



**Ayubu v I & M Bank Limited & 2 others (Civil Application
E331 of 2021) [2023] KECA 1037 (KLR) (4 August 2023) (Ruling)**

Neutral citation: [2023] KECA 1037 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E331 OF 2021
HA OMONDI, A ALI-ARONI & JM MATIVO, JJA
AUGUST 4, 2023**

BETWEEN

DAVID ISOE AYUBU APPLICANT

AND

I & M BANK LIMITED 1ST RESPONDENT

**JOSEPH GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS 2ND
RESPONDENT**

KIPSOSION RERIMOI KIPKORIR 3RD RESPONDENT

*(Being an application for stay of execution of the judgment of the High Court
(Mwita, J.) dated 2nd December, 2020 in Kajiado HCCC No. 24 of 2018)*

RULING

1. In order to contextualize the issues raised in the application dated September 17, 2021 the subject of this ruling, it is necessary to highlight, albeit briefly, the background to the proceedings in the High Court which culminated in the judgment dated December 2, 2020 the subject of the intended appeal.
2. Briefly, on or about the September 20, 2011 the 1st respondent provided financial accommodation to the applicant at the applicant's request to the tune of Kenya shillings seven million (Kshs 7,000,000/=). The facility was secured by a legal charge executed by the applicant as the chargor in favour of the 1st respondent as the chargee, which was registered over the applicant's property known as Ngong/Ngong/9895. The applicant is said to have defaulted in repayment of the said loan, and on January 30, 2018 the 1st respondent through the 2nd respondent sold the property by way of a public auction to the 3rd respondent for Kenya shillings twenty three million (Kshs 23,000,000/=).
3. Aggrieved by the sale, the applicant filed suit; Kajiado HCCC No 24 of 2018 claiming that the property was not only sold without notice, but it was sold below the market value of Kshs 35,000,000/=. It was



his case that he was ready to settle the arrears provided the 1st respondent rendered a true account of the loan account. He disputed having been served with the Statutory Notice. He further disputed that the property was valued before the auction and argued that the highest bidder never paid the purchase price as required. He prayed for inter alia an injunction to stop the transfer and cancellation of the sale. He also prayed for general damages and for an order compelling the 1st respondent to render a true account of the loan facility.

4. Concisely, the 1st & 2nd respondents' case was that the applicant defaulted in repaying the loan and the property was sold by public auction on January 30, 2018 to recover the outstanding amount of Kshs 4,502,858.04. It stated that the highest bid was Kshs 23,000,000 by the 3rd respondent which was accepted. Further, the forced sale value was Kshs 22,500,000 while the market value was Kshs 30,000,000.
5. The 3rd respondent's case was that he participated in the public auction on January 30, 2018; and he was declared the highest bidder; that he purchased the property for Kshs 23,000,000/=; that he deposited Kshs 5,800,000 with the 2nd respondent upon the fall of the hammer being 25% of the purchase price and he paid the balance after obtaining a loan from the 1st respondent. In addition, on April 19, 2018 the applicant voluntarily handed over the property to him.
6. In the impugned judgment, the learned judge was satisfied that a proper notice was issued and served upon the applicant before the auction. On the question whether the property was valued prior to the auction, the trial court noted that the applicant denied the 1st respondent access to undertake the valuation forcing the valuer to do a desk valuation. The learned judge was clear that the applicant cannot be permitted to benefit from his misdeeds, so, he found that the property was valued prior to the auction. On the alleged failure to advertise the property, the learned judge cited decisions in support of the proposition that such an omission was a mere technicality that did not invalidate the sale. Lastly, the learned judge was persuaded that the purchase price was paid. Accordingly, he dismissed the suit.
7. Aggrieved by the above verdict, the applicant filed a notice of appeal dated December 2, 2020 signifying his intention to challenge the said decision in this Court. By a letter of even date addressed to the Deputy Registrar of the court, the applicant requested to be supplied with certified proceedings and the judgment.
8. In his notice of motion dated September 17, 2021 the subject of this ruling, the applicant prays for an injunction to restrain the respondents or their agents from transferring the said property to the 3rd respondent pending the hearing and determination of his intended appeal to this Court. Prayers (1) & (2) are spent. The applicant also prays for costs of the application to abide the outcome of the intended appeal.
9. The core grounds in support of the application are:
 - (a) in absence of an injunction, the property may be alienated rendering the intended appeal nugatory.
 - (b) the applicant will suffer irreparable loss and damage if the stay is not granted.
 - (c) no prejudice will be occasioned to the respondents because they are already in possession and they are collecting rent from the premises.
 - (d) the intended appeal has high chances of success and it is in the interests of justice that the application be allowed.



