



REPUBLIC OF KENYA



Warui & another v HFC Limited & 2 others (Civil Application E239 of 2021) [2022] KECA 816 (KLR) (19 May 2022) (Ruling)

Neutral citation: [2022] KECA 816 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E239 OF 2021
RN NAMBUYE, J MOHAMMED & S OLE KANTAI, JJA
MAY 19, 2022**

BETWEEN

PAULINE WANGECI WARUI 1ST APPLICANT

PETER MATHENGE GITONGA 2ND APPLICANT

AND

HFC LIMITED 1ST RESPONDENT

GARAM INVESTMENTS AUCTIONEERS 2ND RESPONDENT

KEYSIAN AUCTIONEERS 3RD RESPONDENT

(Being an application for injunction from the Ruling of the High Court of Kenya at Nairobi (Okwany, J.) dated 1st July, 2021 in H.C.C.C. No. E377 of 2019)

RULING

1. The High Court of Kenya at Nairobi was moved by the applicants, Pauline Wangeci Warui and Peter Mathenge Gitonga for an injunction against the respondents, HFC Limited, Garam Investments Auctioneers and Keysian Auctioneers, to restrain them from interfering, alienating or otherwise dealing with House No. 8 situate at L.R. No. Ngong/Ngong/47118, Karen (the suit property). In a ruling delivered on 1st July, 2021 Okwany, J., found the application not merited and the learned Judge dismissed the application.
2. The applicants have approached this Court in the Motion brought under rules 5(2) (b) and 42 of the [Court of Appeal Rules](#) praying in the main that we issue an injunction to restrain the respondents from interfering with the applicants' possession of the suit property pending hearing and determination of an intended appeal. In grounds in support of the Motion and in a supporting affidavit of Peter Mathenge Gitonga (the 2nd applicant) it is stated in the main that the intended appeal is arguable because, in the applicants' view, the Judge did not refer or consider supplementary and further



supplementary affidavits filed by the applicants; that the public auction where the suit property was sold was conducted on 24th October, 2019, a day prior to the day advertised for sale; that conducting the public auction on a day before the advertised date was a fraud on the applicants and the public; that in those circumstances the Judge should have issued an injunction; that the intended appeal would be rendered nugatory as the suit property could be transferred to a third party rendering the substratum of the intended appeal nugatory.

3. Christine Wahome, the Legal Manager of the 1st respondent (Housing Finance Company of Kenya Limited) depones in a replying affidavit in essence that the Motion before us is misconceived, frivolous, ambiguous and brought in bad faith brought to prevent the 1st respondent from effectively exercising its statutory power of sale; that the applicants are attempting to stop transfer of the suit property which was properly sold at a public auction; that the High Court was right in refusing to grant the discretionary relief of injunction; that the intended appeal has no chance of success. Further, that the applicants took a loan from the 1st respondent; they mortgaged the suit property as security for the loan and they did not pay the loan; that if the intended appeal succeeded the bank would be in a position to pay damages.
4. The 2nd applicant found it necessary to file a supplementary affidavit where he wonders why Christine Wahome has not addressed the issue raised by the applicants - was the public auction conducted on a day before the advertised date? The 2nd applicant also poses the question why the auctioneer who conducted the sale has not filed a replying affidavit.
5. The applicants and the 1st respondent filed written submissions and Case Digest which we have perused.

The Motion came before us on a virtual platform on December 15, 2021 where learned counsel Mr. Kyalo Mbobu appeared for the applicants; learned counsel Mr. Kelvin Mbogo appeared for the 1st respondent; learned counsel Mr. Paul Mungla appeared for the 3rd respondent and asked to be excused as his client had no interest in the determination of the matter. Mr. Mbobu and Mr. Mbogo highlighted their written submissions which, as we have said, we have considered.

6. The principles that govern consideration of applications for stay of execution or injunction under the rules of this Court are well known. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay – See the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR where the said principles are well summarized.
7. We have perused draft Memorandum of Appeal where various grounds of appeal are taken. It is intended to be argued on appeal whether the Judge misdirected herself by not considering affidavits where an issue was raised that a public auction advertised for October 25, 2019 took place a day earlier on 24th October, 2019. It is also intended to be argued on appeal that the public auction conducted on a day other than the day advertised and where the 1st respondent was declared highest bidder was a fraudulent sale. We find these to be arguable points on appeal and this Court has held that an arguable point is not one that will succeed – *Dennis Mogambi Mongare v Attorney General & 3 Others* [2012] eKLR. This Court has also held that an applicant to succeed on arguability of the appeal need not raise a multiplicity of points as one arguable point will suffice – See the case of *Damji Pragji Mandaria v Sara Lee Household and Body Care (K) Limited*, Civil Application No. NAI 345 of 2004.
8. The applicants say that the suit property is their matrimonial home and resulting from the public auction whose conduct they question and is the subject of the intended appeal the suit property could be sold and be beyond their reach if the appeal succeeded. The 1st respondent, in response, states that



it is able to compensate the applicants should the appeal succeed. Considering the whole matter and balancing the interests of the parties we take the view that the status of the parties before the impugned sale should be preserved pending appeal. We are satisfied that if the matrimonial property is transferred to a third party it would prejudice the applicants and be beyond their reach if the appeal succeeded, the appeal would be rendered nugatory.

9. We allow the Motion and confirm the interim injunction we ordered on December 15, 2021. Costs of the Motion will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2022.

R.N. NAMBUYE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

