



Muga Developers Limited v Equity Bank of Kenya Ltd & 4 others (Civil Application E082 of 2021) [2022] KECA 453 (KLR) (18 March 2022) (Ruling)

Neutral citation: [2022] KECA 453 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E082 OF 2021
RN NAMBUYE, HM OKWENGU & KI LAIBUTA, JJA
MARCH 18, 2022**

BETWEEN

MUGA DEVELOPERS LIMITED APPLICANT

AND

EQUITY BANK OF KENYA LTD 1ST RESPONDENT

PRICEWATER HOUSE COOPERS 2ND RESPONDENT

MUNIU THOITHI 3RD RESPONDENT

GEORGE WERU 4TH RESPONDENT

SANYI JITUAN SENSE INVESTMENT LIMITED 5TH RESPONDENT

(Being an application for injunction under rule 5 (2)(b) of the Court of Appeal Rules, pending filing, hearing and determination of an appeal from part of the Ruling and Order of the High Court of Kenya at Nairobi (Majanja, J.) delivered on 14th December, 2020 in H.C.C.C. E082 OF 2020)

RULING

1. This is an application under rule 5(2)(b) of the [Court of Appeal rules](#) in which the applicant, Muga Developers Ltd. is seeking orders of injunction restraining the 1st respondent, Equity Bank Ltd. (the Bank) from exercising its statutory power of sale in regard to LR No. 28223/33. The High Court (Majanja, J) had issued a temporary injunction limited to the period within which the bank would comply with the statutory requirements for exercising its statutory power of sale. The requirement included issuance of a fresh statutory notice under section 90 of the [Land Act](#) 2012. The applicant, being apprehensive that the bank would proceed to exercise its statutory power of sale before its intended appeal is heard, has applied to this Court for an order of injunction. The applicant has filed a notice of appeal and a draft memorandum of appeal.



2. The application is opposed by the 1st respondent through a replying affidavit sworn by its director corporate banking, one Moses Ndirangu. In the affidavit he has reiterated that credit facilities were advanced to the applicant and securities created by the applicant to secure the credit facilities; that the applicant failed to repay the facilities advanced to it; that the 1st respondent has in the last 4 years attempted to recover the monies from the applicant without success; that the applicant has admitted its indebtedness; and that the High Court only issued the limited temporary order of injunction because it found that the 1st respondent had not served a statutory notice to enable it exercise its statutory power of sale. It is contended that the applicant has not made any attempt to exercise its equity of redemption, nor has it made any offer to repay the entire amount arising from the charge. Finally, the 1st respondent contends that it is a reputable bank and can meet any award of damages that may be awarded against it in the likely event that the applicant's appeal is successful.
3. We have carefully considered this application, and the contending parties written submissions as well as authorities. The application before us being one under Rule 5(2) (b) of the Court of Appeal Rules, this Court in *Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others [2013] eKLR* restated the principles to be applied in considering such an application. An applicant must satisfy the Court on the twin principles of arguability of the appeal and the nugatory aspect, if the order sought to be stayed is not granted. It is also instructive that a single bona fide arguable issue is sufficient, and that an arguable appeal is not necessarily one that must succeed.
4. The issue that emerges for determination in this application is whether the applicant has satisfied the twin principles under Rule 5(2)(b) of the Court of Appeal Rules so as to justify the granting of the orders sought. It is common ground that the applicant obtained financial facility from the 1st respondent in consideration for which it provided the suit property as security. The applicant has not denied that there is money due and owing from it to the bank in regard to the financial security provided to it. The learned Judge of the High Court found that the 1st respondent had the statutory power of sale, but issued a limited injunction because the 1st respondent had not served a statutory notice. The applicant has not demonstrated any efforts to pay the owed amount even though he claims that the 1st respondent has fettered its right of redemption.
5. In *Mrao Limited vs First American Bank of Kenya & 2 Others [2003] eKLR*, the Court of Appeal adopted *Halsbury's Laws of England, Vol. 32 (4th edition)* at paragraph 725 on the circumstances in which a mortgagee may be restrained from exercising his statutory power of sale as follows:

“...The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”
6. It is evident to us that to the extent that the applicant admits that the financial facility was accorded to it by the bank and money arising from the facility, his appeal against the orders issued by the learned Judge in regard to the realization of the security is not arguable. As regards the nugatory aspect, while it is true that the 1st respondent may exercise its statutory power of sale, the applicant's appeal cannot be said to be rendered nugatory. First, the applicant having offered the suit property as security, it has become a commercial entity that can be compensated in monetary value. Secondly, if the applicant is successful in the appeal, he would be entitled to damages and it is common knowledge that the 1st respondent is a reputable banking institution and would have no difficulties in paying damages.



7. For the above reasons, we find that the applicant has failed to satisfy the conditions under Rule 5(2) (b) of the Court of Appeal Rules. Its application has no merit and is accordingly dismissed.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

