



**Elite Intelligent Traffic Systems Limited v Housing Finance Corporation Limited
(Civil Application 360 of 2022) [2023] KECA 284 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 284 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 360 OF 2022
F SICHALE, KI LAIBUTA & LA ACHODE, JJA
MARCH 17, 2023**

BETWEEN

ELITE INTELLIGENT TRAFFIC SYSTEMS LIMITED APPLICANT

AND

HOUSING FINANCE CORPORATION LIMITED RESPONDENT

(An application for injunction pending the filing and determination of an intended appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (Mabeya J.) dated and delivered on 31st August, 2022) In High Court Case No. E 713 of 2021)

RULING

1. Elite Intelligent Traffic Systems Limited the applicant, filed an application dated October 4, 2022 against Housing Finance Corporation Limited the respondent, under Rule 5(2)(b) of this [Court's Rules](#), for orders:
 - i. That this Court do grant an order of injunction restraining the respondent from advertising for sale, offering, selling, disposing off or in any other way dealing or acting in a manner inconsistent with the applicant's ownership and possession of all that parcel of land known as LR No 209/1051/1(the suit property) pending the filing, hearing and determination of the intended appeal: and
 - ii. That the costs of this application abide the result of the intended appeal.
2. The backdrop of this application is that the applicant filed a notice of motion dated July 28, 2021 together with a plaint in the High Court seeking orders of temporary injunction to restrain the respondent from advertising for sale, disposing of, alienating, transferring or interfering with the suit property pending hearing and determination of the suit.



3. The said application was predicated on the grounds that the applicant and the respondent entered into a loan agreement for a facility worth Kshs 364million of which Kshs 95 million was for takeover from Kenya Commercial Bank (KCB) and the balance was for the construction of apartments on the suit property. Later on, the applicant created a supplementary charge in favour of the respondent over a property known as LR No 1160/339 (the Karen Property) as security for the loan of Kshs 364 million in terms of the loan agreement.
4. The respondent paid to KCB the kshs 95 million, but failed to disburse to the applicant the funds needed for the construction of the apartments on the suit property, which resulted in massive losses. Consequently, the applicant lodged a case against the respondent in Civil Suit No 83 of 2016, where it sought, inter alia, an injunction to restrain the respondent from selling the suit property, and a discharge of the supplementary charge over the Karen property.
5. That notwithstanding, the parties herein entered into a Settlement Agreement in which the respondent was willing to waive excess interest and the parties reached a final settlement of Kshs 71,800,000/= as the full debt. Despite the Settlement Agreement, the respondent is said to have acted unilaterally and reverted back to the terms of the previous loan agreement, in breach of the Settlement Agreement. As a result, the respondent threatened to dispose of the suit property.
6. The respondent filed a replying affidavit in opposition to the said application in High Court Case No E713 of 2021. It averred that they extended a loan facility amounting to Kshs 364 million with properties known as LR No 209/1052 (the suit property) and LR No 1160/330 (the Karen property), being offered as security by the applicant, that in spite of offering the above mentioned security, the applicant was sourcing for new equity partners and/or seeking to borrow from other lending entities. For that reason, the respondent was unable to progress the applicant's application for development financing.
7. Consequently, the parties entered into a Settlement Agreement, which was dependent on the applicant fulfilling its obligations, and failing which the agreement would be rendered otiose. The applicant failed to adhere to the Settlement Agreement and in the premise, the respondent had no option but to recover its outlay by exercising its statutory power of sale.
8. The learned Judge considered the matter before him and dismissed the application with costs. Aggrieved by the learned Judge's ruling, the applicant filed a notice of appeal and the instant application to this Court. The said application is premised on the grounds on its face and the supporting affidavit of Patrick Kaibaiya Mwangi sworn on October 4, 2022.
9. The grounds on which the applicant's Motion is founded are that the applicant is apprehensive that if the orders sought are not granted the intended appeal will be rendered nugatory, reasons being that the respondent has threatened to sell and dispose of the suit property by public auction. It is asserted that the intended appeal is not frivolous and raises points of law and fact as contained in the Draft Memorandum of Appeal.
10. It is also deposed that the Judge entirely erred and misdirected himself on both law and fact when he wrongly interpreted the Settlement Agreement and erroneously found that the applicant was undeserving of the Court's protection and that therefore, the applicant has been exposed to risk of sale of the suit property. The applicant faults the Learned Judge for failing to consider its case, and for being biased in favour of the respondent. It is further deposed that the applicant stands to suffer breach of its guarded constitutional right to property and to fair administrative action and that, in the event that it succeeds in this appeal, an award of damages will not be sufficiently restorative against the imminent loss of its massive investment.



