



**Tropical Institute of Community Health Development Trust  
(TICH) Registered Truste v SBM Bank Limited (Civil Application  
153 of 2017) [2022] KECA 108 (KLR) (11 February 2022) (Ruling)**

Neutral citation: [2022] KECA 108 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION 153 OF 2017  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
FEBRUARY 11, 2022**

**BETWEEN**

**TROPICAL INSTITUTE OF COMMUNITY HEALTH DEVELOPMENT TRUST  
(TICH) REGISTERED TRUSTEES ..... APPLICANT**

**AND**

**SBM BANK LIMITED ..... RESPONDENT**

*(Being an application for injunction pending an appeal from the  
ruling of the High Court of Kenya at Kisumu (Kamau J) dated 28th  
June 2021 in Kisumu High Court Commercial Case No. E001 of 2020)*

**RULING**

1. In their Notice of Motion dated 27<sup>th</sup> September, 2021 brought under Rule 5(2)(b) of the Court of Appeal Rules, the applicants seek an injunction to restrain the respondent, whether by itself, its agents, servants or any person claiming through it from selling disposing of or otherwise interfering with the applicants' ownership, use or occupation of L. R. No. 654/45 (IR 123371), No. Kisumu Municipality/BlocK12/201 and Kisumu Municipality/Block 12/143 (hereafter 'the suit properties') pending the hearing and determination of the applicants' appeal.
2. The application is based on the grounds that the applicants are the registered owners of the suit properties. They had filed Kisumu High Court Commercial Case No. E001 of 2020 seeking to stop the realization by the respondent of securities said to be registered over the suit properties to secure the repayment of monies allegedly lent by the respondent to Great Lakes University of Kisumu (GLUCK), a private university established and sponsored by the applicants. They had also filed within the same suit an application seeking an injunction pending the hearing and determination of the suit.



3. In its ruling dated 28<sup>th</sup> June 2021, the High Court dismissed the application and conditionally permitted the respondent to sell the suit properties. The applicants are dissatisfied with the ruling and orders of the High Court and have lodged a Notice of Appeal and also filed their appeal, which they submit is not frivolous. They argue that unless an injunction is granted as prayed, the respondent will almost certainly proceed with the sale of the securities, thereby rendering the applicants' appeal nugatory.
4. The applicants further argue that there is potential harm that they, their students and the public risk suffering if an injunction is not granted. They ask this court to exercise its discretion in their favour and grant the injunction that they seek.
5. Briefly, the facts forming the background to this application are that the applicants had lodged an application before the High Court dated 3<sup>rd</sup> November, 2020 seeking essentially the same orders that they now seek from this Court, pending the hearing and determination of their suit before the High Court. They stated before the High Court that they had incorporated the Tropical Institute of Community Health Development Trust Trustees under The *Trustees (Perpetual Succession) Act*, which trust was registered on 7<sup>th</sup> July 1999, through which they would hold property. In 2011, they established a private university known as the Great Lakes University of Kisumu (GLUCK) and registered a trust known as the Great Lakes University of Kisumu Trust to oversee the establishment of the said University.
6. Thereafter, GLUCK applied for a loan of Kshs 240,000,000/- from the respondent's predecessor, Chase Bank (K) Limited, on the security of charges over the suit properties. The applicants aver that their role in the matter was purely that of a guarantor. They were all along under the impression that GLUCK was repaying the loan, and on no occasion did the respondent inform them that GLUCK had defaulted. The applicants became aware of the default on 2<sup>nd</sup> September, 2020 when Colinet Auctioneers, acting on the instructions of the respondent, served them with a forty-five (45) days' notice to pay the sum of Kshs 303,644,381.75 as at 26<sup>th</sup> August 2020 with interest at 11.75%, failing which the suit properties would be sold.
7. The respondent's response through its Legal Officer, Kevin Kimani, was that by a Letter of Offer dated 26<sup>th</sup> June 2015, it had advanced to GLUCK a term loan facility to the tune of Kshs 230,000,000/= which was to be repaid over a period of one hundred and twenty (120) months at an interest rate of sixteen (16%) per cent per annum on a reducing balance. It was also a term of the facility that late payments were to attract default interest at the rate of 3.33% per month over and above the amount payable. The respondent further averred that the Registered Trustees of GLUCK had executed the Memorandum of Acceptance thereby accepting all the terms and conditions.
8. According to the respondent, by another Letter of Offer dated 20<sup>th</sup> July, 2015, the respondent advanced GLUCK a further term loan of Kshs 10,000,000/= which facility was used to top up the existing loan. That it was a strict term of the said Letter of Offer that the facility would be repaid over a period of twelve (12) months with interest at the rate of eighteen 18% per annum on a reducing balance and that late payments would attract a default interest of 3.33% per month over and above the monthly amount due. These terms were also accepted by the Registered Trustees of the University who once again executed the Memorandum of Acceptance. These facilities, according to the respondent, were secured by a first legal charge over the suit properties which were registered in the applicants' name.
9. By its letter dated 25<sup>th</sup> November 2016, the respondent recalled the total outstanding balance of Kshs 206,285,466.70 due to failure by GLUCK to adhere to the agreed terms of repayment of the loan facility. The respondent then served the applicants, GLUCK and the County Land Commissioner



a ninety (90) days Statutory Notice on 23<sup>rd</sup> March 2017 demanding immediate payment of the sum of Kshs. 214,719,673.45. Instead of remedying the default, GLUCK and the applicants filed Kisumu ELC No 250 of 2017 (now Kisumu HCCC No 42 of 2018). The respondent averred that in that suit, after protracted negotiations over a period of almost three years, the applicants offered to sell the suit properties and a consent dated 15<sup>th</sup> July, 2020 was signed to have the matter settled out of Court and the matter was marked as settled.

