



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO (P), NAMBUYE & ASIKE-MAKHANDIA JJA)**

**CIVIL APPLICATION NO. E 277 OF 2020 (UR)**

**BETWEEN**

**ECO BANK KENYA LIMITED.....APPLICANT**

**AND**

**MANASSEH DENGA .....1<sup>ST</sup> RESPONDENT**

**SAID AHMED.....2<sup>ND</sup>RESPONDENT**

**(An application seeking stay of execution of the Judgment and Decree made at Nairobi (Lady Justice Maureen Odero J) dated 28<sup>th</sup> July 2020 in High Court Civil Case No. 196 of 2014 Milimani Commercial Courts)**

**RULING OF THE COURT**

The motion before us dated 11<sup>th</sup> of September 2020 is brought under Sections 3(2) and 3 (B) of the appellate jurisdiction Act, Section 26 of the Court of Appeal (Organization and Administration) Act, Rules 5(2) (b), 20, and 47 of the Court of Appeal Rules, and all other enabling provisions of the law. The application seeks in the main three prayers, to wit; that pending the hearing and determination of the Intended Appeal, this Court grant a stay of execution of part of the Judgment and decree made on the 28<sup>th</sup> July 2020 requiring the applicant to pay to the 1<sup>st</sup> Respondent the sum of Kshs. 67,500,000/- in damages plus interest and costs; stay of execution of part of the judgment ordering the applicant to pay costs to the 2<sup>nd</sup> respondent and finally, an order of injunction restraining the 2<sup>nd</sup> respondent from selling and or transferring all that piece or parcel of land known as LR. NO 3734/815, hereinafter “the suit premises” with the developments thereon.

The facts leading to this application are clear and straight forward. The Applicant, Eco Bank Kenya Limited and the 2<sup>nd</sup> Respondent, Said Ahmed were sued in the High Court by the 1<sup>st</sup> Respondent, Manasseh Denga for unlawful sale by public auction of his suit premises which was instigated and effectuated by the Applicant and ended up being bought by the 2<sup>nd</sup> Respondent, the current registered owner.

After hearing the dispute, the trial court delivered a judgment in favor of the 1<sup>st</sup> Respondent declaring that the public auction was void and at the same time decreeing that the sale of the suit premises by way of public auction to the 2<sup>nd</sup> Respondent was legal. In the end she ordered the Applicant to pay the 1<sup>st</sup> respondent damages in the sum of Kshs 67,500,000/= arising from the illegal auction.

Being aggrieved by the said decision, the applicant filed a notice of appeal dated 10<sup>th</sup> August 2020 and thereafter filed the current application. The applicant believes that it has “a sound arguable appeal with high chances of success” for which contention some more than seventeen grounds are cited. However the Two main grounds that the applicant has advanced to persuade us that the intended appeal is arguable are that there seems to be two contradictory findings by the trial court on the legality of the sale and secondly awarding damages arising from a sale that has been found to be illegal and thus legalizing the once declared illegal sale.

The application is opposed by the Respondents. In replying affidavits, submissions and list of authorities, the respondents pray that the application be dismissed on the grounds that the applicant has not established an arguable appeal as the issue of service of statutory notices on the applicant which was found by the trial court four different times when the proceedings were pending determination were properly and legally issued hence this is not an arguable issue. On the nugatory aspect, it is submitted that the 1<sup>st</sup> Respondent though a foreigner has established home in Kenya. That should he be paid the amount awarded he would be able to refund the money in case of a successful appeal. The 2<sup>nd</sup> respondent on his part submits that the Application is misconceived, frivolous, and scandalous as the judgment which is sought to be stayed has partially been executed and possession of the suit premises granted.

We have considered the pleadings, the written submissions and oral highlights of the respective counsel for the parties and we take the

following view of the matter.

In the case of **Stanley Kang'ethe Kinyanjui Vs. Tony Keter and 5 others, civil Application No. NAI 31/2012** this court inter alia stated:-

- i). In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See Ruben & 9 others-v-Nderitu& Another (1989) KLR 459.**
- ii). The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.**
- iii). The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai& Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.**
- iv). In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni,Civil Application No. Nai 189 of 2001.**
- v). An applicant must satisfy the court on both of the twin principles.**
- vi). On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.**
- vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau& Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.**
- viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. Damji Pragji (supra).**
- ix). the term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.**
- x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.**
- xi). Where it is alleged by the applicant that an appeal will rendered nugatory on account of the respondent's impecunity, the onus shifts to the latter to rebut by be alleged evidence the claim. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.**

From the above, it is obvious that two key principles do guide this court in applications of this nature. Firstly, an applicant is required to demonstrate that the appeal or the intended appeal is arguable or in other words, that it is not frivolous and secondly that unless the Applicant is granted a stay of execution or injunction as the case may be, then the appeal or intended appeal, if successful will be rendered nugatory.

As to whether the intended appeal is arguable, the applicant has indeed set out eleven (11) grounds in the draft memorandum of appeal but we consider the two stated elsewhere in this ruling to be crucial. We consider the above grounds to be arguable and which will require the respondents to respond to in the appeal.

We now turn to consider whether the intended appeal will be rendered nugatory if the orders of stay and/or injunction are not granted, should it succeed. It is not in dispute that the 1<sup>st</sup> respondent obtained a loan facility from the Applicant. The 1<sup>st</sup> respondent it would appear for some reason defaulted and the suit premises was put on sale by public auction by the applicant resulting in the purchase of the same by the 2<sup>nd</sup> respondent. Further it is not in dispute that the 2<sup>nd</sup> respondent is currently the registered owner of the suit property after a transfer to him following a public auction. The decretal sum this far is Kshs. 67,800,000/-plus costs payable by the applicant to the 1<sup>st</sup> Respondent. Further from information gathered from the 1<sup>st</sup> Respondent during virtual oral highlighting of the submissions he had filed an application before the trial court to have the decree amended to reflect a sum of kshs.70, 000,000/= as due and payable to him by the applicant.

On the basis of the foregoing, we hold the view that, the suit premises having been transferred and registered in the name of the 2<sup>nd</sup> Respondent , who is also in possession and control over the same, there would be nothing to preclude him from disposing of the same before the intended appeal is heard and determined which would then in effect render the appeal nugatory if it were to succeed. There is therefore high possibility that there will be distraction??? of the substratum of the appeal if the suit premises were to be transferred to a different party.

The decretal sum is colossal being in excess of Ksh. 70,000,000/=. There is no evidence that if this amount is paid upon execution of the decree the 1<sup>st</sup> Respondent will be in a position to pay back. The applicant has demonstrated that the 1<sup>st</sup> Respondent may not be able to reconstitute the money if paid out given after his indebtedness to the applicant and failure to meet his financial obligations to date. That the 1<sup>st</sup> Respondent is a foreigner, a Nigerian who may leave the jurisdiction of the court and make it difficult to have the decretal amount realized from him. The intended appeal will thus be rendered nugatory.

Consequently, we do find that the applicant has met the threshold for the grant of the prayers sought in the Motion. Accordingly, pending the

hearing and determination of the appeal, there shall be an order of stay of execution of that part of the judgment and decree ordering the applicant to pay the 1<sup>st</sup> respondent KShs 67,500,000/= and also for payment of costs to the 2<sup>nd</sup> respondent. Further an order of temporary Injunction is hereby issued restraining the 2<sup>nd</sup> respondent from selling and or transferring the suit property until the appeal is determined. Costs shall abide the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH, 2021.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**