



**Mc Tough & another v National Bank of Kenya Limited & another (Civil Application E095 of 2023) [2023] KECA 1265 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1265 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E095 OF 2023  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
OCTOBER 25, 2023**

**BETWEEN**

**MICHAEL MC TOUGH ..... 1<sup>ST</sup> APPLICANT**

**ANN MC TOUGH ..... 2<sup>ND</sup> APPLICANT**

**AND**

**NATIONAL BANK OF KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GEOFFREY COLLINS OMONDI T/A COLLINET AUCTIONEERS .... 2<sup>ND</sup>  
RESPONDENT**

*(An Application for injunction from the Ruling of the High Court of Kenya at Kisumu (Mwanaisha, J.) dated 31st July, 2023) in H.C. Commercial Case No. E003 of 2023)*

**RULING**

1. The 1<sup>st</sup> applicant, James Michael Mc Tough, and the 2<sup>nd</sup> applicant, Patricia Ann Mc Tough, are, respectively, the registered owners of the parcels of land known as Kisumu Municipality Block 11/219 and Kisumu Municipality Block 11/53 (collectively, suit properties). On the former parcel, they have built a family home in which the 1<sup>st</sup> applicant lives. On the latter parcel, they have developed a hotel christened “Sovereign Hotel” which they describe as a “high end hotel facility.... patronized by very important guests attending various official and non-official functions.” The hotel is operated by a company known as Sovereign Hotel Limited. The 1<sup>st</sup> applicant is a director of Sovereign Hotel Limited. It is unclear if the 2<sup>nd</sup> applicant is a shareholder or director in this company.
2. On 27<sup>th</sup> August, 2015, the 1<sup>st</sup> and 2<sup>nd</sup> applicants jointly offered the suit properties as securities for a loan granted to Sovereign Hotel Limited by the 1<sup>st</sup> respondent amounting to US\$5,846,000 and an overdraft facility of Kshs. 10,000,000. The 1<sup>st</sup> respondent duly registered charges on both suit properties.



3. In addition, to further secure the loan facilities granted to Sovereign Hotel Limited, the 1<sup>st</sup> respondent entered into a debenture agreement with Sovereign Hotel Limited. This latter agreement, we can only glean from the responses and pleadings by the 1<sup>st</sup> respondent as the applicants have not disclosed as much in their filed documents both before this Court and at the High Court.
4. In any event, Sovereign Hotel Limited fell into arrears in the servicing of the loan facilities. There is contestation, as often happens in this type of cases, about how much Sovereign Hotel Limited still owes; and how much of the principal debt it has actually paid to date. The bottom line is that it is not denied that Sovereign Hotel Limited owes the 1<sup>st</sup> respondent at least US\$3,802,158 – before the calculation of accrued interests and penalties for default. This is by the applicants’ own calculation. It is noteworthy that the applicants have not attached comprehensive evidence of the amounts they claim Sovereign Hotel Limited has paid.
5. The applicants claim that the default was caused by the effects of COVID-19 Pandemic and that they approached the 1<sup>st</sup> respondent with a view to restructure the loan. They claim that the 1<sup>st</sup> respondent was open to these overtures and the negotiations reached an advanced stage. However, , in the midst of these negotiations, the 1<sup>st</sup> respondent suddenly changed course and invaded the Sovereign Hotel “in the company of armed guards and wrestled control of the management and placed Sovereign Hotel Limited under receivership.” They say that this “invasion” was done in “utter disregard to the law governing receivership.”
6. Sovereign Hotel Limited reacted to the “invasion” by moving to Court in Kisumu Insolvency Cause No. E002 of 2022: *Sovereign Hotel Limited v National Bank Limited & another*. In that case, Sovereign Hotel Limited was granted conditional interim orders restraining the 1<sup>st</sup> respondent and its receiver manager from placing the hotel under receivership, administration or taking over the control of its affairs pending the hearing of the insolvency petition. The condition was that Sovereign Hotel Limited was required to pay a monthly sum of US\$20,000 towards the liquidation of the loan owed to the 1<sup>st</sup> respondent. The applicants claim that Sovereign Hotel Limited has been faithfully paying.
7. Meanwhile, the 1<sup>st</sup> respondent sought to exercise its statutory power of sale over the suit properties. As such, the 2<sup>nd</sup> respondent served the 1<sup>st</sup> applicant with a 45-day redemption notice; and later, placed advertisements in the national dailies scheduling a public auction for the suit properties on 8<sup>th</sup> March, 2023. The 1<sup>st</sup> respondent insists that he served the requisite statutory notices and has duly exhibited them in its replying affidavit before this Court.
8. This prompted the applicants to lodge a suit in the High Court against the respondents seeking, in the main, a permanent injunction stopping the scheduled public auction. The main grounds upon which they sought a permanent injunction against the 1<sup>st</sup> respondent’s exercise of its statutory power of sale were that the 1<sup>st</sup> respondent’s alleged failure to comply with mandatory provisions of the *Land Act* and alleged breaches of the loan agreement.
9. The applicants benefited from temporary orders of injunction at the High Court as the parties awaited a decision on the applicants’ application for interlocutory injunction pending the hearing of the main suit. However, in a ruling dated 31<sup>st</sup> July, 2023, the High Court (Mwanaisha Shariff, J.) dismissed the application for interlocutory injunction and, consequently, discharged the temporary injunction.
10. In her ruling, the learned judge dismissed the notice of motion application for want of merit on the ground that the applicants did not establish a prima facie case. She held that since there was no dispute that the subject properties sought to be sold off were charged on account of a loan facility provided by the 1<sup>st</sup> respondent to the Hotel, and Sovereign Hotel Limited had defaulted on the payment thereof,



the allegation that there were ongoing negotiations with a view to restructuring the facility did not in any way amount to a waiver of the 1<sup>st</sup> respondent's statutory power of sale or any other legal recourse available to it. Having found that no prima facie case was established, the learned judge held that the other elements enjoined to be established for successful outcome of the application for grant of orders of injunction fell by the way side.

11. The applicants are aggrieved by the dismissal of the application for interlocutory injunction and have timeously filed a Notice of Appeal. They also filed the Notice of Motion dated 2<sup>nd</sup> August, 2023. It seeks the following prayers that:
  - a. This application be certified urgent and be heard forthwith and ex-parte in the first instance.
  - b. A temporary injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents, their servants and/or agents, jointly and severally from advertising for sale, auctioning, selling, transferring, disposing, dealing and/or interfering whatsoever with the 1<sup>st</sup> applicant's suit property Kisumu Municipality Block 11/219 pending the hearing and determination of this application.
  - c. A temporary injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents, their servants and/or agents, jointly and severally from advertising for sale, auctioning, selling, transferring, disposing, dealing and/or interfering whatsoever with the 2<sup>nd</sup> applicant's suit property Kisumu Municipality Block 11/53 pending the hearing and determination of this application.
  - d. A temporary injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents, their servants and/or agents, jointly and severally from advertising for sale, auctioning, selling, transferring, disposing, dealing and/or interfering whatsoever with the 1<sup>st</sup> applicant's suit property Kisumu Municipality Block 11/219 pending the hearing and determination of the intended appeal.
  - e. A temporary injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents, their servants and/or agents, jointly and severally from advertising for sale, auctioning, selling, transferring, disposing, dealing and/or interfering whatsoever with the 1<sup>st</sup> applicant's suit property Kisumu Municipality Block 11/53 pending the hearing and determination of the applicants intended appeal.
  - f. Costs of the application be provided.
12. The application is opposed by the 1<sup>st</sup> respondent vide a replying affidavit of Paul K. Chelanga, the 1<sup>st</sup> respondent's recoveries manager deposed on 14<sup>th</sup> September, 2023.
13. Both parties filed written submissions which they sought to rely on during the plenary hearing.
14. The applicants contend that they have an arguable appeal. They point out that they have raised eight (8) grounds of appeal in their draft Memorandum of Appeal, all of which constitute arguable points of law. They outlined the notable points as being that the learned judge erred: in law in failing to find that their application dated 20<sup>th</sup> February, 2023, had not only met the threshold for grant of an injunction but that the same was meritorious pending the hearing and determination of the main suit; in law in misinterpreting the provisions and import of Order 40 Rule 1 and 2 of the *Civil Procedure Rules* in arriving at her decision; in law and in fact in finding that the 1<sup>st</sup> respondent's statutory power of sale



