



Anfakari Limited & 3 others v Fidelity Commercial Bank Ltd (Civil Application E061 of 2021) [2022] KECA 448 (KLR) (18 March 2022) (Ruling)

Neutral citation: [2022] KECA 448 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E061 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MARCH 18, 2022**

BETWEEN

**ANFAKARI LIMITED 1ST APPLICANT
SORIANO ANTONI 2ND APPLICANT
SORIANO CARLO LUIJI 3RD APPLICANT
SORIANO FRANCISC 4TH APPLICANT**

AND

FIDELITY COMMERCIAL BANK LTD RESPONDENT

(Being an application for injunction restraining the respondent from advertising for sale, selling by public auction or in any manner whatsoever disposing off all that property known as LR No. 749 (Original No 703/10 Malindi) in purported exercise of its statutory power of sale in respect thereof pending the hearing and determination of an appeal from the Judgement of the High Court of Kenya at Malindi delivered by Hon. Nyakundi, J. on 6th October, 2021 in High Court Civil Suit No 11 of 2017)

RULING

1. The application before us is dated 3rd December, 2021 brought pursuant to Rules 5(2)(b), 42 and 47 of the *Court of Appeal Rules* and seeking an injunction to restrain the Respondent from advertising for sale, selling by public auction or in any manner whatsoever, disposing off all that property known as LR No. 749 (Original No 703/10) Malindi in purported exercise of its statutory power of sale hereof pending the hearing and determination of the intended appeal from the judgment of the High Court of Kenya in Malindi, Civil Case No. 11 of 2017. The motion was supported by the sworn affidavit of the 3rd Applicant.



2. The application is brought pursuant to Rule 5 (2) (b) of the Court of Appeal Rules which provides as follows:

“ 5. Suspension of sentence, injunction and stay of execution and stay of further proceedings.

- (1) No sentence of death shall be carried out until the time for giving notice of appeal has expired or, where notice of appeal has been given, until the appeal has been determined.
- (2) 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 —
 - (a) in any criminal proceedings, where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal;
 - (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 a stay of any further proceedings on such terms as the Court may think just.”

3. The background of this application is a dispute whereby the Applicants approached the Respondent bank for a loan of Kshs.6,000,000/=, which was advanced on the 2nd August, 2011 to the 1st Applicant, and secured by a charge over the parcel of land being LR 749 (Originally 703/10 Malindi) (suit property). The 2nd, 3rd and 4th Applicants, directors of the 1st Applicant company were personal guarantors. The Applicants were aggrieved by the Respondent’s attempt at realization of security of the charged property over the loan advanced to them for reason: that the Respondent was acting on the strength of a defective charge document purported to have been executed by the 2nd and 4th Applicants; that there was no Resolution authorizing the further charge; that the Respondent was ready to sell the suit property as per Notification of Sale for 20th December, 2021; and that the Applicants stand to suffer loss if the suit property is sold to recover Kshs.10,000,000/= as its current value is Kshs.120,000,000/=.

4. The Applicants filed suit against the Respondent in the High Court in which they challenged the demand notice for Kshs.3,635,330/= on grounds there was a restructured loan scheme that was not signed by any of the directors as they were all abroad at the time, and that therefore the statutory notice issued by the Respondent was based on a defective agreement; that the alleged balance of the loan demanded by the Respondent lacked any basis stating the repayments made were more than acknowledged by the Respondent going by the amount demanded; and, that there was no company resolution passed by the 1st Applicant to authorize the restructuring of the term loan.

5. The Respondent in its defence maintained that the 1st Applicant was advanced a loan of Kshs.3,000,000/- and a charge over the suit land was executed; that the loan facility was extended for an amount of Kshs.6,000,000/- without creation of a further charge and that the original loan was restructured; that there was a board resolution of the 1st Applicant that approved the credit facility applied for.

6. The High Court was satisfied that the loan was advanced to the 1st Applicant and the same was secured with the suit property. The court was satisfied that the 2nd to 4th Applicants were personal guarantors for the loan and therefore none of them were excluded from responsibility for the debt; that the Respondent had a legal interest on the title to the suit property being the security for the loan; that