11. In opposition, the respondent filed a replying affidavit sworn by Hedaya Malesi on October 12, 2022 in which it avers that based on the evidence presented before the Judge by the parties, the Judge was correct in holding that the applicant had breached the terms of the Settlement Agreement by failing to make the agreed payment in accordance with the strict time lines. Further, that the learned judge correctly and objectively interpreted the Settlement Agreement and was right in finding that the applicant had not established a prima facie case and thus, was not deserving of injunctive relief.
12. The Respondent deposes that the intended appeal is not arguable and has no merit for reasons that:
 - a) There is a valid and existing debt owed to the respondent by the applicant arising out of the loan facilities advanced by the letters of offer dated October 10, 2013 and the Settlement Agreement.
 - b. The applicant has on numerous occasions admitted its indebtedness to the respondent as captured in its letters to the Bank as well as in the Settlement Agreement.
 - c. The outstanding amount owed by the applicant to the respondent from the date of the Settlement Agreement to date is Kshs 176,020,547.47 which amount continues to accrue interest at contractual rates.
 - d. The applicant is duly indebted to the respondent and thus, it is in the interest of fairness and justice that it be allowed to recover the amounts owed to it.
 - e. The applicant is the offending party in the present dispute as it blatantly neglected and/or refused to make payment to the respondent as per the terms of the settlement agreement leaving the Bank with no other alternative than to exercise its statutory power of sale.
 - f. Owing to the applicant's breach of contract, the respondent will be greatly prejudiced if the orders sought are granted.'
13. It is also deposed that in the event that the intended appeal is successful, the respondent being a reputable financial institution, has financial capacity to pay the applicant damages to the value of the suit premises and, thus, the intended appeal cannot be rendered nugatory if the orders of stay are not granted.
14. This application was disposed of by way of written submissions. M/s Gathie Mwanza & Co Advocates filed written submissions dated October 15, 2022 on behalf of the applicant, while M/s Nyaanga & Mugisha Advocates filed written submissions dated October 19, 2022 on behalf of the respondents.
15. M/s Gathie Mwanza & Co Advocates submit that the intended appeal, as can be discerned from the Draft Memorandum of Appeal, is not frivolous and raises arguable points of law and fact. Further, that the substantive issue in dispute in the intended appeal is the rushed exercise of an illegal and unlawful statutory power of sale, the same having not arisen at all.
16. They rely on the decision in *Teachers Service Commission vs Kenya National Union of Teachers, Sup Ct Appl No 16 of 2015*, where the Supreme Court considered the nature and scope of the jurisdiction under Rule 5(2)(b) of the Court of Appeal Rules, and held that it is essentially a tool for preservation. Additionally, they rely on the decision in *Dennis Mogambi Mang'are vs Attorney General & 3 Others*



Civil Application No Nai 265 of 2011, where the Court put into perspective what an arguable appeal is by stating that:

' An arguable appeal is not one that must necessarily succeed; it is simply one that is deserving of the Court's consideration'

17. It is contended that in the event that the applicant succeeds in this appeal, which is highly likely, an award of damages would not be sufficient to restore it against the impending loss of massive investment over the suit property; that if the property was to be altered, transferred or interfered with, restoring it to its original state would be a tedious process riddled with losses; and lastly, that it will also interfere with the quiet possession of third parties who have acquired units over the suit premises with the consent of the respondent.
18. In rebuttal, M/s Nyaanga & Mugisha Advocates argue that there is a valid existing debt owed to the respondent by the applicant which has not been denied. As such, it is evident that the applicant is the offending party as it reneged on its contractual obligations occasioning loss and injury upon the respondent by breaching the terms of the loan facility. As a result, they assert that the intended appeal is not arguable as the applicant is liable for the breach of contractual obligations and that the present application is a frivolous attempt to frustrate the respondent's realization of its security.
19. On whether if the appeal succeeds it will be rendered nugatory, they submit that it would not be rendered nugatory. They place reliance on this Court's decision in Julius Wabinya Kang'ethe & Another vs Mubia Muchira Ng'ang'a (2017) eKLR where it was held:

' 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'
20. Lastly, they submit that in the event that the intended appeal succeeds, the respondent being a reputable financial institution, has the financial capacity to pay the applicant compensation in the form of damages pegged on the value of the suit properties. Thus, the intended appeal cannot be rendered nugatory.
21. We have considered the application, the reply thereto, the rival arguments and authorities relied on and the applicable law. In exercise of jurisdiction under rule 5(2)(b) of this Court's Rules, the court must be satisfied on the twin principles that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, it will be rendered nugatory. In Isbmael Kagunyi Thande vs Housing Finance Company of Kenya Limited, Civil Application No 157 of 2006 [2007] eKLR, this Court pronounced itself on the twin principles as follows:

' The jurisdiction of the Court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the Court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.'
22. We are also guided by this Court's pronouncement in the often cited decision of Stanley Kangethe Kinyajui vs Tony Ketter & 5 Others (2013) eKLR where it rendered itself as follows:
 - vi) on whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised;



- 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'
23. The applicant is of the view that the learned Judge misinterpreted the Settlement Agreement between the parties, and as a result came to the wrong conclusion. In rebuttal, the respondent support's the learned Judge's interpretation of their Settlement Agreement.
24. An arguable appeal as stated earlier is not one that must necessarily succeed. It is simply one that is deserving of the Court's consideration. Without saying more on this limb lest we embarrass the Court on the substantive appeal, we are of the view that the interpretation of the parties' Settlement Agreement is a matter that deserves due consideration by this Court, and is thus an arguable ground.
25. On whether the appeal will be rendered nugatory should it succeed, in Stanley Kang'ethe Kinyanjui (supra), this Court stated that:
- ix). The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- x). 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.'
26. The applicant argues that, in the highly likely event that the intended appeal succeeds, an award of damages will not be sufficient to restore it against the impending loss of massive investment over the suit property since, if the property was to be altered, transferred or interfered with, restoring it to the original state would be a tedious process riddled with losses.
27. In rebuttal, the respondent contends that the appeal will not be rendered nugatory in the event that it succeeds since the respondent, being a reputable financial institution, has the financial capacity to pay the applicant compensation in the form of damages pegged on the value of the suit property. In short, the applicant is seeking that the suit property be preserved, while the respondent seeks to have the contractual obligation between the parties to be enforced.
28. In the instant case, the applicant has come under Rule 5(2)(b) of Court of Appeal Rules seeking that a temporary injunction be granted restraining the respondent from advertising for sale, offering, selling, disposing off or in any other way dealing or acting in a manner inconsistent with the applicant's ownership and possession, in all that parcel of land known as LR No 209/1051/1 (suit property) pending the determination of the intended appeal herein.
29. In *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others [2021] eKLR*, this Court had occasion to consider two prayers sought under Rule 5(2)(b) of Court of Appeal Rules. In the first prayer, the applicant sought stay of execution and in the second, he sought an injunction. We quote in extenso what the court said in addressing the two prayers:

' With regard to the first prayer, a cursory perusal of the record herein shows that the High Court vide its judgment dated July 30, 2020, merely dismissed the applicant's case with costs to the respondents. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay. See Western College of Arts and



Applied Sciences v EP Oranga & 3 others [1976] eKLR where the Learned Judges stated thus:

'what is there to be executed under the judgment, the subject of the intended appeal' The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.'

Similarly, in *Raymond M Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010*, Makhandia, J (as he then was) stated thus:

'The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to Court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise.'

Consequently, the prayer for stay of execution must fall by the wayside and the same is hereby dismissed.

With regards to the prayer for temporary injunction, and as to whether the applicant has an arguable appeal, it is our considered opinion that the issue raised by the applicant namely; failure to obtain the consent of the Land Control Board by the 1st respondent in transferring the suit property to the 2nd and 3rd respondents raises an arguable appeal worthy of consideration by this Court and as such the intended appeal is not frivolous. Of course we are mindful of the fact that we will not make further comments lest we embarrass the bench that will handle the matter. As has been previously stated by this Court, an arguable appeal is not one that must necessarily succeed, but one which merits consideration by the Court. Consequently, from the circumstances of this case, we are satisfied that the applicant has an arguable appeal'.

30. Taking all the circumstances of this case in to consideration, we are of the view that the intended appeal will be rendered nugatory if the orders sought are not granted, for the reasons that third parties are said to have acquired units in the suit property under the development project with the consent of the respondent. If therefore, the appeal was to succeed and the property has already changed hands by virtue of the bank exercising its statutory power of sale, the damage thereby occasioned may be cumbersome to reverse, and will adversely affect innocent third parties.
31. Consequently, we order:
 - a. That a temporary injunction be and is hereby granted restraining the respondent from advertising for sale, offering, selling, disposing off or in any other way dealing or acting in a manner inconsistent with the applicant's ownership and possession, in all that parcel of land known as LR No 209/1051/1 (the suit property) pending the determination of the intended appeal.



b. The costs of the application will abide the outcome of the appeal.

Delivered and Dated at Nairobi this 17th day of March, 2023.

F. SICHALE

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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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