- had arisen to warrant their decision to advertise the applicants suit properties for public auction; and, in acting on the wrong principles and misdirected herself in considering irrelevant issues while arriving at her finding.
15. As regards the question whether the appeal would be rendered nugatory, the applicants argue that they have demonstrated that they are bound to suffer substantial loss if the injunction is not granted and that the respondents already advertised the subject properties for public auction to take place on 21<sup>st</sup> September, 2023.
  16. The applicants also argue that prior to the impugned ruling of the superior court, they were enjoying quiet possession and use of the subject properties; that, they had, in their suit before the superior court, shown that the 1<sup>st</sup> respondent's simultaneous placing of the Hotel under receivership and exercising its statutory power of sale of both subject properties, was malicious and unlawful. In this regard, the applicants contended that the objects set out in section 522 of the *Insolvency Act* are meant to maintain a company in distress as a going concern; achieving a better outcome for the whole body of creditors and to realize the property of the company in order to make a distribution to one or more secured creditors. However, the 1<sup>st</sup> respondent's move to take over the control and management of the Hotel while on the other hand selling the subject property wherein the Hotel sits was, to the applicants, nothing more than "a kiss of death" which would ensure that the applicants come out with nothing. Meanwhile, the applicants add, the selling of the subject property of the 1<sup>st</sup> applicant would mean that he shall have nowhere else to go.
  17. The applicants submitted that either way, the balance of convenience tilted in their favour as they are the registered owners of the subject properties; and further, the Hotel has continued to remit the monthly payment of USD 20,000 (Kshs. 2 million) to the 1<sup>st</sup> respondent as ordered in Kisumu HCC Insolvency Cause No. E002 of 2022, *Sovereign Hotel Limited v National Bank Limited & Kolluri Venkata Subbaraya Kamsastry*. Thus, they argue, the 1<sup>st</sup> respondent will not suffer any prejudice as it continues to receive its monthly pay as usual before it placed the Hotel on receivership.
  18. On its part, the 1<sup>st</sup> respondent contended that the applicants filed this instant application as an afterthought after the High Court declined to grant ex parte orders of their application dated 31<sup>st</sup> July, 2023, by directions given on 1<sup>st</sup> August, 2023. Hence, the 1<sup>st</sup> respondent argues, this application is an attempt by the applicants to get from this Court, the ex parte orders that they failed to obtain from the High Court. In this regard, the 1<sup>st</sup> respondent argued that it was improper for a party to file identical applications seeking similar orders in two different courts; and further argued that it was aware that the applicants have continued to sustain both applications as they have not withdrawn either of the applications in either court.
  19. The 1<sup>st</sup> respondent argued that the applicants' application in the High Court was fixed for hearing on 19<sup>th</sup> September, 2023 based on a hearing notice served upon it by the firm representing the applicants (exhibit on page 202 of the 1<sup>st</sup> respondent's record). In this regard, the 1<sup>st</sup> respondent argued that: the applicants conduct amounted to forum shopping in the hope that either this court or the High Court will grant the orders sought in the identical applications filed in the two courts; the current state of affairs is likely to embarrass the administration of justice if the two courts reach conflicting decisions on the identical applications; this court should strike out this application and refrain from hearing it as the earlier filed application in the High Court is still active; and if this Court hears this application, it ought to dismiss it for lack of merit and for being an abuse of the court process.



