



**Heshimart Enterprises v Kenya Women Microfinance Bank Limited (Civil Application E172 of 2021) [2022] KECA 699 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 699 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E172 OF 2021  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
JULY 8, 2022**

**BETWEEN**

**HESHIMART ENTERPRISES ..... APPLICANT**

**AND**

**KENYA WOMEN MICROFINANCE BANK LIMITED ..... RESPONDENT**

*(Being an application for injunction pending an intended appeal against the Ruling /Order (O. Sewe, J) delivered on 12th October, 2021 (Nyakundi, J) in Eldoret HCCC NO. 49 of 2018)*

**RULING**

1. Heshimart Enterprises (Heshimart or the applicant) is a borrower who sought to injunct a lender and chargee, Kenya Women Microfinance Bank Limited (the Bank or the respondent), from exercising its statutory power of sale. The attempt at injunction, made in Eldoret HCCC No. 49 of 2018 Heshimart Enterprises –vs- Kenya Women Microfinance Bank Limited, was unsuccessful when Hon. Githinji, J dismissed the suit in a judgment delivered on March 16, 2021.
2. Dissatisfied with that decision, the applicant filed a Notice of Appeal and moved the High Court for stay of that judgment through an application dated April 22, 2021. That application too was disallowed. The applicant now turns to this Court and seeks our intervention through an application dated December 6, 2021 brought under Rule 5 of the Court of Appeal Rules, 2010 for the following substantive orders:

That an injunction do issue against the Respondent restraining it whether by itself, its servants and/or agents from evicting, denying access or interfering with the user and occupation by the Applicant of the land parcel known as Eldoret Municipality/block 6/251 and thereafter pending the hearing and determination of the intended appeal.

That the legal status with respect to that parcel of land known as Eldoret Municipality/ block 6/251 subsisting as at October 6, 2021, be maintained pending the hearing and



determination of this Application inter-partes and thereafter pending the hearing and determination of the intended appeal.

3. In support of the Motion, Samuel Mutahi Kamau, a director of the applicant company, swore an affidavit whose date is incomplete. In it, he simply states that the respondent has instructed Kogo Junior Auctioneers to proceed with the sale of the charged property on December 9, 2021 (a date now passed) and should the sale proceed then the intended appeal will be rendered nugatory. This was reiterated at the plenary hearing of the application. In addition, learned counsel Mr. Ngetich for the applicant, in his address told us that the intended appeal is arguable but failed to specify any arguable point, notwithstanding the Court prodding him to do so.
4. The application is opposed. The respondent contends that the intended appeal is not arguable as not even a draft memorandum of appeal was shown to Court. As regards the risk that the appeal will be rendered nugatory if the injunction is not granted, it is the respondent's position that the applicant can be adequately compensated in damages if successful at appeal. In an affidavit sworn by Festus Kiprotich Korir on February 28, 2022, he deposes that the applicant owes the Bank a sum of Ksh 21,605,598.69 and it has made no effort to pay. We were told that to put off the sale further would result in a real risk that the debt may outstrip the value of the suit property.
5. This Court's power to grant stay or an injunction under Rule 5 (2) (b) of our Rules is predicated on the applicant satisfying the Court that the intended appeal is arguable and that the appeal will be rendered nugatory in the event of success, if the orders are not granted. An arguable appeal is not one that must necessarily prevail, but not a trifling one, and it passes the test even if it raises just one ground that deserves the consideration and decision of this Court at hearing. Both limbs must be satisfied. See *Stanley Kangethe Kinyanjui –vs- Tony Ketter & 5 others* [2013]eKLR.
6. The applicant has neither by way of a draft memorandum of appeal nor through grounds on the face of the application nor in the affidavit in support of the application nor in the arguments before us demonstrated the arguability of its intended appeal. And even if we were to find the intended appeal to be viable, he applicant must still fail on the second limb.
7. The applicant offered and charged its property, land reference number Eldoret Municipality/Block 6/251, as security for a facility granted to it by the respondent. By so doing, the property was made available for sale in the event of default of repayment of the facility. The respondent alleges default and demands a sum of 21,605,598.69, a sum said to be due as at 24<sup>th</sup> February 2022. Indeed, in the judgment sought to be impugned in the intended appeal, the learned trial Judge notes that the applicant had admitted indebtedness. Even if it turns out that the exercise of the statutory power of sale by the respondent was premature or illegal in any other manner, it has not been demonstrated or even contended by the applicant that the respondent, a bank, would not be able to pay any damages that may be ordered eventually or that damages would not be a sufficient remedy.
8. The application dated December 6, 2021 is without merit and is hereby dismissed with costs.

**DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF JULY, 2022.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

*Signed.*

**DEPUTY REGISTRAR**

