



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, MUSINGA & GATEMBU, J.J.A.)

CIVIL APPLICATION NO. E008 OF 2021

BETWEEN

SAGAL INVESTMENT LIMITED.....1ST APPLICANT

BEYRUHA ACADEMY LIMITED.....2ND APPLICANT

AND

GULF AFRICAN BANK LIMITED.....1ST RESPONDENT

LEAKEY'S AUCTIONEERS LIMITED.....2ND RESPONDENT

Being an application for injunction pending the hearing and final determination of an intended appeal from the Ruling/Order of the Commercial & Tax Division Court at Nairobi High Court Civil Case No. E211 of 2020 by the Honourable Justice W. Okwany delivered on 17th December 2020)

RULING OF THE COURT

1. In their application dated 14th January 2021 presented under Sections 3, 3A & 3B of the Appellate Jurisdiction Act and Rules 5(2)(b) & 47 of the Court of Appeal Rules, the applicants seek an order of injunction to restrain the respondents from selling, in exercise of statutory power of sale, properties known as L.R. No.209/18158 (I.R. No. 127286) Diamond Park Estate, South B and L.R.No.209/12221/333 (I.R. No. 81080) Five Star Estate, South C, Nairobi pending the hearing and determination of their intended appeal.
2. The applicants are aggrieved by and intend to appeal against a ruling given on 17th December 2020 by which the High Court (*Okwany, J.*) upheld a preliminary objection by the 1st respondent to their application for similar orders on grounds of *res judicata*, in that the issues the applicants raised had been determined in a previous suit, namely HCCC No. E2228 of 2019 on 5th June 2020. Following the ruling on 17th December 2020, the respondents have gone ahead to advertise the charged properties for sale by public auction.
3. During the hearing of the application before us, *Ms. Mary Wanjiku*, learned counsel appeared for the applicants while *Mr. Paul Ogunde*, learned counsel appeared for the respondents.
4. In support of the application, the applicants rely on the supporting affidavit sworn by Abdi Hassan Abdi and the submissions filed by Hassan N. Lakicha & Company advocates. It is their case that the properties have unlawfully been advertised for sale; that the 2nd applicant runs an educational facility on one of the properties which has remained closed on account of the prevailing pandemic despite which the 1st respondent has declined to entertain the applicant's requests for restructuring of the secured debt; and that the advertisement of the properties has occasioned panic amongst the children and parents who will be affected.
5. It is contended that the intended appeal is arguable in that the learned Judge failed to appreciate that the suit before her was different from HCCC No. E228 of 2019 and wrongly upheld the preliminary objection that the matter was *res judicata*; and that if the properties are sold the intended appeal will be rendered nugatory.
6. In opposition to the application, the respondents have relied on the replying affidavit sworn by Lawi Sato, a legal officer of the 1st respondent and the respondents' submissions filed by Walker Kontos Advocates. Their case is that the intended appeal is not arguable; that the claim that the applicants fell into default in their repayments of the debt to the bank on account of the epidemic is inaccurate because

default in repayment started well before the Covid 19 pandemic; that the intended appeal is frivolous as the contention by the applicants that *res judicata* is not applicable has no basis; that there is clearly a debt which is secured by legal charges over the properties as well as default and the 1st respondent is within its rights to exercise its statutory power of sale having given all requisite notices; that the intended appeal will in any event not be rendered nugatory as the applicant “*has quantified its view of damages that could be incurred if the securities are enforced.*”

7. We have considered the application and all the material placed before us. In an application of this nature, the applicants are required to satisfy this Court, firstly that their intended appeal is arguable, and secondly that if the orders sought are declined, and the appeal or the intended appeal is ultimately successful, then the appeal will have been in vain. See *Stanley Kangethe Kinyanjui vs. Tony Ketter & others [2013] eKLR.*

8. As to whether the intended appeal is arguable, the applicants state in their draft memorandum of appeal that the Judge erred in upholding the plea of *res judicata*; that HCCC No. 228 of 2019 and HCCC.NO. E211 of 2020 are different actions; that although an application for injunction was declined in the earlier suit, the applicants filed a fresh suit and were entitled, under Order 25 Rules 1 and 2 of the Civil Procedure Rules to institute a fresh application.

9. Bearing in mind that an arguable appeal is not one that will necessarily succeed, we are prepared to give the applicants’ the benefit of doubt that the intended appeal is not frivolous.

10. On the second limb, it is contended that one of the properties is used as an educational institution and the other one as a matrimonial home. There is however no contest that both properties are charged to the 1st respondent, as chargee to secure banking facilities in respect of which there is concession there is default. As submitted, the 1st respondent can compensate the applicants by way of damages if the appeal ultimately succeeds.

11. The result is that the application fails and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 19th day of May, 2021.

W. KARANJA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR