



**Barclays Bank of Kenya Limited v Shibeka & 2 others (Civil Application
E064 of 2022) [2023] KECA 224 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KECA 224 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E064 OF 2022
HM OKWENGU, J MOHAMMED & S OLE KANTAI, JJA
MARCH 3, 2023**

BETWEEN

BARCLAYS BANK OF KENYA LIMITED APPLICANT

AND

SAMUEL SHIMBA SHIBEKA 1ST RESPONDENT

ANNE AMAYA MUSOTSI 2ND RESPONDENT

PETER MAINA NJUGUNA 3RD RESPONDENT

(Being an application for stay of execution of the Ruling and Orders of the High Court of Kenya at Nairobi (Muigai, J.) delivered on 10th December 2021 in HC Civil Suit E089 of 2019)

RULING

- 1 By a notice of motion dated March 7, 2022 the applicant, Barclays Bank Kenya Limited (Barclays) seeks in the main an order for stay of execution of the High Court Ruling (Muigai, J.) delivered on December 10, 2021.
- 2 The application arises from the judgment of the High Court in a motion that was filed by the 1st and 2nd respondents seeking to have the applicant restrained from evicting the 1st and 2nd respondents, and/or transferring property known as L.R. 158533 (Orig No. 12507/63) Mokoyeti Estate, Langata Area (the suit property); and to set aside the sale of the suit property by the applicant to the 3rd respondent by public auction on grounds of material irregularity, fraud, and violation of the [Civil Procedure Rules](#), 2010, the [Auctioneers Act](#) No. 5 of 1996, the [Auctioneers Rules](#) 1997 and the [Land Act](#) No. 6 of 2012; an order for repayment of the purchase price to the 3rd respondent without interest; and revision of the terms of the charge registered in favour of the applicant.
- 3 The High Court in its ruling dated December 10, 2021, allowed the application and granted an interim injunction for 90 days to enable the 1st and 2nd respondents to redeem the suit property by paying the



- outstanding loan facility, and ordered that in default, the statutory power of sale of the suit property shall be regularized and the 1st and 2nd respondents shall vacate the suit property. The High Court further ordered that if the 1st and 2nd respondents settle the outstanding loan facility within 3 months, the purchase price shall be refunded to the 3rd respondent as the sale was premature.
- 4 The applicant, being aggrieved, filed a notice of appeal against the ruling. The applicant contends that it has an arguable appeal that raises fundamental questions of law of public interest and importance that merits resolution by the Court. Such questions include whether the right to redeem property by a chargor in default, may be revived after the fall of the hammer at a public auction, and after the transfer of the suit property to a third party; whether after the right to exercise its statutory power of sale has accrued, a chargee is bound to accept an offer for a partial offset of the outstanding loan balance, the subject matter of a charge; whether the failure to consider an offer for a partial offset of the outstanding balance is sufficient reason to void and/or invalidate a sale duly conducted in exercise of a chargee's statutory power of sale; and under what circumstances it is just and merited for the Court to reopen a charge under section 105 and 106 of the *Land Act*.
 - 5 The applicant further contends that if the order of stay is not granted, the enforcement of the orders made in the impugned ruling of the High Court will proceed, and this would render the applicant's intended appeal nugatory. Moreover, the applicant and the 3rd respondent would be greatly prejudiced if the execution proceeds.
 - 6 The applicant filed written submissions in which it submits that it has satisfied the twin requirements of rule 5(2)(b) of the *Court of Appeal Rules* as set out in *Kenya Industrial Estate Limited & anor vs Matilda Tenge Mwachia* [2021] eKLR. It reiterates that the intended appeal raises bona fide issues that are not only arguable, but also constitute matters of significant public importance.
 - 7 On the nugatory aspect, the applicant submits that it is unable to comply with the request for information on the outstanding loan balance from the 1st and 2nd respondents, or receive any funds towards repayment of the said loan, as the sale of the suit property was concluded and the loan account closed, and the applicant is likely to be held in contempt of court orders as it will not be able to comply with them. The applicant also questions the financial position of the 1st and 2nd respondents maintaining that they would not be able to compensate it, should its appeal succeed.
 - 8 The 1st and 2nd respondents have opposed the application through a replying affidavit sworn by their advocate, Allan K. Rapando, in which he deposes that the applicant's motion is anchored on a defective notice of appeal that has not complied with rule 75(1) & (2), and rule 77(1) of the *Court of Appeal Rules*.
 - 9 The 1st and 2nd respondents have also filed written submissions in which they urge that it is imperative for the Court to determine whether there is an appeal that properly lies before the Court since rule 75(1) & (2) and rule 77(1) of the *Court of Appeal Rules* require that a notice of appeal be filed within 14 days of the decision/order intended to be appealed against, and served within 7 days of the lodging of the appeal; that the issue whether or not an appeal is filed on time, goes to the jurisdiction of the Court. In support of this position, the 1st and 2nd respondents cited *Patrick Kiruja Kithinji vs Victor Mugira Marete* [2015] eKLR where it was held that the notice of appeal was filed way outside the prescribed time frame, and therefore no proper appeal lies before the court.
 - 10 We have considered the applicant's motion and the contending submissions. The 1st and 2nd respondents have raised a pertinent question regarding the jurisdiction of this court to hear the application for stay of execution. This concerns the legality of the notice of appeal that was filed by the applicant. The 1st and 2nd respondents contend that the notice of appeal upon which the intended