- the Respondent's power of sale had accrued as there was a default on the part of the 1st Applicant; and that there was an enforceable contract between the parties. The suit was dismissed.
7. The Applicants filed a notice of appeal and a memorandum of appeal. In that memorandum, the Applicants take issue with the court's failure to find that no statutory notice was issued to the Applicants; the failure to make a pronouncement on the validity of the charge document despite the evidence that the 1st Applicant's directors did not execute the same despite absence of a resolution authorizing the further charge. It was sought that the judgement of the High Court be set aside and substituted with entry of judgement as prayed in the Applicants' plaint.
 8. When this application was called out for virtual hearing on the 26th January 2022, Mr. Wameyo learned counsel appeared for the Applicants, while Mr. Mutugi appeared for the Respondent. Each advocate had filed written submissions. Mr. Wameyo in a brief highlight urged this court to grant the injunction sought arguing that if the same was not issued, the appeal will be rendered nugatory as the Respondent has all the intention of selling the suit property on 20th December, 2021 in exercise of its statutory power of sale as evidenced by the notification of sale dated 21st October, 2021. To counsel, the Respondents will suffer no prejudice if the order sought is granted. Counsel urged that the charge in respect of which the Respondent purported to use in exercise of its statutory power of sale was defective as it was not validly executed. Secondly, that there was no resolution from the company in respect of the further charge. Thirdly, the Applicants also urged that the requisite Notification of Sale was not issued on them, and that all they were served was the 14 days' notice, instead of the 90 days' notice anticipated in the law.
 9. On the nugatory aspect counsel urged that the suit property was valued in excess of Kshs.100,000,000/-, while amount sought to be recovered was Kshs.6,000,000/-; that if the suit land is sold the appeal will be rendered nugatory. On the other hand, counsel urged, the Respondent will suffer no prejudice if order is granted as it will still recover the amount due to it. Counsel cited *Madhupaper International v Kerr* Civil Application No. 116 of 2015 for the proposition that the order for injunction is discretionary and depends on the nature of the case, and urged the court to exercise it in the Applicants' favour. He relied on the case of *Mrao Ltd v First American Bank & Others Civil Appeal 39 of 2002* for the proposition that his clients had satisfied the test of a prima facie case required for grant of injunction.
 10. Counsel submitted that his clients were ready to deposit Kshs. 6 million in order to obtain stay pending the appeal. However, Mr. Mutugi had no instruction on the offer but said that since his client was claiming the total amount due was Kshs. 10 million he could be agreeable to that amount being deposited. No agreement was reached in that regard.
 11. Mr. Mutugi in his submissions started by stating that the property was not sold on 20th December, 2021 as earlier advertised. He relied on his submissions and urged that the value of the suit property was contested, but added that once amount owed is realized, the balance will be surrendered to the Applicants; that in any event the suit property was charged as security for the amount loaned, and that its immaterial if it exceeded the value of the loan it secured. Counsel submitted that the Applicants cannot claim the charge is invalid after they received the amount loaned, and urged that the Applicants had no arguable appeal, and the application should be dismissed. He relied on *Trust Bank Limited and another v Investech Bank Limited and 3 Others [2000] eKLR*.



12. This application invokes the exercise of judicial discretion. As it has been stated by this Court in numerous cases especially in the case cited by the Respondent of Trust Bank Limited And Anor, (supra), thus:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionally and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, or 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.”

13. The law on the grant of orders under Rule 5(2)(b) of the Court of Appeal Rules (including injunction) is well settled as restated by this Court in *Chris Mungga N. Bichage v. Richard Nyagaka Tongi & 2 Others [2013] eKLR* where the court succinctly set out the law as follows:

“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”

14. Turning to the matter at hand, we have considered the application, the affidavit sworn in support of it, submissions by each counsel and the authorities relied upon. Applying the above principles to the facts of this case, we find there is divergence on the facts of the case. However, it is not in dispute that the Applicants applied for a loan from the Respondent and secured it with the suit property. What is disputed includes whether the Applicants acquired an additional facility from the Respondent, and whether the requisite notices were issued to the Applicants.

15. The Applicant has been consistent both at the high court and before this court that they contest the validity of the execution of the charge instrument upon which the Respondent intends to exercise its statutory power of sale. Two reasons were urged in support of that ground, first that the same was not executed by the directors of the 1st Applicant, and secondly, the 1st Applicant did not pass a resolution to authorize the execution of that instrument. We think that this is an arguable ground of appeal upon which the Applicants should be heard.

16. On the nugatory aspect, the Applicant has urged that it stood to lose enormously if an injunction is not granted because the amount sought to be recovered by the Respondent was Kshs. 6 million against the value of the property of over Kshs. 100 million. On the other hand, it is contended that the Applicants are in default and the Respondent has a right to exercise its statutory power of sale, which right has accrued, in order to recover what is due to it.

17. At the same time, the argument that the Applicants stand to suffer enormous loss cannot stand for the simple reason that they willingly surrendered the suit property to the Respondent as security for the facility they obtained from it, turning the property to a commercial chattel, and at the time they did so, the Applicants were well aware of the value of the suit property and the risk involved. Is likelihood to suffer substantial loss a good ground to grant stay or an injunction pending appeal? On that issue,



in the case of *Wambugu Road Estate Limited & another v Kesbaria & another* (Civil Application 227 of 2019) [2021] KECA 218 (KLR) this court held:

“Likelihood of suffering substantial loss has never been a ground for grant of an order of stay of execution under rule 5(2) (b) of this Court’s Rules.”

18. We say no more. Even then we are satisfied, and we take note that in the event the suit property is sold in realization of its security by the Respondent, and their appeal eventually succeeds, the Applicants can be compensated by an award of damages. There is no assertion that the Respondent is incapable of making good such compensation. In the circumstances, the Applicants’ appeal will not be rendered nugatory if the injunction sought is declined and the appeal succeeds. The Applicants have, therefore, failed to demonstrate the existence of both limbs as required by Rule 5(2)(b) of this Court’s Rules.
19. The upshot is that we decline to grant an injunction pending the hearing and determination of the intended appeal as sought. The Notice of Motion application dated 3rd December, 2021, is dismissed with costs to the Respondent.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MARCH 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