10. In its decision, the High Court found that the balance of convenience in the matter tilted against the grant of an injunction in favour of the applicants, and it dismissed the applicants' notice of motion dated 3<sup>rd</sup> November, 2020, leading to the application now before us.
11. In their submissions before this court dated 26<sup>th</sup> October 2021, the applicants argue that one of the main grounds upon which the High Court rejected their application for injunction is that there was an earlier suit in which a consent was recorded and that it was persuaded that there had indeed been a consent, the substance of which was that the borrower had agreed with the respondent that it was at liberty to sell the suit properties. The applicants submit that there is no question that they were not parties to that suit, and they could not be bound by the terms of a consent in a suit to which they were not parties. That neither they nor the borrower were parties to that suit, and the respondent had conjured up a false law suit using the name of a non-existent entity in order to defraud the applicants and the borrower, averments which the High Court had ignored.
12. The applicants further submit that the finding of the High Court was also contradictory when it found that there was nothing to prove that the consent had been filed while at the same time saying that the consent had generated a court order and it could not sit on an appeal against the order.
13. The applicants further submitted that the High Court had chosen to accept the evidence of the respondent over that of the applicants; that the existence of two different versions on a matter as basic but fundamental as the very fact of the registration of a charge should have led the court to find that the question whether there was a valid charge should have led to a finding that a prima facie case with a probability of success existed.
14. It was also their case that the question whether the loans were disbursed in the first place, and whether a charge on the main security was even registered, matters which the High Court stated are fit for trial, make this a fit and proper case for the grant of an unconditional injunction pending the hearing and determination of the appeal.
15. In its submissions in reply dated 27<sup>th</sup> October 2021, the respondent notes that in its decision in *Alfred Mincha Ndubi v Standard Limited* [2020] eKLR, this Court had noted that in an application under Rule 5(2)(b) of the Court of Appeal Rules, an applicant must satisfy the court that it has an arguable appeal, and that the appeal will be rendered nugatory should the orders sought not be granted. Its submission was that the applicants neither had an arguable appeal, and if they did, it would not be rendered nugatory.
16. According to the respondent, it is the applicants who forwarded to it a consent dated 5<sup>th</sup> October 2018 granting the bank liberty to proceed with the intended auction and that the monies realized from the auction in excess of Kshs.304, 000, 000/= was to be deposited in the borrower's account. That the applicants having admitted the debt and consented to the sale of the properties, their appeal is frivolous and need not be argued fully before this Court.
17. The respondent submitted further that the applicants have not demonstrated how the appeal will be rendered nugatory should the respondent proceed with the auction as agreed. According to the respondent, the subject matter of the suit are properties which were charged to obtain loan facilities.



Upon being charged, the properties, became commodities capable of being realized. The respondent relies on the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* (1986) eKLR in which the court held that it is not normal in money decrees for the appeal to be rendered nugatory if payment is made. It submits that it would be able to refund the decretal amount should the appeal succeed, an averment that has not been challenged by the applicants. Reliance for this submission is placed on *Alfred Mincha Ndubi v Standard Limited (supra)*.

18. We have considered the application and the parties' submissions with respect thereto. The applicants seek the exercise of this Court's jurisdiction under Rule 5(2)(b) of this Court's Rules. The exercise of jurisdiction under this Rule is discretionary and requires that a party satisfies the court on two limbs. First, that it has an arguable appeal and secondly, that its appeal, if successful, will be rendered nugatory should the order it seeks not be granted. In its decision in *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR the Court explained its jurisdiction in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

19. Regarding the question whether an appeal is arguable, this Court in *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR stated as follows:

“On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. 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.”

20. The applicants tacitly acknowledge that the respondent advanced a loan to GLUCK for which they were the guarantor, and that the properties registered in their name were used as security for the loan. They however, dispute that either they or GLUCK were parties in HCCC No. 42 of 2018, the suit in which a consent was entered into permitting the respondent to dispose of the charged properties. They also allege that there is an issue as to whether or not a charge was actually registered against the subject properties. As the court observed in *Stanley Kang'ethe Kinyanjui*, an arguable appeal is not one that must necessarily succeed, but one that is worthy of consideration by the court. In light of this holding and taking into account the above contentions by the applicants, we find that the applicants have demonstrated that they have an arguable appeal.
21. The question, however, is whether the applicants have established that their appeal will be rendered nugatory should the court fail to grant the injunction that they seek and their appeal ultimately succeeds. The applicants submit that should the Court not allow their application, the interests of students and the public will suffer as they have established an institution on the suit properties. The fact, however, that an institution that serves the public has been established on land that has been used as security for a loan is not, in and of itself, a basis for finding that disposal of the property in exercise of a chargee's power of sale will render an appeal nugatory. The applicants have not challenged the respondent's averment that should the appeal succeed, it will be in a position to compensate the applicants in damages.



22. In the circumstances, we find that the applicants have not satisfied the second limb required for the grant of relief under Rule 5(2)(b). The application dated 27<sup>th</sup> September 2021 is accordingly without merit and is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR.**