appeal is anchored was filed out of time, the consequence of which is that this court lacks jurisdiction to entertain the intended appeal.

11 In *Halai & anor v Thornton & Turpin [1963] Limited* [1990] KLR 365, this Court was categorical that in an application under rule 5(2)(b) of the *Court of Appeal Rules*, the court becomes seized of the matter only after the notice of appeal has been filed under rule 74 and that where no appeal is filed, the court has no jurisdiction to entertain an application for stay.

12 Similarly, in *Safaricom Limited v Ocean View Beach Hotel & 2 others* [2010] eKLR, Omolo JA. stated as follows:

“At the stage of determining an application under rule 5(2)(b) there may or there may be no actual appeal. Where there is no actual appeal already lodged, there nevertheless must be an intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under rule 5(2)(b) because as I have already pointed out, the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal, as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the decision of the court.”

13 Of relevance to the respondents’ argument, is the *National Industrial Credit Bank Limited v Aquinas Francis Wasike & Anor*, [2006] eKLR, where it was argued that the notice of appeal filed by the applicant in that appeal was invalid. In response to this argument, this Court stated as follows:

“We, however, take note of the fact that no application has been made by the respondents for the striking out of the notice of appeal and as the Court has repeatedly pointed out, rule 5(2)(b) does not provide that “...where a valid notice of appeal...”. The rule simply provides that:

‘In any civil proceedings where a notice of appeal has been lodged in accordance with rule 74...’

Rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under rule 5(2)(b) is being considered.”

14 From the above decisions, it is our view that the issue of the legality of the notice of appeal has been raised prematurely as it is not an issue for consideration in this application. It suffices for the purposes of this court’s jurisdiction to hear the motion under rule 5(2)(b) of the *Court of Appeal Rules* that a notice of appeal has been filed.

15 This court’s decision in *Patrick Kiruja Kithinji v Victor Mugira Marete* (supra) that was relied upon by the respondents is distinguishable as the Court was not dealing with an application under rule 5(2)(b) of the *Court of Appeal Rules* but was dealing with an application to strike out the appeal under rules 82(1) & (2) & rule 84 of the former *Court of Appeal Rules*, 2010. For the purpose of the application before us, it suffices that a notice of appeal has been filed as the filing of the notice is what gives this court jurisdiction to hear the application.