10. The 1st and 2nd respondents opposed the application vide the replying affidavit sworn on September 27, 2021 by Vincent Barchok, the 1st respondent's officer, Debt Recoveries Unit. The key highlights of the affidavit are-
- (a) the intended appeal is not arguable.
 - (b) the intended appeal cannot be rendered nugatory because the applicant can be compensated by way of damages.
 - (c) the applicant's equity of redemption has been extinguished under section 99 of the Land Act.
 - (d) the applicant is unable to pay the loan so it is unlikely he will be able to pay damages in the event the appeal fails, and,
 - (e) the injunction if granted will occasion hardship to the bank.
11. The 3rd respondent opposed the application through his replying affidavit dated September 26, 2021. The key highlights are that:
- a. he is a bona fide purchaser of the property at a public auction on January 30, 2018 for Kshs 23,000,000/=.
 - (b) he paid the entire purchase price to the 1st Respondent.
 - (d) the property is yet to be transferred to him.
 - (e) the injunction sought if granted will greatly prejudice him;
 - (f) The applicant has not satisfied the tests for granting the orders sought; (g) there was no irregularity in the sale;
 - (h) should the intended appeal succeed, the applicant can be compensated by damages.
12. In a further affidavit dated January 5, 2023 and a supplementary affidavit dated May 30, 2022 the applicant urged the court to grant the injunction sought claiming that the applicant had already moved the High Court seeking to lift the restriction on the title.
13. In his submissions, the applicant's counsel cited Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others, Civil Application No NAL 31/2012, in which this Court stated that for a stay of execution to be granted, the applicant must satisfy that there is an arguable appeal and if stay is not granted, the appeal will be rendered nugatory. Counsel made reference to the grounds cited in the draft memorandum of appeal and argued that the applicant has demonstrated that the intended appeal is arguable.
14. On the nugatory aspect, counsel cited Catherine Matei Chena v Pradeep Harish Hindocha Eldoret Court of Appeal Civil Application No 69 of 2020 in support of the proposition that in law, an arguable appeal need not be one that will succeed but one that is sufficient for interrogation by the Court and one that is not frivolous. Counsel argued that there is a real risk of the property being alienated in absence of an injunction because the respondents are in possession of the premises. Counsel cited George Otieno Gacha & another v Judith Akinyi Bonyo & 5 others, Civil Application No 74 of 2016, where this Court held that nothing prevented the respondents who were in possession of the property from dealing with it in a way that could change the character of the property, thereby rendering the appeal if successful an academic exercise because the situation may be irreversible and an award of damages may not be adequate.



15. In opposition to the application, the 1st and 2nd respondent’s advocates submitted that the applicant has not demonstrated that he has an arguable appeal. Further, the intended appeal cannot be rendered nugatory because the applicant can be compensated by way of damages. Counsel cited *Madhupaper International Limited v Kerr* (1985) eKLR, *Equip Agencies Limited v I & M Bank Limited* (2019) eKLR and *Julius Musili Kyunga v Kenya Commercial Bank Ltd & 2 Others* (2016) eKLR in support of the position that where the value of the property is known, an applicant can adequately be compensated in monetary terms.
16. In opposition to the application, the 3rd respondent’s counsel submitted that the applicant has not demonstrated that he is entitled to the reliefs sought. He also argued that he is a bona fide purchaser of the property and that the applicant’s remedy if at all there was an irregularity in the sale lies in section 26 of the *Auctioneers Act*. Counsel relied on *Julius Musili Kyunga v Kenya Commercial Bank Ltd & 2 others* (2016) eKLR in which this Court dismissed a similar application for failing to satisfy the principles under rule 5 (2) (b) of the *Court of Appeal Rules, 2022*. Counsel further submitted that the applicant has not demonstrated the existence of an arguable appeal or that the intended appeal if successful will be rendered nugatory and relied on *Licinus Investments Limited v Maurizio Dalpiaz* (2021) eKLR.
17. Our invitation to intervene on behalf of the applicant has been invoked under Rule 5(2)(b) of the *Court of Appeal Rules, 2022* which provides:
- In any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.
18. The principles that guide the Court in the discharge of its mandate under the above rule and which we fully adopt were aptly articulated by this Court in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others* (2013) eKLR. First, an applicant must demonstrate that the appeal or the intended appeal is arguable and second, that the appeal will be rendered nugatory should it ultimately succeed after the substratum of the appeal is no more or out of reach of the successful appellant.
19. We are also guided by the decision in *Eric Makokha & 4 others v Lawrence Sagini & 2 others* (1994) eKLR CA where this Court in an application under rule 5 (2) (b) stated:
- “An application for injunction under Rule 5 (2) (b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity...”
20. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others* (*supra*) where this Court described an arguable appeal in the following terms:
- “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.
- viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”
21. Regarding the first prerequisite, namely, whether the intended appeal is arguable, the applicant relies on the grounds in support of the application. We have also read the draft memorandum of appeal. It



will add no value for us to replicate the grounds here. We are conscious that in the application before us we are not required to make definitive findings on the proposed grounds of appeal. That is the function of the court which will hear the appeal. An arguable ground is not necessarily a ground that will succeed. Conversely, it is simply a ground that merits interrogation by the Appellate Court. In law, an arguable appeal is not one, which must necessarily succeed, but one, which is not frivolous but raises a bona fide issue that, can be argued fully before the court. Without saying more lest we embarrass the bench that will be seized of the appeal, we are satisfied that the intended appeal is arguable.

22. Turning to the second prerequisite, whether the appeal, if successful, would be rendered nugatory in the event we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (*supra*) this Court stated:

“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.”

23. In determining whether an appeal will be rendered nugatory, the position in law is that this 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. See *Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA 227.

24. We have considered the above threshold, in light of the applicant’s positions herein on this prerequisite. From the circumstances of this case, the auction took place. The 3rd respondent paid the bid price in full and he took possession of the premises and started collecting rent. The value of the property is known. In fact, the applicant provided a figure, which he claims, is the value of the property. We are therefore persuaded that an award of damages would adequately compensate the applicant in the event the intended appeal succeeds. This being the position, we find and hold that the applicant has not established that the appeal, if successful, will be rendered nugatory.

25. In conclusion, it is our finding that the applicant has failed to satisfy the two prerequisites under rule 5 (2) (b) of the *Court of Appeal Rules, 2022*. Accordingly, we hereby dismiss the application dated September 17, 2021 with costs of the respondents.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

ALI- ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

