



**Loorkipony & another v Molyn Credit Limited & 2 others (Civil Appeal
(Application) E073 of 2023) [2023] KECA 517 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 517 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E073 OF 2023
K M'INOTI, A ALI-ARONI & JM MATIVO, JJA
MAY 12, 2023**

BETWEEN

PAUL SITEIYA LOORKIPONY 1ST APPLICANT

NAPOLEON WAKUKHA MURENDE 2ND APPLICANT

AND

REGENT AUCTIONEERS 1ST RESPONDENT

MOLYN CREDIT LIMITED 2ND RESPONDENT

ERIC TIMOTHY BALONGO 3RD RESPONDENT

*(Application for injunction pending the hearing and determination of
an appeal from the Judgment and Decree of the High Court of Kenya at
Nairobi (Mshilla, J.) dated 20th January 2023 in HCCC No. 563 of 2015)*

RULING

1. Before us is a motion on notice taken out by the two applicants, Paul Siteiya Loorkipony and Napoleon Wakukha Murende, under rule 5(2) (b) of the *Court of Appeal Rules*. The motion, dated February 15, 2023 seeks, in the main, a prayer worded as follows:

“That this honourable court be pleased to grant an order of injunction restraining the respondent (sic) whether themselves (sic), their employees, servants, agents or auctioneers from evicting the applicant(sic), advertising for sale, selling whether by public auction or public treaty, disposing or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise interfering with the applicants’ ownership or title to (the) parcel of land known as land



reference number Kajiado/Kisaju/10733 pending the hearing and determination of the appeal herein.” (Emphasis added).

2. In support of the motion, the 1st applicant, Paul Siteiya Loorkipony, swore an affidavit on February 15, 2023 and filed written submissions and a list of authorities on March 30, 2023. The respondents, although duly served with a hearing notice, neither filed replying affidavit, submissions nor appeared for the hearing of the application.
3. The short background to the application is as follows. In or about 2014, the 2nd applicant, Napoleon Wakukha Murende took credit facilities from the 1st respondent, Molyn Credit Ltd for Kshs 7,200,000 payable in 6 years at 4% interest per annum, on reducing balance. As security, the 2nd applicant offered his motor vehicle registration No KBZ 455G and a legal charge over his parcel of land, LR No Butsoso/Shikoti/17887. In addition, the 1st applicant, Paul Siteiya Lookipony, charged his property known as LR No Kajiado/Kisaju/10733 (the suit property) as guarantor to the 2nd applicant. Contending that the applicants had failed to service the loan per the agreement, the 1st respondent, on November 2, 2015, advertised the suit property for sale by public auction. The sale was scheduled for November 18, 2015.
4. On November 10, 2015, the applicants filed a suit in the High Court at Nairobi seeking a long list of reliefs, among them a permanent injunction to restrain the respondents from selling the suit property as well as LR No Butsoso/Shikoti/17887, a declaration that any sale of the said properties by public auction or private treaty was null and void, and an order for cancellation of any sale or transfer of the said properties. The applicants contended that the 1st respondent had not informed them when the facility became non-performing; had not rendered an account of the facility; had levied oppressive interest and penalties and had failed to serve upon them the requisite statutory notice of sale. The 1st respondents filed a defence and denied the applicant’s claim.
5. Simultaneously with the suit, the applicants applied for an interim injunction pending the hearing of the suit and on November 16, 2015 the court granted a conditional injunction, which required the applicants to continue to service the loan. The applicants did not abide by the conditions and instead presented to the 1st respondent cheques that were subsequently dishonoured. Accordingly, on July 8, 2016 the court vacated the interim orders. On August 2, 2016, the 1st respondent sold and transferred the suit property to the 3rd respondent, Eric Timothy Balongo. It appears from the record that after the initial injunction was discharged, the applicants went back to the court and obtained yet another injunction on July 13, 2016. Subsequently, the applicants amended their suit to seek cancellation of the sale and transfer of the suit property to the 3rd respondent and its re-conveyance to the 1st applicant. The prayers were sought on the grounds that the sale was fraudulent; that no moneys were due and owing from the applicants to the 1st respondent; and that the sale was conducted in violation of a court order.
6. The applicant’s suit was ultimately heard by Mshilla, J. who, in the judgment the execution of which the applicants seek to stay, found no merit in the suit. The learned judge found that a court of coordinate jurisdiction had earlier held that the applicants were properly served with the statutory notice, that they had failed to prove fraud to the required standard, and that there was no evidence of the applicants having extracted and served upon the respondents the last order of injunction.
7. In the motion now before us, the applicants submit that their appeal is arguable because the suit property was sold fraudulently, the same not having been charged in favour of the 1st respondent. As an alternative argument, they contended that if the suit property was charged, the 1st respondent did not serve upon the applicants any statutory notice. It was also contended that the sale of the suit property was in violation of a court order and therefore the sale and transfer must be cancelled. On whether the



