



Kibaru & another v Standard Chartered Bank of Kenya Limited & another (Civil Application E370 of 2022) [2022] KECA 1409 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KECA 1409 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E370 OF 2022
DK MUSINGA, F SICHALE & PM GACHOKA, JJA
DECEMBER 16, 2022**

BETWEEN

DUNCAN JOSEPHAT MURUGA KIBARU 1ST APPLICANT

PERPETUA WACHEKE MUTURI 2ND APPLICANT

AND

STANDARD CHARTERED BANK OF KENYA LIMITED 1ST RESPONDENT

JOSEPH M. GIKONYO T/A GARAM AUCTIONEERS 2ND RESPONDENT

(An application for stay of the Ruling and Decree of the High Court of Kenya at Nairobi (D. S. Majanja, J.) dated 7th October, 2022 in H. C. Comm. Appeal No. E073 of 2022)

RULING

1. The applicant's notice of motion dated October 14, 2022 seeks stay of the judgment and decree of the High Court (Majanja, J) in HCC No E073 of 2022 pending hearing and determination of an appeal against the impugned judgment.
2. The applicants are the joint registered owners of a property known as Title No NAIROBI/BLOCK 76/139 (the suit property) situate at Buruburu Phase III whose purchase had been partially financed by the 1st respondent in the sum of Kshs 8,100,000/= that was secured by a charge over the suit property.
3. The applicants defaulted in repayment of the advanced sum and interest and the 1st respondent issued the applicants with a statutory notice of intention to realise the security if the default persisted. However, the applicants contended that they had not been secured with any statutory notice and on that ground moved to the Chief Magistrate's Court in Milimani CMCC No E176 of 2022 and obtained an interim order of injunction to restrain the respondents from selling the suit property pending hearing and determination of the suit.



4. Being aggrieved by that ruling, the respondents preferred an appeal to the High Court. In its ruling delivered on October 7, 2022, the court in allowing the appeal found, inter alia:
 - i. The respondents were served with the 90 days' statutory notice;
 - ii. That only the 1st respondent was served with the 45 days' redemption notice by the Auctioneer;
 - iii. That although the applicants had established a prima facie case with a probability of success for the reasons that the 2nd respondent had not been served with the 45 days' redemption notice, damages are an adequate remedy under section 99 (4) of the *Land Act*, 2012.
 - iv. The suit property had been sold to a third party on January 18, 2022 and therefore the applicants' equity of redemption had been extinguished.
5. The applicants have now filed an appeal to this Court to challenge that ruling. They have contended that the appeal is arguable and that unless this Court grants the orders sought the appeal, if successful, shall be rendered nugatory.
6. On the other hand, the respondents submit that the appeal is not arguable for the reason that it is not in dispute that the applicants have failed to service the loan as agreed under the charge; the 1st respondent has already exercised its statutory power of sale of the suit property; and the buyer of the suit property is not a party to these proceedings.
7. The respondents further argue that the appeal, if successful, will not be rendered nugatory because any loss the applicants may suffer can be ascertained and the 1st respondent is able to compensate them in damages.
8. We have considered the application as well as all the parties' written submissions that were highlighted by Mr Kirimi, learned counsel for the applicants and Mr Njoroge, learned counsel for the respondents.
9. The principles that guide this Court in its determination of an application of this nature are well settled. An applicant must satisfy the court that the appeal or intended appeal is arguable and that unless the court grants the order(s) sought, the appeal, if successful, shall be rendered nugatory. See *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR*.
10. In determining whether an appeal or intended appeal is arguable, the court at this stage basically expresses its opinion, without going into a detailed analysis of the facts and the law, bearing in mind that an arguable appeal is not one that must necessarily succeed, but one which is shown to have, prima facie, at least one well found issue that deserves full consideration by the court.
11. Considering the learned judge's findings that the applicants had indeed not serviced the loan in terms of the charge (which is not disputed by the applicants), and the fact that the property having been sold the applicants' equity of redemption had been extinguished, we do not think that the applicants have an arguable appeal.
12. But even if the applicants have an arguable appeal, they have not demonstrated that the appeal, if successful, shall be rendered nugatory unless the application is allowed. It is trite law that the applicants' remedy would lie in damages. The 1st respondent is a reputable bank and there is no doubt that it would be able to pay such damages as may be ordered if the appeal succeeds.
13. For those reasons, we find no merit in this application and dismiss it with costs to the respondents.



Dated and delivered at Nairobi this 16th day of December, 2022.

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

