



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO, (P), ASIKE-MAKHANDIA & MUSINGA, JJ. A.)

CIVIL APPLICATION NO. 1 OF 2020

BETWEEN

JANE WANJIRU NDERITU

alias JANET NDERITU 1ST APPLICANT

LES CARMES LIMITED.....2ND APPLICANT

AND

SHIMA PROPERTIES LIMITED.....1ST RESPONDENT

MUGEMA AUCTIONEERS.....2ND RESPONDENT

(An application for injunctive orders pending the hearing and determination of the appeal against the ruling of the Environment and Land Court of Kenya at Malindi (Olola, J.) dated 5th December, 2019

in

E.L.C. No. 31 of 2018)

RULING OF THE COURT

On 5th December, 2019 Olola, J. of the Environment and Land Court rejected the applicants' prayer for a temporary injunction to restrain the respondents from:

“.. alienating or causing to be alienated, attaching, selling, disposing and/or in any way whatsoever, dealing with all the items and/or equipment contained within the premises (known) as Fabian House containing ten rooms situate on Plot No. 664 Malindi and/or any other properties owned by the 1st applicant pending the hearing of the suit and to issue an order directed against the respondents restraining them from demanding the sum of Kshs. 551,000 pending the *interpartes* hearing of the suit herein”.

In dismissing the application, the learned Judge was not satisfied that the applicants had a *prima facie* case with a probability of success, particularly because they had breached the Management Contract of 16th February, 2016, by defaulting in the payment of rent for the entire period of the tenancy amounting to Kshs. 450,000.

The Judge further found that the 1st applicant was undeserving of an order of injunction after she moved into and occupied the premises as her residence, contrary to the terms of the tenancy.

In determining whether the applicants had met the second test for the grant of a temporary injunction, the Judge expressed the view that there was no evidence to show that any of the items in the premises belonged to them or that they stood to be wasted or damaged by a mere distress.

The learned Judge, for these reasons found that the applicants did not stand to suffer any loss that would be irreparable or damage that would

not be compensated by an award of damages.

With that, the application for injunction was dismissed with costs to the 1st respondent. The applicants intend to challenge that outcome by lodging an appeal to this Court. In the meantime, however they are before us to provide them with some measure of protection against the execution of the order.

The applicants were expected to show, in fulfillment of the two principles that must be satisfied before an application under **Rule 5(2)(b)** of the Court of Appeal Rules can be allowed, first that the intended appeal is arguable and in addition; that the intended appeal will be otiose if it was to succeed after execution of the decree. See **Stanley Kang’ethe Kinyanjui vs. Tony Ketter & 5 others** [2013] eKLR.

We do not, for our part, think that the applicants have discharged the burden of proving the arguability of the appeal.

Looking at the conclusions made by the learned Judge, without ourselves making any conclusive determination, it is apparent that he considered the three principles ordinarily applied in the exercise of discretion in granting or denying a request for a temporary injunction, guided by binding authorities such as **Nguruman Ltd vs. Jan Bonde Nielsen & 2 Others** (2014) eKLR.

It is, for this reason, doubtful that the intended appeal will not be arguable. Similarly, there is nothing to suggest that the intended appeal, if successful will be rendered nugatory, considering the uncontroverted averment that the applicants have not, since the execution of the contract, paid any rent, standing at nearly Kshs. 450,000 at the time the action was instituted.

It is the 1st respondent, in our view, who stands to suffer prejudice.

In the end, we are of the opinion that this application is bereft of any merit.

Accordingly, we dismiss it with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR