



**George Town Travel & Tour Limited v SBM Bank (Kenya) Limited & 2 others
(Civil Appeal E238 of 2022) [2022] KECA 1310 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1310 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E238 OF 2022
HM OKWENGU, HA OMONDI & JM MATIVO, JJA
DECEMBER 2, 2022**

BETWEEN

GEORGE TOWN TRAVEL & TOUR LIMITED APPLICANT

AND

SBM BANK (KENYA) LIMITED 1ST RESPONDENT

MORGAN E KPICHIRCHIR 2ND RESPONDENT

LINAH J KIPKEMBOI 3RD RESPONDENT

*(Being an application for injunction pending the hearing and determination
of an intended appeal against the ruling of the High Court of Kenya at
Nairobi(D.S. Majanja J.)dated 13th June, 2022 in HCCC NO. E92 OF 2021)*

RULING

1. The application dated July 4, 2022 and supported by an affidavit of even date is made pursuant to rules 5(2) (b) of the [Court of Appeal Rules 2010](#), and seeks that pending the *inter partes* hearing and determination of the intended appeal, an order of temporary injunction do issue restraining the respondent, its servants and or agents from selling, offering for sale, transferring, or from effecting any registration or completing any transfer of the suit property LR No 209/19939(IR No 131508).
2. The application is opposed vide are a replying affidavits dated July 8, 2022 sworn by the 2nd respondent and on behalf of the 3rd respondents, as well as the replying affidavit of the 1st respondent.
3. The background of this matter is that the applicant is the registered owner of the suit property, and obtained two loan facilities and an overdraft from the respondent to the applicant herein and as a result the suit property was charged to secure the loan advanced. A charge and further charge have been registered securing the respondent's interest.



4. The applicant defaulted in repayments, and the 1st respondent through its agents, Integra Auctioneering (K) Company, intended to sell the suit property by way of an auction on November 23, 2021, for the amount due for the two charges. In a bid to exercise its power of redemption, the applicant sought and found a willing buyer, namely, the 2nd and 3rd respondents herein, to purchase the property at Kshs 23,000,000/-. According to the applicant, there were some administrative delays in the transaction, due to lapses at the Ministry of Lands, Nairobi as the Land Registry's file could not be traced; and that this situation was within the 2nd and 3rd respondents' knowledge. The applicant, apprehensive that his property would be sold, sought temporary injunction orders pending its pursuit of the private treaty.
5. In opposition, the 1st respondent contended that the application was both *res judicata* and *sub judice* as there existed Nairobi HCCC No E323 of 2020 George Mwangi & others vs SBM Bank seeking to restrain the bank from exercising its statutory power of sale; which was heard and determined while the suit was still pending.
6. The 2nd and 3rd respondents, jointly opposed the motion by a replying affidavit sworn on January 26, 2022 on grounds that the sale agreement, forming the private treaty alluded to in the motion was overtaken by events, as the suit property was advertised for sale, by auction which they attended and made bids to purchase.
7. The trial court dismissed the application, and ordered stay of the proceedings pending hearing and determination of Nai 323 of 2020, on grounds that the proceedings were *res judicata*, as the applicant and some of its directors sought similar orders to redeem the suit property. The court also found that there was no sale agreement between the applicant and 2nd and 3rd respondents and that the applicant could not rely on the sale agreement to redeem its property by way of private treaty.
8. It is this decision that the applicant has appealed against, and sought the orders for injunction to restrain the respondent from exercising its statutory power of sale, pending hearing and determination of the appeal, saying the appeal raises arguable issues such as whether it was proper to dismiss the application which in effect derogated his statutory power of sale.
9. He is also apprehensive that the appeal will be rendered nugatory as the respondent is likely to re-advertise the property for sale by auction, and that would take the suit property out of the applicants reach, and render the appeal nugatory.
10. All the respondents oppose the application, and submit that the applicant has not met the threshold for an application under rule 5(2) (b) as the debt is admitted; it is undisputed that the applicant is in arrears to the tune of USD 234,668.99 which debt continues to accrue; the suit property was already sold on June 30, 2022 by auction; the 2nd and 3rd respondents herein have rescinded the sale agreement which was by way of private treaty; and the applicant has not demonstrated to the court that they have a single *bona fide* arguable ground of appeal.
11. Further, that the applicant has failed to show how its appeal would be rendered nugatory as the application has since been overtaken by events as the suit property has already been sold by auction; and the respondent is a financial institution, and is able to compensate the applicant should its appeal succeed.
12. As to whether the applicant has satisfied the requirements necessary for granting an order for injunction, this court in the case of *Chris Munga N Bichage v Richard Nyagaka Tongi & 2 others* [2013] eKLR has stated that whether it be an application for injunction, stay of execution or stay of



proceedings the applicable principles are the same. To succeed in an application in 5(2)(b) the applicant has to establish that: -

- i. The appeal is arguable
- ii. The appeal is likely to be rendered nugatory if the stay is not granted and appeal succeeds.

These two limbs must be demonstrated, and it would not be enough that only one is demonstrated.

13. This application invokes the exercise of judicial discretion, as has been stated by this court in *Trust Bank Limited & another v Investech Bank Limited & 3 others* [2000] eKLR,

"The jurisdiction of the court under rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that the appeal or intended appeal is arguable or put it another way, it is not frivolous and secondly that unless he is granted stay the appeal or intended appeal, if successfully will be rendered nugatory. These are the guiding principles, but these principles must be considered against facts and circumstances of each case."

14. In the case of *Wasike vs Swala* [1984] KLR 591 this court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court. It is sufficient that the issues raised are arguable, and that an applicant has met the threshold as existence of a single bonafide issue is sufficient.

15. Our perusal of the application, grounds and supporting affidavit and draft memorandum of appeal shows that the trial court found that the sale agreement that was being relied upon to sell the suit property to the 2nd and 3rd respondents had been rescinded; as such there existed no sale agreement.

16. In addition, this court has held on several occasions that a relief under 5(2)(b) will not be granted if there is a loan amount that is outstanding. In the case of *Joseph Okoth Waudi v National Bank of Kenya* CA NRB Civil Appeal No 77 of 2004 [2006] eKLR the court held

"It is trite law that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged."

17. We take note that the applicant does not dispute that it applied for a loan and secured the same with the suit property, and that it is in default. What is disputed is the sale agreement to sell the suit property by way of private treaty had been rescinded. This court is of the view that this is an arguable ground of appeal on which the applicants should be heard.

18. On the appeal being rendered nugatory, this court has held in the case of *Reliance Bank Limited vs Norlake Investment Limited* [2002]1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides.

19. In the case of *African Safari Club Limited vs Safe Rentals Limited*, Nai Civ App 53/2010 this court held:

"...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles



aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

20. The applicant is apprehensive of suffering irreparable loss and harm in the event that the suit property is sold. This court has in the case of *Esso Kenya Limited v Mark Makwata Okiya* Civil Appeal No 69 of 1991,

“...as it is settled law that where the remedy sought can be compensated by an award if damages then the equitable relief of injunction is not available.”

21. Also in the case of *Wambugu Road Estate Limited & another v Kesbaria & another* (Civil Application No 227 of 2019) [2021] KECA 218 (KLR), this court held that:

“Likelihood of suffering substantial loss has never been a ground for grant of an order of stay of execution under rule 5(2) (b).”

22. We take note that the suit property having been auctioned, the application has been overtaken by events and as such should the appeal succeed, the applicant can be compensated for in damages. Indeed, in the case of *John Nduati Kariuki t/a Jobester Merchants v National Bank of Kenya Ltd* Civil Application No Nai 306 of 2005 [2006] 1EA 96 it was held that:

“The applicant having obtained the funds and having full benefit of it and having offered securities knowing full well that they would be sold if there was default cannot be heard to say that the securities are unique and special to him as the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capacity has not been challenged.”

23. There is no assertion made that the respondent is incapable of making good such compensation and we find that the applicant has failed to show that the loss cannot be adequately remedied by an order of damages. In any event the 1st respondent is a bank we are satisfied that should the appeal succeed, the applicant can be adequately compensated by an award for damages.

24. In the circumstances the applicant’s appeal will not be rendered nugatory if the injunction sought is declined and the appeal succeeds. The applicant has therefore failed to demonstrate the existence of both limbs as required by rule 5(2) (b), and the upshot is that application fails, and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