20. Further, the 1<sup>st</sup> respondent argues that the application lacks merit because, in their view:
- a. The applicants do not have an arguable appeal against the impugned High Court ruling.
  - b. The appeal would not be rendered nugatory in the unlikely event that it succeeds even if the orders of injunction pending appeal are not granted.
  - c. The properties whose sale by public auction in the exercise of 1<sup>st</sup> respondent's statutory power of sale the applicants seek to stop are commodities of trade having been offered by the applicants as security for a credit facility.
  - d. The charged properties, being commodities, have a value fixed to them.
  - e. The loss of the charged properties can be easily compensated by an award of damages if a sale by public auction is conducted, and the applicants are eventually successful in their intended appeal or in their suit pending at the High Court.
21. The 1<sup>st</sup> respondent argues that for the above stated reasons, this application lacks merit. It further argues that the applicants have not demonstrated that they have an arguable appeal, nor that they would suffer substantial loss if the orders sought are not granted. In particular, the 1<sup>st</sup> respondent emphasizes that the charged subject properties are commodities for sale whose value can be ascertained and can be compensated by an award of damages if the applicants are eventually successful. The 1<sup>st</sup> respondent further argues that it is a profitable commercial bank with substantial resources and has the capability to pay any damages that may eventually be ordered if the applicants are successful on appeal.
22. For these reasons, the 1<sup>st</sup> respondent submits that the applicants have not demonstrated that the intended appeal will be rendered nugatory if it succeeds; and urge this Court to dismiss this application.
23. During the plenary hearing on 19<sup>th</sup> September, 2023, Mr. Odeny appeared for the applicants while Mr. Tugee appeared for the 1<sup>st</sup> respondent. The Court urged both advocates to attempt a negotiated settlement and placed the file aside to facilitate that. However, when the two advocates returned to the platform, they reported that they had made no headway.
24. In a further attempt to nudge the parties a negotiated settlement, this Court granted the applicants a temporary injunction stopping the public auction of the suit properties which was scheduled for 21<sup>st</sup> September, 2023 in exchange for the applicants paying within 30 days, Kshs. 375 Million to the 1<sup>st</sup> respondent towards liquidating the owed amounts.
25. When the parties' advocates appeared before the Court for a scheduled mention on 18<sup>th</sup> September, 2023 to update the Court on the status, both Mr. Odeny and Mr. Tugee confirmed that the applicants had not paid the amounts ordered by the Court. Consequently, this Court discharged the conditional temporary injunction it had granted on 19<sup>th</sup> September, 2023.
26. Rule 5(2)(b) of the [Court of Appeal Rules](#) which the applicants have invoked before us provides that:
- Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may -
- (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction



or stay of any further proceedings on such terms as the Court may think just.

27. As this Court has said countless times, this rule clothes this Court with original jurisdiction to preserve the substratum of the appeal pending before it. The invocation of the rule does not usher in an analysis akin to an appeal against the impugned decision of the superior court; neither is the rule aimed at correcting the exercise of discretion by the trial court.
28. It is common ground between the parties that for the applicants to succeed, they must satisfy the twin principles enunciated in our jurisprudence: demonstration that the appeal is arguable; and a demonstration that the appeal would be rendered nugatory but for the prayed-for relief of stay of execution or injunction.
29. On the first principle, whether the appeal is arguable, we have to consider whether the appeal, as filed, raises at least a single *bona fide* arguable point noting, as the Court defined it in [Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others](#) [2013] eKLR, that an arguable appeal is not one with a high probability of succeeding; it is, instead, one which ought to be argued fully before the Court. Differently put, an arguable appeal is one which is not frivolous.
30. Is the appeal preferred before the Court frivolous? The applicants strenuously argue that they will be able to demonstrate that the learned judge of the High Court proceeded from wrong principles in denying the interlocutory injunction; and that her assessment of whether a prima facie case had been established was plainly wrong. We are willing to charitably concede that since the applicants are exercising their undoubted right of first appeal, a claim of abuse of discretion based on contested factual analysis can form an arguable appeal as we have loosely defined it in our jurisprudence.
31. The case turns, however, on whether the appeal would be rendered nugatory if the injunctive relief is not granted. We note the following:
  - a. There is no dispute that the applicants offered the suit properties as securities for loans advanced to Sovereign Hotel Limited;
  - b. There is equally no dispute that the monies were advanced to Sovereign Hotel Limited;
  - c. There is, further, no dispute that there was a default in liquidating the loans advanced to Sovereign Hotel Limited and that substantial amounts are still owed;
  - d. Further, indisputably, Sovereign Hotel Limited is unable or unwilling to repay the loan amount even after defaulting and being called to pay the full amounts in order to redeem the charged properties;
  - e. The applicants charged their properties willingly and knowingly. The existence, validity or integrity of the charge instrument has not been questioned;
  - f. There is no suggestion that the 1<sup>st</sup> respondent, a first-tier bank, lacks the ability to repay any amounts proved owed to the applicants at the conclusion of the trial or appeal;
  - g. The legal dispute between the applicants and the 1<sup>st</sup> respondent herein is distinguishable from that between Sovereign Hotel Limited and the 1<sup>st</sup> respondent: whereas the former is governed by the charge instruments



