



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, KIAGE & J. MOHAMMED, J.J.A)

KISUMU CIVIL APPLICATION NO. 128 OF 2020

BETWEEN

BLUE WATERS HOTEL LIMITED.....1<sup>ST</sup> APPLICANT

WILLIAM OSEWE GUDA.....2<sup>ND</sup> APPLICANT

STELLA MUTHEU OSEWE .....3<sup>RD</sup> APPLICANT

AND

GUARANTY TRUST BANK (KENYA)

LIMITED.....RESPONDENT

*(An application for injunction pending appeal from the Ruling and Orders of the High Court of Kenya at Kisumu (Cherere, J.) dated 28th July, 2020 in HCCC No. 79 of 2018)*

RULING OF THE COURT

By their motion dated 30th October, 2020 and brought under **Rule 5(2)(b)** of the Rules of this Court, the three applicants Blue Waters Hotel Limited, William Osewe Guda and Stella Mutheu Osewe seek, in the main, orders as against Guaranty Trust Bank (Kenya) Limited which is the 1st respondent, that;

**“2. The court be pleased to grant an (sic)**

*temporary injunction restraining the Respondent, its agent and/or assigns from dealing with, disposing of, selling or otherwise interfering with the ownership of all that parcel of land registered as Kisumu Municipality/Block 13/16 (hereinafter referred to as ‘the Kisumu Hotel’) and all that parcel of land registered as LR No. 209/14340 (hereinafter referred to as ‘the South C Apartments’) and developments thereon pending the hearing and determination of the Appeal from the decision of the High Court (T.W Cherere) issued on 28th July 2020.*

**3. The court be pleased to stay the High Court Civil proceedings No. 79 of 2018 pending the hearing and determination of the appeal from the decision of the High court (sic) (T.W Cherere) issued on 28th July 2020.”**

The motion is founded on multiple grounds appearing on the face of it which give a detailed account of the relationship between the applicants and the respondent as a result of which the applicants were unable to satisfy their loan obligation to the respondent, a fact that is undisputed, leading it to exercise its statutory power of sale donated to it by the various charges executed in its favour by the 1st and 2nd applicants.

The applicants, in protecting their interests, sought an injunction at the High Court vide a motion on notice dated 27th June 2018 to restrain the respondent from exercising its statutory power of sale over its properties. The respondent opposed that motion by way of a replying affidavit sworn by its Recoveries Manager who deposed that the debt owed to the respondent was undisputed and therefore the application had no merit. By a ruling dated 28th July 2020, Cherere, J disallowed the application in its entirety.

Aggrieved, the applicants filed a notice of appeal which gives us jurisdiction to hear and determine the **5 (2) (b)** application before us.

In their submissions, the applicants maintain that their appeal is arguable and they have a reasonable chance of success; the appeal would be

rendered nugatory if the appeal is not allowed; and to buttress their plight, it was submitted that the applicants, since filing the suit, have continued to service their loan to the greatest extent possible bearing in mind the disruptions caused by COVID-19.

The respondent submitted that granting this application would amount to a serious, grave and fundamental interference with the right to an expeditious disposition of the case at the High Court, and that the continuation of the hearing of the suit in the High Court will not prejudice the hearing of this appeal.

The principles upon which this Court grants relief under **Rule 5(2)(b)** of its Rules are well settled and they are that to succeed, an applicant must show that he has an arguable appeal and that if the orders sought, be they of stay of execution or injunction are not granted, the said appeal would be rendered nugatory or useless, illusory, academic and of no effect. By an arguable appeal is meant one that raises at least one *bona fide* point that calls for a response from the respondent and is worthy of decision by the Court hearing the appeal. See, **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS [2013] eKLR** and **KIENI PLAINS CO. LTD & 2 OTHERS vs. ECOBANK KENYA LTD [2018] eKLR**.

We have considered the application and conclude that the grounds raised by the applicants are arguable and cannot be said to be frivolous such as to be dismissed as insubstantial. Their properties are in danger of being sold and if this application is not granted they stand to suffer a colossal loss if transferred to third parties due to the value involved, and the appeal would be rendered nugatory. The two limbs are therefore satisfied.

In dealing with an application such as before us, we seek to achieve a just result and may, where the situation demands it, grant a conditional stay. Given the sums said to be owing and which are constantly growing as they remain unpaid, after hearing the motion on 17th December 2020, we reserved this ruling and granted a temporary injunction on condition that a sum of Ksh. 25,000,000 was to be paid to the respondent within 45 days failing which the interim order would lapse.

We hereby now grant the injunction and stay of proceedings sought in the motion and order that once the condition imposed by this Court on 17th December 2020 is satisfied, such injunction and stay shall extend to the hearing and determination of the appeal.

The costs of the motion shall be in the appeal.

**Dated and delivered at Nairobi this 5th day of February, 2021.**

**HANNAH OKWENGU**

**JUDGE OF APPEAL**

**P. O. KIAGE**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**