



Ratemo & another v Credit Bank Limited & another (Civil Appeal (Application) E006 of 2022) [2022] KECA 1177 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KECA 1177 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E006 OF 2022
HM OKWENGU, LA ACHODE & PM GACHOKA, JJA
OCTOBER 21, 2022**

BETWEEN

RONALD MOTURI RATEMO 1ST APPLICANT

VIALE DECO SOLUTIONS LIMITED 2ND APPLICANT

AND

CREDIT BANK LIMITED 1ST RESPONDENT

WESTMINSTER COMMERCIAL AGENCIES 2ND RESPONDENT

(Being an Application for an injunction pending the hearing and determination of an intended appeal against the ruling of the High Court of Kenya at Kajiado (S. N Mutuku, J.) delivered on 30th November 2021 in Kajiado HCCC Civil Case No. E015 of 2021)

RULING

1. The applicants have approached this court by way of notice of motion dated January 10, 2022 brought under rule 5 (2)(b), 41, 42, 45 and 47 of the [Court of Appeal Rules 2010](#). The applicants seek the following orders:
 - a. ... spent.
 - b. pending the interparties hearing and determination of this appeal, this honourable court be pleased to issue an order of an injunction restraining the respondents (whether acting jointly or severally or through their successors, assignees, servant or agents, or the assignees, servants or agents of any of them) from selling, transferring, or from effecting any registration or completing any transfer of the property known as Kajiado/Kaputiei-North/25599 on the January 18, 2022 or any date thereafter.
 - c. The costs of this application be provided for in any event.



- d. Such other or further orders as this honourable court may deem fit and just.
2. By way of background, this matter arises from a bank/customer relationship. In September 2015, the 1st applicant approached the 1st respondent applying to take over banking facilities that had been granted to the 2nd applicant by National Bank of Kenya Limited. Those banking facilities had been secured by a charge over the suit property, Kajiado/Kaputiei/25599
 3. It is clear from the documents that the 1st applicant's request seeking financial facilities was accepted by the 1st respondent and that the 2nd applicant was granted credit facilities for an aggregate sum of Kenya shillings ninety-eight million only (Kshs 98,000,000). As a security, a first ranking legal charge was created over the suit property which is registered in the name of the 1st applicant.
 4. The applicants did not repay the loan when it fell due but sought further financial accommodation by applying for a restructuring. As a result, the facility was renewed for an aggregate sum of Kenya shillings one hundred million, three hundred thousand only (Kshs 100,300,000).
 5. On May 30, 2017, the 2nd applicant sought to have the outstanding facilities of Kenya shillings forty-five million seven hundred and thirteen thousand two hundred and sixteen only (Kshs 45,713,216), then owing to be restructured which was accepted by the 1st respondent on terms spelt out in a letter of offer dated July 2, 2017.
 6. It is not disputed that the applicants defaulted in repaying the loan and consequently, the charged property was advertised for sale on July 25, 2021.
 7. Upon advertisement of the charged property for sale by public auction, the applicants filed a suit in the High Court praying for injunctive orders to stop the public auction. Upon hearing the parties, the High Court dismissed the application for injunction on November 30, 2021, which has triggered the application that is now before us. In dismissing the application the learned judge held as follows:

“I remind myself that I am not conducting the main suit but determining this application whose central issue is whether the plaintiffs have satisfied this court that they deserve the interlocutory injunction they are seeking. I have shown in this ruling that they have not. The notices herein were, in my view properly served. Where it is claimed that they were not, I was not given any evidence to persuade me this was the case. Consequently, the notice of motion dated July 19, 2021 must fail and is hereby dismissed with costs to the defendants. It is so ordered.”
 8. We have carefully considered the application, the rival affidavits, the supporting documents and the written submissions by the parties.
 9. To succeed in an application under rule 5 (2)(b) of the *Court of Appeal Rules*, an applicant has to satisfy the twin principles that are enumerated in many decisions of this court namely:
 - i. An applicant must demonstrate that they have an arguable appeal; and
 - ii. That the intended appeal (or appeal if already filed) will be rendered nugatory if the execution of the decree, order of proceedings is not stayed.
 10. On the first limb of this twin principle, this court held in *David Morton Silversein -vs- Atsango Chesoni* [2002] eKLR that for an order of stay to issue, the applicant must first demonstrate that the appeal or intended appeal is arguable, that is, it is not frivolous and that the appeal or intended appeal would in the absence of stay be rendered nugatory.



11. Regarding the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay of the orders sought, this court in *Yellow Horse Inns Ltd -vs- AA Kawir Transporters and 4 others* [2014] eKLR, observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point would succeed, as this court held in *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR.
12. On the arguability of the appeal, the applicants have raised a number of grounds in their memorandum of appeal stating that the statutory notices were defective and were not served on them in any event. Upon considering the grounds of the appeal, we are persuaded that they arguable but as to whether they will succeed, that will be dealt with by the bench that will hear the appeal. Therefore, the applicants have satisfied the first limb of the two principles but subject to succeeding on the second limb on whether the appeal will be rendered nugatory if the order of injunction is not granted.
13. On the second limb of this principle, as to whether the appeal would be rendered nugatory if the stay is not granted, this court in *Reliable Bank Ltd -vs- Norlake Investments* [2002] 1 EA defined the word “nugatory” in the following words:

“it does not mean only worthless, futile, or invalid, it also means trifling.” The court also expressed the view that what may render the success of the appeal nugatory must be considered within the circumstances of each case.
14. The court notes that the applicants offered the charged property as a security for the loan. A valuation was done before the charge was created and therefore, even if it is sold, the value can be established. Consequently, the resultant damage, if any, is capable of compensation as the 1st respondent is a licensed banking institution. It has not been argued or demonstrated that the 1st respondent is not capable of compensating the applicants in the event that they are successful. This court has addressed this issue in the case of *Elizabeth Jerono v Consolidated Bank of Kenya Limited & another* [2019] eKLR which held as follows:

“The 1st respondent is a reputable bank. It has not been suggested that should the intended sale found to be wanting, it may not be able to pay the applicant the damages they be awarded. We reiterate that once a property has been given as security for financial accommodation, it becomes a commodity for sale and therefore sentimental attachment to the same becomes inconsequential and must be sold in accordance with the law”
15. The upshot of the foregoing is that this application does not satisfy the twin principles for grant of an order for stay under rules 5(2)(b) of the Rules of this court. Consequently, we dismiss the application with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

L. GACHOKA, CIArb, FCIArb



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

