with the sale of the suit property by private treaty to 1<sup>st</sup> respondent. The 5<sup>th</sup> respondent filed a counter-claim against the applicant, seeking for costs of auctioneers for the postponed auction and the unrecovered balance of on account of her personal guarantee.
6. On May 13, 2022, the High Court (Mabeya, J.) delivered a judgment dismissing the applicant's case, and ordered inter alia that the applicant vacates the residential houses developed on LR No 209/10730 within 30 days of the judgment; and judgment was also entered for the 5<sup>th</sup> respondent against the applicant for the sum of Kshs.849,001.65 plus interest at court rates from the date of the suit until payment in full. Meanwhile, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have prepared and caused the formal decree to be signed and sealed.
7. In seeking stay of execution, it is the applicant's contention that the judgment delivered on May 13, 2022 is unlawful as there was no compliance with provisions of order 21 Rule 6 of the [Civil Procedure rules](#); the debt that informed the purported sale of the suit property by the bank was in respect of overdraft facilities extended to a company operated by the 3<sup>rd</sup> respondent and not the applicant; the decision to dismiss the applicant's suit was erroneous as the 4<sup>th</sup> defendant who oversaw the sale of the suit property was not qualified to practice as an advocate; the respondents never demonstrated the mode of exercising the sale by private treaty; and the subject matter of the suit is the applicant's residential dwelling, so if stay is not granted and eviction takes place, she shall suffer irreparable damage that cannot be compensated in an award for damages and the appeal shall be rendered nugatory.
8. In opposing the application, the 1<sup>st</sup> respondent in a replying affidavit dated July 13, 2022, sworn by Margaret Mwaura, states that the application has been overtaken by events as 1<sup>st</sup> respondent's wife took possession of the suit property once the 30 days given by the court lapsed; a tenant already paid the rent deposit to the 1<sup>st</sup> respondent, and is in occupation of the suit property; and the appeal cannot be rendered nugatory as the subject matter is land and title can be reverted.
9. The 5<sup>th</sup> respondent in opposing the application through the replying affidavit dated July 12, 2022, sworn by David G Irungu points out that the applicant and 3<sup>rd</sup> respondents as directors of Transrapid



Express Cargo Ltd applied for and obtained an overdraft facility on behalf of the company; the applicant executed several security documents inter alia guarantee, and indemnity, agreements, legal charge and credit agreements; there was default in repayments, leading to issuance of statutory notices to the applicant who in turn pleaded for time to repay the loan, so the sale was called off. Despite several promises to pay, no payment was made leading to the sale of the suit property which did not realize the entire amount of the debt, leaving a balance which stood at Kshs.849,001.65 as at December 31, 2001, hence the finding in its favour by the trial court.

10. The respondent laments that this suit has been in court for over 21 years and the said application is intended to hamper the conclusion of this matter; and it has been filed as a delaying tactic; and there is no arguable appeal as the applicant had admitted the indebtedness to the bank.
11. The issue that requires our determination is simply whether the applicant has satisfied the requirements necessary for granting an order for stay of execution. This Court has stated that whether it be an application for injunction, stay of execution or stay of proceedings the applicable principles are the same. To succeed in an application in Rule 5(2) (b) the applicant has to establish that: -
  - (i) The Appeal is arguable.
  - (ii) The Appeal is likely to be rendered nugatory if the stay is not granted and Appeal succeeds.

For instance, this Court in the case of *Trust Bank Limited and Another v Investech Bank Limited and 3 Others* [2000] eKLR delineated the jurisdiction of this Court in such an application 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...”

12. 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. This Court has held on several occasions that a relief under 5(2) (b) will not be granted if there is a loan amount that is outstanding. In the case of *Joseph Okoth Waudi v National Bank of Kenya* Court of Appeal Nrb Civil Appeal No 77 of 2004 [2006] eKLR the court held:

“it is trite law that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged.”

Our perusal of the pleadings herein traces no arguable issue as the applicant admits to being indebted the 5<sup>th</sup> respondent.

13. On the issue of the appeal being rendered nugatory, this Court has held in the case of *Reliance Bank Limited v Norlake Investment Limited* [2002]1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the Court is bound



to consider the conflicting claims of both sides. In the case of *African Safari Club Limited v Safe Rentals Limited*, Nai Civil Application No 53 of 2010 this Court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

14. The applicant has stated that she will suffer irreparable loss and harm. This Court has in the case of *Esso Kenya Limited v Mark Makwata Okiya* Civil Appeal No 69 of 1991, “...as it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available.”

15. The applicant has raised the issue that the appeal will be rendered nugatory because the suit land will be out of reach/sold/disposed off/transferred, and that the investments made will be wasted. In the case of *John Nduati Kariuki T/A Jobester Merchants v National Bank of Kenya Ltd* Civil Application No Nai 306 of 2005 [2006] 1EA 96 it was stated that:

“The applicant having obtained the funds and having full benefit of it and having offered securities knowing full well that they would be sold if there was default cannot be heard to say that the securities are unique and special to him as the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capacity has not been challenged.”

16. From the foregoing, whether or not an appeal will be rendered nugatory depends on whether 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 aggrieved party; and the Court is also called upon to decide which party’s hardship is greater. The 1<sup>st</sup> respondent is the registered owner of the property, and we are mindful that the 1<sup>st</sup> respondent is not just in possession already, but has installed a tenant in the renovated suit property. The greater hardship would be removing the tenant at short notice, thus causing a ripple effect of inconvenience to a party who has nothing to do with the dispute herein. Our considered view is that if the applicant’s prayer for stay of execution is denied and the appeal eventually succeeds, the 1<sup>st</sup> respondent’s status is reversible, and the applicant can be adequately compensated by an award for damages.

17. Finally, we take note that the order sought to be stayed is dismissal of the applicant’s suit in the High Court, and we are of the view that this being a negative order, it cannot be stayed, and the only recourse is vide an appeal.

18. Accordingly, this Court finds that the applicant has not demonstrated that she has an arguable appeal nor has she shown how the appeal would be rendered nugatory if the order sought is not granted. Having failed to satisfy both limbs of the test in a 5(2) (b) application, this Court finds that the application lacks merit and it is for these reasons that we dismiss the same with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MARCH, 2023.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**



**H. A. OMONDI**

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**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