intended appeal stands to be rendered nugatory if it succeeded, it was submitted that the suit property was the 1st applicant's matrimonial home, that he will be rendered destitute if it is sold, and that his loss is not capable of compensation by damages.

8. We have carefully considered the application and the various authorities cited by the applicant expounding on the court's jurisdiction under rule 5(2) (b) and the principles that guide the court in the exercise of its discretion. There is no dispute that to entitle the applicants to the orders they seek, they must demonstrate first, that they have an arguable appeal and second that appeal risks being rendered nugatory if it succeeds without an order of stay of execution. They must satisfy the court on both those issues and satisfying only one will not suffice. An arguable appeal need not succeed at the hearing; it is merely an appeal that raises even one bona fide issue deserving consideration by the court.
9. What will render and appeal nugatory will depend on the circumstances of each case. The primary concern of the court, however, is to ensure that a successful appeal does not become a mere pyrrhic victory in the sense that the successful appeal will be rendered worthless due to fundamental change of circumstances, which cannot be compensated by award of damages. The court expressed the proposition as follows in, *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others* (2013 eKLR) where the principles under rule 5(2)(b) were comprehensively enumerated:

“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.”
10. On whether the applicants have presented an arguable appeal, we are satisfied that the intended appeal is not frivolous. It is arguable. There are issues that genuinely deserve full consideration by the court. In saying so, we do not express any opinion on the merits of the appeal or whether it will ultimately fail or succeed. That is not our remit.
11. Will the appeal be rendered nugatory if it succeeds? We do not think so. In their own amended plaint, the applicants sought, as alternative prayers, an order compelling the 1st respondent to re-scheduling repayment of the loan, or valuation of the suit property by an independent valuer to determine its true value. The applicants do not deny that they offered the suit property as security and thereby deliberately put it on the market. Indeed, from their own pleadings, it is fairly easy to determine its value. Moreover, the applicants have not suggested, even remotely, that the 1st respondent is incapable of compensating them to the full value of the suit property (as determined by valuation) should the appeal succeed.
12. Lastly, it is worth noting that the bulk of the prayers in the motion before us, rather disingenuously, seek to stop the adverting for sale, the sale, transfer or conveyance of the suit property. From their own pleadings the applicants are fully aware that indeed the suit property was sold and registered in the name of 3rd respondent way back on August 2, 2016, close to seven years ago. Upon the court asking Mr Mirie, learned counsel who appeared online for the applicants on April 17, 2023 whether the suit property had not already been sold and transferred to the 3rd respondent, counsel answered in the affirmative.
13. It is trite that the court will not issue a prohibitory injunction to stop that which has already happened. That will be tantamount to issuing an order in vain, which no court will do. What is most regrettable is the lack of condor on the part of the applicants. They cannot seek an injunction to stop an auction and transfer that they know took place almost seven years ago.
14. For the foregoing reasons, this application has no merit and is hereby dismissed in its entirety. Since the respondents did not appear to oppose the application, we make no orders on costs.



DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023

K. M'INOTI

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JUDGE OF APPEAL

A. ALI-ARONI

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JUDGE OF APPEAL

J. M. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

