



Odhiambo v Housing Finance Company (K) Ltd (Civil Application E059 of 2022) [2023] KECA 406 (KLR) (31 March 2023) (Ruling)

Neutral citation: [2023] KECA 406 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E059 OF 2022
HM OKWENGU, M NGUGI & F TUIYOT, JJA
MARCH 31, 2023**

BETWEEN

PERES ADHIAMBO ODHIAMBO APPLICANT

AND

HOUSING FINANCE COMPANY (K) LTD RESPONDENT

(Being an application for injunction pending the determination of an intended appeal from the judgment and order of the High Court of Kenya at Kisumu (Fred. A. Ochieng, J) dated 11th November, 2021 in Kisumu High Court Commercial Case No. 73 of 2018)

RULING

1. The applicant, Peres Adhiambo Odhiambo filed the application dated April 25, 2022 seeking a temporary injunction to restrain the respondent, its employees or agents from entering into, evicting and/or interfering with her possession and occupation of LR No 15983/192 pending the hearing and determination of her intended appeal. She also prayed that the costs of the application abide the outcome of the appeal.
2. The application is brought under Rule 5 of the [Court of Appeal Rules, 2010](#). It is premised on the grounds that on November 11, 2021, judgment was entered against her dismissing Kisumu High Court Commercial Case No 73 of 2018 contrary to the principles of natural justice; that she has an arguable appeal with high chances of success; and that unless an order of stay be granted, the appeal will be rendered nugatory.
3. The application is supported by an affidavit sworn by the applicant on April 25, 2022. She avers in this affidavit that she is dissatisfied with the judgment of the High Court; that her Advocate on record lodged a notice of appeal and wrote a letter requesting for typed proceedings; and that to date, the proceedings have not been supplied to her.



4. The applicant further avers that as indicated in a letter dated March 3, 2022, the respondent intends to exercise its statutory power of sale of her property, and that this will render her appeal nugatory. She further avers that she will suffer irreparable loss as it will be difficult to recover the property once it is sold and transferred to third parties.
5. The application is opposed. In a replying affidavit sworn on June 27, 2022 by Jared Talo, the respondent's Manager at its regional office in Kisumu, it is averred that the respondent did in fact grant the applicant a financial facility of Kshs 1,540,000 to enable her purchase the suit property, LR No 15983/192/3, a residential house located at Kenya Re Estate, Kisumu. A legal charge was registered against the suit property in favor of the respondent.
6. The respondent further avers that the High Court correctly found that the applicant did not pay the loan and the applicant having defaulted in repayment of the said loan, it is entitled to exercise its statutory power of sale over the suit property.
7. It is the respondent's further averment that the applicant's memorandum of appeal does not raise any arguable ground of appeal to warrant the grant of the prayers sought. Further, that it is a stable financial institution with sufficient capacity to compensate the applicant in the event that the appeal is determined in her favour. In the respondent's view, stopping the intended sale will amount to further delay without a justifiable cause, thereby occasioning unwarranted injustice to the respondent. The respondent avers that should the Court be inclined to grant the orders that the applicant seeks, such orders should be conditional upon the applicant paying to the respondent Kshs 204,850 and a substantial part of the Kshs 7,785,454 due to the respondent as at June 6, 2022 as set out in the statements annexed to the affidavit in reply.
8. In submissions in support of the application, the applicant contends that a notification of sale had already been issued and should the respondent proceed to sell the suit property to a third party, the third party may proceed to sell, transfer, charge, lease or alienate the suit property thus occasioning the applicant substantial loss.
9. She submits, further, that the appeal is arguable as the trial court made an order dismissing her claim yet she had paid the full purchase price of the suit property, and that she had lost money through the bank's agent but had nothing to show for it. Should the orders sought not be granted and the appeal is successful, it will be rendered nugatory as the suit property might have been sold and transferred to third parties.
10. In submissions in reply, the respondent contends that in an application under Rule 5 (2) (b), the applicant has to satisfy the Court that she has an arguable appeal and that unless an order of stay is granted, the appeal would be rendered nugatory. The respondent submits that the applicant has not made any effort to address the nature of the intended appeal, whether it raises any arguable ground of appeal or that the intended appeal is not a frivolous one. The respondent notes that the applicant's grounds of appeal set out in the memorandum of appeal do not raise the issues addressed by the High Court in the impugned judgment. Further, that the applicant has not explained how the appeal will be rendered nugatory.
11. We have considered the pleadings and submissions of the parties. The principles upon which this Court grants relief under Rule 5(2)(b) are well settled. To succeed in her application, the applicant must demonstrate, first, that she has an arguable appeal and, secondly, that if the orders she seeks are not granted, her appeal will be rendered nugatory. It is further settled that an arguable appeal is not one that must necessarily succeed, but one that raises at least one bona fide point that calls for a response



from the respondent and is worthy of consideration by the Court-see *Stanley Kangethe Kinyanjui v Tony Keter & 5 Others (2013) eKLR*.

12. Regarding the question whether she has an arguable appeal, the appellant contends that the trial court failed to appreciate that there is a dispute regarding the issuance of the loan facility and subsequent issues with the respondent's Branch Manager with respect to the said loan. She contends that the High Court therefore failed to take into account matters that it ought to have taken into account and in so doing, arrived at the wrong decision.
13. The threshold for an arguable appeal is fairly low. However, this court observes that the applicant does not dispute that she borrowed a sum of Kshs 1,540,000 for the purchase of the suit property, nor does she contend that she has repaid the loan facility. The issue she raises- regarding alleged withdrawals by the respondent's Manager- had been the subject of litigation and determination in a prior suit between the parties hereto. That being the case, we find that the applicant has not been able to satisfy the first limb for consideration in an application of this nature.
14. However, even had there been an arguable point in the matter, we find that the applicant has not satisfied the second limb that the intended appeal would be rendered nugatory should the orders she seeks not be granted. The respondent seeks to exercise its statutory power of sale with respect to the charged property. As averred in the replying affidavit, the respondent is a financial institution, and the applicant has not placed anything before the Court that shows that should her appeal succeed, the respondent would be unable to compensate her in damages.
15. Accordingly, we find no merit in the application dated April 25, 2022 and it is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023

HANNAH OKWENGU

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

F TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

