



**James v Kenya Commercial Bank Limited & another (Civil Application
E045 of 2021) [2022] KECA 573 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KECA 573 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E045 OF 2021
AK MURGOR, HA OMONDI & KI LAIBUTA, JJA
MAY 13, 2022**

BETWEEN

JANE NJERI JAMES APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED 1ST RESPONDENT

GREAT RIFT INVESTMENTS LIMITED 2ND RESPONDENT

(Being an application for stay of further proceedings and an injunction pending the hearing and determination of an intended appeal from the ruling of the High Court at Nakuru (H. K. Chemitei, J.) dated 22nd July, 2021 in HCC No. E003 of 2021)

RULING

1. By a Notice of motion dated 26th July, 2021 and an affidavit in support sworn by the applicant, (Jane Njeri James) on the same day, the applicant seeks (i) a stay of further proceedings in Nakuru HCC No. E003 of 2021 - Jane Njeri James vs Kenya Commercial Bank Limited pending the hearing and determination of an intended appeal, and (ii) a temporary injunction to restrain the 1st respondent, its agents, servants or employees from receiving payment of the purchase price from the 2nd respondent, and transferring or registering any dealings in that parcel of land known as Nakuru Municipality Block 20/11 (the suit property) in favour of the 2nd respondent or any other 3rd party pending the hearing and determination of the intended appeal.
2. The motion is brought on grounds that the applicant approached the 1st respondent for a mortgage facility to purchase the suit property; that, following its valuation, the 1st respondent granted the applicant a mortgage facility of Kshs. 21,300,000, to be repaid over a period of 10 years with a monthly repayment of Kshs. 367,730.00; that the mortgage facility was secured by way of a legal charge over the suit property.



3. The applicant contended that unbeknown to her, one Loice Wairimu Wagwa had filed Nakuru ELC No. 163 of 2014 claiming ownership of the property to which she had joined the applicant as a defendant; that the suit was dismissed on 29th July, 2020. The applicant contended that during the pendency of the Nakuru ELC No. 163 of 2014, she periodically serviced the mortgage facility, but continued to remain in arrears; that sometime in October, 2020, the 1st respondent instructed a firm of auctioneers to realize the security, and the suit property was advertised for sale on 26th October, 2020; that this prompted the applicant to institute Nakuru ELC No. E010 of 2020 where she sought an injunction to stop the sale of the suit property, which the trial court declined to grant; that subsequently, the suit property was sold to the 2nd respondent as the highest bidder.
4. The applicant stated that, thereafter, she joined the 2nd respondent in the suit, and sought orders to prohibit the transfer of the suit property by the 1st respondent to the 2nd respondent which, once again, the lower court declined to issue; that she then realized that her advocate had instituted the proceedings in Nakuru ELC No. E010 of 2020 in the Environment and Land Court, notwithstanding that the dispute was of a commercial nature and fell within the exclusive jurisdiction of the High Court; that this caused the applicant to apply to have the suit transferred to the High Court for hearing and determination; that the Environment and Land Court declined to transfer the suit, prompting the applicant to withdraw Nakuru ELC No. E010 of 2020 and to instead institute Nakuru HCC No. E003 of 2021 in the High Court. Contemporaneously with that, the applicant sought for an order of temporary injunction to restrain the 1st respondent from receiving payment of the purchase price, and from transferring the suit property to the 2nd respondent pending the hearing and determination of the suit; that in a ruling dated 22nd July, 2021, the High Court dismissed the applicant's application for reasons that it was res judicata, and that the applicant had not demonstrated that she had repaid the loan.
5. The applicant was aggrieved by the High Court's decision and filed a Notice of appeal to this Court seeking to appeal against that decision. The applicant expressed apprehension that the 1st respondent will transfer the suit property to the 2nd respondent, and that the applicant and her family will be evicted unless a temporary injunction and stay of proceedings is granted; that the appeal raises triable issues.
6. In a replying affidavit sworn on 9th August, 2021 by Kennedy Kasamba, the 1st respondent's recovery manager, the 1st respondent deponed that the application is an abuse of the court process as the applicant has sought the same injunction orders that were sought for and declined in Nakuru ELC No. E010 of 2020 and by the High Court in HCCC No. E003 of 2021; that the suit property was sold by auction on 26th October, 2020 to the 2nd respondent as the highest bidder; that the applicant has failed to regularize her loan account, but instead purported to approach this Court having enjoyed interim orders for over three months in Nakuru ELC No. E010 of 2020; that in Nakuru HCCC No. E003 OF 2021, she was granted interim orders which she enjoyed upto 22nd July, 2021 when they were thereafter vacated; that the applicant's conduct has demonstrate that she has no legitimate claim, that she is litigious and only intent on forum shopping.
7. That furthermore, the appeal is not arguable and the applicant will not suffer any irreparable damage if the injunction is not granted as she can always be compensated by way of damages.
8. In the written submissions, the 1st respondent asserted that the appeal is not arguable because it seeks to challenge the ruling delivered on 22nd July, 2021 based on a preliminary objection; that the same issues were determined in the application before the Environment and Land Court and subsequently in the application before the High Court, and as such, the applicant has failed to establish an arguable appeal.



9. On the nugatory issue, it was asserted that the applicant had willingly offered the suit property as security for her facility; that in default, the suit property was sold by auction to the 2nd respondent, but that the transfer and registration were still pending; that the 1st respondent is a reputable financial institution that has the ability to refund any money which may be due to the applicant.
10. On his part, James Michoma swore an affidavit on 10th August, 2021 on behalf of the 2nd respondent wherein the application was opposed and where it reiterated the averments of the 1st respondent.
11. In so far as applications filed under rule 5(2) (b) of this Court rules are concerned, the threshold requirement to be satisfied are amplified in the case of Republic vs Kenya Anticorruption Commission and 2 others [2009] eKLR thus:

“The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, their results or success could be rendered nugatory”.
12. In this case, in considering whether the intended appeal is arguable, it becomes apparent that the applicant seeks to challenge an exercise of discretion by the trial court. A review of the application and draft memorandum of appeal does not show that the applicant has disclosed where or in what manner the trial judge should be faulted in the exercise of his discretion. Without identifying any fault or failing on the part of the trial judge, there is nothing that demonstrates that the intended appeal is arguable. In our view therefore, we are not satisfied that the appeal is arguable.
13. In the circumstances, the applicant having failed to satisfy the first limb, we need not go into considering whether the applicant has established the nugatory aspect.
14. In sum, the motion dated 26th July, 2021 fails and is hereby dismissed with costs to the 1st and 2nd respondents.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022.

A.K. MURGOR

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JUDGE OF APPEAL

H. OMONDI

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JUDGE OF APPEAL

Dr. K.I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

