



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, J. MOHAMMED & KANTAL, JJ.A)

CIVIL APPLICATION NO. E021 OF 2020

BETWEEN

FSM (Suing as mother and next friend of

FW & JMM).....APPLICANT

AND

JMM.....1ST RESPONDENT

BANK OF AFRICA LIMITED.....2ND RESPONDENT

*(Being an Application for injunction in an intended appeal against
the Judgment and Decree of the High Court of Kenya at Nairobi,*

(D.S. Majanja, J.) dated and delivered on 17th January 2020 in H.C Petition No. 5 of 2019)

RULING OF THE COURT

1. Before this Court is a motion on notice dated 16th July, 2020 filed by FSM (the applicant), suing as next friend of her two children **FW** and **JMM**, under **Rule 5(2)(b)** of this Court's Rules. The motion seeks injunctive orders against the decision of the Commercial Court (**Majanja J**) who found in favour of the 2nd respondent. The learned Judge held that the applicant had failed to establish her case that the imminent sale of the suit property by the Bank, in exercise of its statutory power of sale, threatened to violate the children's right to shelter protected under Article **53(1)(c)** of the Constitution. According to the learned Judge, although the suit property constituted matrimonial property on which the applicant and her two children were living following a grant of orders for interim custody of the children by an order of the Nairobi Children's Court (**Nairobi Children's Court Case No. 276 of 2018**), the same had been charged to the 2nd respondent by the 1st respondent to secure a loan facility, and the Bank had a right to exercise its statutory power of sale in case of default in payment.

2. Aggrieved, the applicant preferred an appeal to this Court and also filed the instant motion on notice seeking orders, *inter alia*, that pending the hearing of the instant application and intended appeal, an order of temporary injunction, in the interest of the minors, do issue to restrain the 1st and 2nd respondents, their servants, employees and agents from auctioning off or in any other way disposing of the suit property where the minors live.

3. The application is supported by the applicant's affidavit sworn on 8th July, 2019 in which in a nutshell, she deposes that she has filed a Notice of Appeal against that judgment; that the appeal raises arguable issues of law and has overwhelming chances of success; that unless an injunction is issued to restrain the respondents from commencing and prosecuting recovery proceedings, the minors shall suffer irreparable loss as their attachment to the matrimonial home does not have an ascertainable value capable of being compensated in damages and; that the minors will be greatly prejudiced if such proceedings are commenced.

4. The 1st respondent (BMM), the applicant's estranged husband and father of the two minors, vehemently opposed the application through his replying affidavit sworn on 13th August, 2020. He averred that the orders granted by the Nairobi Children's Court had been overtaken by time; that the constitutional rights allegedly infringed by the 2nd respondent did not exist; that he lacked the financial capability to continue servicing the financial facility and hence the 2nd respondent had the right to exercise its statutory power of sale over the suit property against which the charge was registered as the same had crystallized; that the instant application was frivolous, vexatious and an abuse of the Court process.