16 The application before us being one under rule 5(2)(b), the principles upon which such an application may be determined has been stated by this court many times. In *National Industrial Credit Bank Limited v Francis Wasike & anor* (supra), this Court stated as follows:

“What falls for consideration by the court under rule 5(2)(b):

- (a) Whether the appeal or the intended appeal as the case may be is an arguable and not a frivolous one; and
- (b) If whether the stay of the injunction sought is not granted and the appeal or the intended appeal were to eventually succeed, such success would have been rendered nugatory by the earlier refusal to grant the stay or the injunction.”

17 In *Kenya Airways Limited v Patrick Waweru Mwangi & anor* [2016] eKLR, this court reiterated:

“The principles that we apply in applications for stay of execution pending appeal are now well settled. An applicant to be successful, must, firstly, show that the appeal, if filed, or the intended appeal is arguable which is to say that it is not frivolous. Such an applicant must in addition show that the appeal or the intended appeal if successful will be rendered nugatory absent stay. These principles have been well enunciated in many judicial pronouncements that have come forth from this Court such as the case of *Githiaka v Nduriri* [2004] 2 KLR 67.”

18 As regards arguability, the applicant has set out various questions of law that it intends to raise in the appeal, which questions we have already adverted to above. It is instructive that all that the applicant has to establish is that they have at least one single issue that is capable of eliciting a spirited debate on appeal. (See *Yellow Horse Inns Limited & another v A.A. Kawir Transporters Ltd & 4 others* [2014] eKLR). The issues raised by the applicant, are issues that are of interest in the exercise of a chargee’s statutory power of sale, and there is no doubt that they are capable of eliciting an animated debate with contending arguments. The intended appeal is clearly therefore arguable.

[19] As regards the nugatory aspect, in *Stanley Kang’ethe Kinyanjui v Tony Keter & 5 others* [2013] eKLR, this court reiterating the principles to be applied in an application under rule 5(2)(b) of the *Court of Appeal Rules*, stated:

- “(ix) The term nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means stifling, *Reliance Bank Limited v Norlake Investment Limited* [2002] 1 EA 227 at page 232.
- (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.
- (x) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Disease v Kinyua* [1990] KLR 403.”

20 It is not disputed that the subject of the suit is land (suit property) which the applicant had purportedly sold to the 3rd respondent by public auction in exercise of its statutory power of sale arising from the 1st and 2nd respondents’ default in repaying the financial facility granted to them by the applicant. In



its ruling subject of the intended appeal, the High Court, holding that the sale was premature, had granted the respondents 90 days to redeem the suit property by paying the outstanding loan facilities, and ordered that the purchase price paid by the 3rd respondent be refunded to him, if the 1st and 2nd respondents redeem the debt.

- 21 The applicant maintains that should the respondent proceed to execute the ruling and the orders of the High Court, it will be greatly prejudiced as its intended appeal will be rendered nugatory. That the applicant has already concluded the sale of the suit property, transferred the suit property to the 3rd respondent, and closed the loan account. It is therefore not able to give the 1st and 2nd respondents any information regarding the outstanding loan balances on its loan facility. The applicant is apprehensive that it stands the risk of being held in contempt of the High Court orders, as it will not be able to give information on the 1st and 2nd respondents' outstanding loan balances.
- 22 Given the circumstances of this case, the fact that the subject matter of the suit is land that is subject of a disputed auction sale, and it being admitted that there is an amount owing to the applicant in regard to the financial facility that was given to the 1st and 2nd respondents, the applicant's apprehension that its intended appeal if successful may be rendered nugatory is not without justification. More so, since the 1st and 2nd respondents have not offered any evidence to contradict the applicant's assertion that it will not be able to pay damages if so ordered.
- 23 In the circumstances, it is in the interest of justice that the right of both parties be preserved. Accordingly, we issue orders that pending the hearing and determination of the applicant's intended appeal, execution of the orders granted by the High Court on December 10, 2021 shall be stayed, and the title to the suit property shall not in any way be interfered with.

Cost of the application shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