between the applicants and the 1<sup>st</sup> respondent, the latter is governed by the debenture agreement between the 1<sup>st</sup> respondent and Sovereign Hotel Limited. As such, the regime of remedies under each contract is different and distinct and the exercise of the rights of the 1<sup>st</sup> respondent under one regime cannot, ipso facto, limit the exercise of rights in the other regime. Consequently, the actions that the 1<sup>st</sup> respondent has taken to recover its debt under the debenture agreement between itself and Sovereign Hotel Limited are legally irrelevant for the exercise of its statutory power of sale arising from the charge between itself and the applicants.

32. The bottom-line is that what the applicants seek to injunctively interfere with is the 1<sup>st</sup> respondent's exercise of its statutory power of sale in a situation where the loans advanced and the default are incontestable. As between a chargee and a chargor, this Court is very slow to restrain the former. Indeed, our jurisprudence is that even an allegation of fraud (of the kind made here) on the part of the chargee is usually insufficient to provoke a restraint without requiring the chargor to pay into court the disputed amounts (see *Mrao v First American Bank of Kenya Limited & 2 Others* [2003] eKLR). There are, of course, exceptions to this general rule
  - for example where there are issues germane to the validity of the instrument creating the charge or when the integrity of the charge instrument is impugned.
33. In the instant case, there is not even a whisper that these exceptions apply. The applicants have not otherwise demonstrated to us why we should carve a special exception in their case. The general legal logic – borne of Law and Economics sensibility – is that when a chargor accepts to charge their property as security for a loan, they are, definitionally, agreeing that the charged property is a fungible commodity. Doing so means that such a chargor-applicant accepts that damages are an adequate remedy should a dispute or default arise and the chargee opts to exercise its statutory power of sale. Our jurisprudence has, consequently, consistently taken the position that charging a property commoditizes it: to offer a property as security for a loan is to convert it into a commodity for sale in the land market in the event of a default. See, for example, *Paul Muhoro Kihara vs Barclays Bank (K) Ltd*, Milimani HCCC No.33 of 2002 (2001) 2EA 420 and *John Nduati Kariuki t/a Jobester Merchants v National Bank of Kenya Ltd* [2006] eKLR.
34. The upshot is that, in the circumstances of this case, the applicants are simply unable to demonstrate, in the face of the valid charge instrument and incontestable evidence that the debt is still owing, that their appeal will be rendered nugatory because, definitionally, there are adequate monetary reliefs for their alleged cause of action. This is one of those cases where, adopting the words of Lord Hoffman in *National Commercial Bank of Jamaica v Olint Corp. Limited* [2009] 1 WLR 1405, the applicants should be “left to their remedy in damages” in the event they eventually succeed.
35. Consequently, we reach the conclusion that the application dated 2<sup>nd</sup> August, 2023 has no merit. It is hereby dismissed with costs to the 1<sup>st</sup> respondent. Further, we order that the 1<sup>st</sup> respondent is at liberty to proceed with a new public auction following due advertisement of the sale without the need to serve new statutory notices on the applicants.
36. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF OCTOBER, 2023.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