5. The 2nd respondent, on the other hand, opposed the application vide the affidavit of Morgan Kinyanjui, its Recoveries Manager, sworn on 12th August, 2020. His depositions echo those of the 1st respondent's save for adding that by dint of **Section 103** of the Land Act 2012, the applicant lacked *locus standi* to seek relief against it as she was not privy to the charge instrument.
6. The application was heard by vide video link in absence of counsel/ parties based on the submissions already filed on behalf of the parties pursuant to the Covid-19 court protocol directions. The 1st respondent did not file any submissions and appears to rely on his replying affidavit.
7. Urging the Court to allow the application, counsel for the applicant submitted that her intended appeal, has high chances of success. He maintained that the learned Judge erred by: putting the 2nd respondent's interests above those of the minors in violation of the constitutional principles which champion the importance of children's rights as envisaged under **Article 53(2)** of the Constitution; failing to consider the fact that the 1st respondent owned other properties against which the 2nd respondent would institute recovery proceedings and; by failing to consider the applicant's submissions before the trial Court that she was willing to come to a consensus with the 1st respondent on how to offset the outstanding amounts due to the 2nd respondent.
8. Counsel contended that the suit property was matrimonial property and it had sentimental value to the minors who had spent their entire childhood on it. He maintained that in the event an injunction is not granted as prayed, the 2nd respondent would exercise its power of sale hence, the applicant would suffer irreparable loss not capable of being compensated in damages. Further, that the minors stood to suffer a greater inconvenience as compared to the respondents in the event that this Court allowed the instant application.
9. Opposing the application, counsel for the 2nd respondent submitted that the applicant lacked *locus standi* to institute the instant application as she was not privy to the charge instrument entered into by the 1st and 2nd respondents. He maintained that the learned Judge was right in holding that the decision by the Children's Court that the children remain on the suit property could not be construed as determining the applicant's and/or minor's proprietary rights and/or interests in the suit property.
10. Counsel contended that the 1st respondent was the registered sole proprietor of the suit property against which the charge was registered. Further, that it was not in dispute that the 1st respondent had defaulted to service the loan facility issued in his favour when it became due and that the 2nd respondent's statutory power of sale had crystallized.
11. He argued that the instant application was capricious, frivolous and an attempt by the applicant to delay the 2nd respondent's exercise of its statutory power of sale over the suit property. Counsel contended that there was no provision under either the Constitution or the Land Act, 2012, imposing a duty upon the 2nd respondent to provide shelter for the children of borrowers who had defaulted to service a loan facility when it became due.
12. Citing **Equip Agencies Limited & Another v. I & M Investment Bank & 2 Others (2020) eKLR** counsel submitted that even if an injunction is not issued, the intended appeal would not be rendered nugatory as the applicant would be entitled to seek redress under **Section 99(4)** of the Land Act which provides for a remedy in damages in the event of an unauthorized, improper or irregular exercise of the statutory power of sale.
13. He maintained that the 2nd respondent is a bank of repute with sound financial base and would be in a position to fully refund the proceeds from the sale of the charged property should the intended appeal succeed. He urged the Court to dismiss this application.
14. This is an interesting and unique application and we anticipate the appeal itself to be similarly interesting. That notwithstanding, we must eschew delving into the substantive issues raised in the appeal and leave those to the bench that will be seized of the appeal to determine the same. (See: **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others, Civil Application 31 of 2012**).
15. In order to succeed in an application under **Rule 5(2)(b)** of this Court's rules, such as the one before us, the applicant needs to satisfy the Court that: the intended appeal is arguable, that it is not frivolous, while bearing in mind that an arguable appeal is not necessarily one that will succeed; and that if the orders sought are not granted, and the appeal succeeds, then the same would be rendered nugatory. It is trite that both limbs must be proved for an applicant to benefit from an application under **Rule 5(2)(b)**. (See: **Reliance Bank (in liquidation) v. Norlake Investments Ltd, (2002) 1 EA 227**.)
16. On the issue of whether the appeal is arguable, a careful perusal of the averments by the applicant as reiterated in her draft memorandum of appeal, shows that the appellant challenges the manner in which the learned Judge analyzed and evaluated the evidence before him. She argued that the learned Judge erred in finding that the children's rights had not been violated by the 2nd respondent's exercise of its statutory power of sale. She also contended that the learned judge failed to consider that she was unaware of the notice served upon the 1st respondent yet she had proprietary rights over the suit property by virtue of it being matrimonial property.
17. Having read the record before us, as is clear from the description of the parties on the heading of the application, the applicant is suing on behalf of her children who are minors and is seeking, through her appeal, to enforce the orders granted by the Children's court in favour of the children. The second respondent argues that the applicant lacks the *locus standi* to file an appeal and an application as neither she nor the children were parties to the Charge the second respondent wants to enforce.
18. We are persuaded by that argument. We note further that the 1st respondent has admitted on oath his inability to service the loan and has no objection to the 2nd respondent exercising its statutory power of sale which the 1st respondent concedes has crystallised. We do not see any arguable issue in the intended appeal.
19. The limb on arguability has not been demonstrated. It is well settled that for the application to succeed the applicant must satisfy both limbs of the twin principles. (See: **Republic v. Kenya Anti-Corruption Commission & 2 others (2009) KLR 31**, and **Reliance Bank Ltd v. Norlake Investments Ltd (2012) 1 EA 227**). Having failed to satisfy the first limb, it is not necessary for us to determine the nugatory

aspect. The application fails to reach the threshold set for applications of this nature as demonstrated above. Accordingly, the same is hereby dismissed with no orders as to costs.

Dated and delivered at Nairobi this 29th day of January, 2021.

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR