



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Pankaj v Bank of Baroda & another (Civil Application
E002 of 2022) [2022] KECA 780 (KLR) (10 June 2022) (Ruling)**

Neutral citation: [2022] KECA 780 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E002 OF 2022
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
JUNE 10, 2022**

BETWEEN

SHAH REKHAVANTI PANKAJ APPLICANT

AND

BANK OF BARODA 1ST RESPONDENT

SPORTLIGHT INTERCEPTS AUCTIONEERS 2ND RESPONDENT

(An application for stay of execution of the ruling and order of the High Court of Kenya at Mombasa by the Hon Justice P.J. Otieno in Mombasa Civil Case No E3 of 2020 dated and delivered on 27th November 2020 pending hearing and determination of the intended appeal)

RULING

1. The application before this Court for ruling is a Notice of Motion dated January 26, 2022, which seeks orders that pending hearing and determination of the intended appeal against the decision of the High Court (P. Otieno J.) dated November 27, 2020 delivered in Mombasa Civil Case No E3 of 2020, the Respondents be restrained from handing over vacant possession of the premises MN/1/1185 CR 10161(hereinafter “the suit property”) to the purchaser thereof, and that there be stay of proceedings in the High Court in the cited suit.
2. The application is supported by the Applicant’s affidavit of even date, and is based on alleged irregularities in the auction of the suit property, and the subsequent failure by the High to grant an injunction to stop the disposition of the said property. The Applicant contends that the intended appeal is arguable in light of evidence that the impugned auction was carried out improperly by the 2nd Respondent and in violation of the [Auctioneers Act](#), and will be rendered nugatory if the orders sought are not granted as the sale and transfer of the suit property will be completed.
3. A brief background to the application is that the Applicant had filed a suit in the High Court challenging the process of auction of the suit property and also filed an application dated September



- 15, 2020 seeking injunctory reliefs against the Respondents to prevent sale, dealing or alienation of the suit property, and to nullify the sale by auction on the grounds that it was unlawful and illegal. The Applicant had in this respect intended to be a bidder in the auction for the suit property.
4. The High Court in dismissing the application, was satisfied that a prima facie case was not established by the Applicant against the 1st Respondent, who had a contractual and statutory right of sale, and that the said contract was entered between the 1st Respondent and a third party who is not party to the suit. It was concluded that the appropriate remedy against the 2nd Respondent would be for damages and not an injunction. The Applicant, aggrieved with the said ruling lodged a Notice of Appeal on December 11, 2020, and subsequently filed the instant application.
 5. The Respondent apposed the instant application by way of a replying affidavit sworn on February 11, 2022 by Neela K. Raj, the 1st Respondent's Nyali Branch Manager. The Respondent's case is that there is no order of the court that is capable of being enforced or restrained by injunction. It was averred that no appeal has been filed for 20 months since requesting for proceedings, therefore the sale of the property cannot render an unfiled appeal nugatory. The Respondents refuted that the Applicant had an arguable appeal, since he did not participate in the auction therefore there is no indication of any loss she would suffer. In addition, that the Applicant has not demonstrated his ability to pay for the suit property if the appeal is successful and a repeat auction is ordered.
 6. Furthermore, that the order of stay would be an exercise in futility as the 1st Respondent has been paid the auction price, a transfer has been executed in favour of the successful bidder, and the suit property transferred on January 8, 2021. On the prayer for stay of proceedings, it was contended that no steps have been taken by the Applicant in his suit in the High Court after his application for injunction was dismissed. Lastly, the Respondents averred that by dint of Section 99(4) of the Land Registration Act, a person aggrieved by an irregular exercise of power of sale had a remedy in damages.
 7. Learned counsel Mr. Ken Rutere for the Applicant, and learned counsel Mr. James Gathaiya for the Respondents relied on their respective written submissions during the hearing of the application on March 7, 2022. The main issue for determination is whether the Applicant has met the threshold for grant of the prayers sought. The principles applicable in the exercise of the Court's unfettered discretion under Rule 5(2) (b) to grant an order of stay are as follows.
 8. First, this court is properly seized of an application for stay of execution where a notice of appeal has been lodged in accordance with Rule 75 of the *Court of Appeal Rules*, which rule requires the said Notice of Appeal to be lodged within 14 days of the judgment intended to be appealed against. This position was also confirmed by this Court in Halai & Another vs Thornton & Turpin (1963) Ltd. (1990) KLR 365. In the instant application, the Applicant annexed a copy of the Notice of Appeal lodged on December 11, 2020 against the impugned ruling delivered on November 27, 2020, and we are therefore properly seized of the application.
 9. Second, an applicant is required to satisfy the twin limbs restated and amplified by this Court in Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR, namely that there in an arguable appeal and unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. On the first limb, the Applicant's counsel referred us to the Applicant's draft memorandum of appeal and the grounds therein to demonstrate that it has an arguable appeal. The Applicant has in his grounds in the memorandum of appeal challenged the findings of the learned judge as being inconsiderate to the process of carrying out an auction, inconsiderate to public interest and erroneous application of the principle of privity of contract.



10. The 1st Respondent’s counsel on his part reiterated that the Applicant did not participate in the auction and has not spend any money and therefore has no arguable appeal. We are however cognisant of the fact that in the first limb of an arguable appeal, the Applicant need only demonstrate one arguable ground, and further that an arguable appeal is not necessarily one that will succeed. The Applicant has raised concerns on the procedure employed in the conduct of the auction of the suit property, which in our view merit consideration by this Court. To this extent we find that the Applicant’s intended appeal is arguable.
11. On the second limb, the Applicant’s counsel, while placing reliance on the case of *Kibagi & Another vs Jamii Bora Bank & 2 Others* (2021) KECA, argued that the property is of sentimental value and if he is robbed of the chance to own the property then the appeal will be relegated to an academic exercise. Counsel posited that there are orders capable of being stayed. It was sought that the court order that status quo be maintained pending the appeal.
12. The 1st Respondent on is part cited the case of *Cortec Mining Kenya Limited v A.G & 8 Others*, Civil Appeal 119 of 2015 (UR 95/2015) for the position that there was no positive order made by the High Court that is capable of being stayed, and also submitted that the 1st Respondent has the financial muscle to compensate the Applicant by way of damages if the appeal succeeded and ought to be allowed to enjoy the benefits of realizing its security.
13. It was stated by this Court in *Reliance Bank Limited vs Norlake Investments Ltd* [2002] 1 E.A. 227, that “the term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.” Likewise, it was held in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or injuncted, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
14. In the present application it is not disputed that the Applicant was neither a bidder nor purchaser of the suit property. In addition, that the 1st Respondent has since realized its security and a third party has already purchased the suit property and is in possession thereof. In our view any loss or prejudice suffered by the Applicant can be adequately remedied by damages in the circumstances, if his intended appeal succeeds. We therefore find that the Applicant has not met the threshold for the second limb for these reasons.
15. We accordingly find that the Applicant’s application is not merited, and the Notice of Motion dated January 26, 2022 is accordingly dismissed with costs to the Respondents.
16. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF JUNE, 2022.

S. GATEMBU KAIRU (FCI Arb)

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....



JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

