



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, J. MOHAMMED & KANTAL, J.J.A.)

CIVIL APPLICATION NO. NAI 140 OF 2019

BETWEEN

**JULIUS MWANGI KAHARA t/a THIKA COLLEGE OF
BANKING, ACCOUNTANCY & COMPUTER STUDIES1ST APPELLANT
JANET NJERI MWANGI.....2ND APPELLANT**

AND

**HOUSING FINANCE COMPANY OF KENYA LIMITED1ST RESPONDENT
BARCLAYS BANK OF KENYA LIMITED2ND RESPONDENT**

(Being an application under Rule 5 (2) (b) of the Court of Appeal Rules for an injunction from the Ruling of the High Court of Kenya at Kiambu (Meoli, J.) dated 17th April, 2019)

in

H.C.C.C. No. 2 of 2018)

RULING OF THE COURT

Julius Mwangi Kahara t/a Thika College of Banking, Accountancy & Computer Studies (the 1st applicant) and his wife **Janet Njeri** (the 2nd applicant) were, in or about June, 2013 offered a loan of **Ksh.16,000,000** by **Housing Finance Company Kenya Limited** (the 1st respondent) to finance certain activities. They were the registered proprietors of a parcel of land **L.R. No. Thika Municipality/Block 9/715** situate in Thika town on which, as proprietors, they run Thika College of Banking Accountancy and Computer Studies. According to them the 1st respondent mismanaged their loan account in various ways over a period of time and, in frustration, they approached Barclays Bank of Kenya Limited (the 2nd respondent) to buy off the loan outstanding with the 1st respondent. This led to an arrangement where the 2nd respondent not only took over the 1st respondent's loan but advanced more money to the applicants upon their request. According to the applicants they had instructed the 2nd respondent to take over the loan facility and give an undertaking of **Ksh.24,000,000** to the 1st respondent but, contrary to their instructions, an undertaking of **Ksh.29,932,000** was given, later increased to **Ksh.31,500,000**. The applicants say that the loan they owed to the 1st respondent was indeed, taken over by the 2nd respondent after meeting the terms of the undertaking given to the 1st respondent but that:

“The undertaking the 2nd Respondent issued to the 1st Respondent through their advocates IKM Advocates was unauthorized, illegal and a nullity since our consent was neither sought nor obtained beforehand openly, wilfully and intentionally.”

The 2nd respondent thereafter demanded payment of a sum which the applicants disputed.

This is a summary of the facts that led to the filing by the applicants of **HCCC No. 2 of 2018** at Kiambu accompanied by a Notice of Motion where orders of injunction were sought. C. Meoli, J., in the ruling delivered on 17th April, 2019 did not find merit in the Motion and dismissed it.

The applicants are now before us in a Motion said to be brought under **rules 5(2) (b) and 42(1)** of the **Court of Appeal Rules** where it is

prayed in the main that we issue an injunction restraining the 2nd respondent from selling or otherwise interfering with the said parcel of land L.R. No. Thika Municipality/Block 9/715 pending hearing and determination of the intended appeal. The grounds on the face of the Motion and the lengthy supporting affidavit of **Julius Mwangi Kahara** is more or less what we have summarized in this ruling. It is said that the applicants have an arguable appeal which is not frivolous and raises substantive matters of law and that if a stay is not granted the appeal will be rendered nugatory and the applicants will suffer substantial irreparable loss and damage. Various facts and particulars are given in the supporting affidavit to show that the applicants' account was mismanaged, first by the 1st respondent, and thereafter, by the 2nd respondent.

There is a replying affidavit by **Lucas Gikungu**, the **Corporate Recoveries Manager** of the 2nd respondent. He says that the 1st applicant approached the 2nd respondent to take over a loan owed to the 1st respondent and that the parties agreed on the terms and conditions to govern the proposed banking facility. The facility amount agreed was Ksh.46,500,000 to finance debt take over from the 1st respondent Ksh.29,500,000 and an additional term loan of Ksh.17,000,000 and further terms and conditions agreed and security offered by the applicants was the said parcel of land. Following those arrangements, the charge on the parcel of land by the 1st respondent was discharged, a charge created over the same in favour of the 2nd respondent and the loan by the applicants to the 1st respondent, was paid by the 2nd respondent. On additional terms of the undertaking given to the 1st respondent by the 2nd respondent Mr. Gikungu says at paragraph 11 of the replying affidavit:

“11. It is within my knowledge that the applicants wrote to Barclays Bank on 8th February 2017 expressly authorizing Barclays Bank to pay the 1st responded the necessary amounts as per the Undertaking issued to the 1st respondent. In the applicants own words:

“In view of the foregoing, we request that you disburse to HFCK the sh.31 million or so as per the terms of the professional undertaking and leave us to handle the issue with them through legal channels.”

Found in a Copy (sic) of a letter from the Applicants dated 8th February 2017 is found on the Record of Appeal, page 336 paragraph 20.”

The loan facility was therefore varied to indicate that, of the loan sum of Ksh.46,500,000 the sum of Ksh.31,500,000 was debt take over from the 1st respondent, refinance capex Ksh.2,500,000 and construction sum of Ksh.12,500,000. The deponent says that the current outstanding loan balance (14th June, 2019) was Ksh.62,679,529.10; the value of the suit property was Ksh.55,000,000 (current market value) and Ksh.41,500,000 being forced sale value.

We are cognizant of the fact that the High Court gave orders on an interlocutory application from which the applicants intend to appeal. The suit is pending and we should not dwell too much into the matter.

This is essentially an application under **rule 5(2) (b)** of the **Court of Appeal Rules** which donates power to this Court to stay judgments or orders of the High Court pending appeal, and in appropriate cases, issue injunction to preserve status pending appeal.

It has been held by this Court in a longline of cases such as **Stanley Kinyanjui Kangethe v Tony Ketter & Others [2013] eKLR** that for an applicant to succeed in an application of this nature he must, firstly demonstrate that the appeal, or intended appeal, is arguable which is the same as saying that the appeal is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay. From the facts of the case which we have detailed in this ruling the main complaint by the applicants against the 2nd respondent is that the 2nd respondent gave an undertaking to the 1st respondent in the sum of Ksh.31,500,000 against the applicants' instructions. We note from the record (p.337-343) a “Letter of Variation – Term LOAN” where the loan facility was amended and the facility amount varied to Ksh.46,500,000 comprising *inter alia* debt take over Ksh.31,500,000. This debt variation dated 15th February, 2017 is signed by the borrower (the applicant) as is the Schedule attached to the debt variation and in those circumstances it is difficult to appreciate the applicants' complaint that they did not authorise the take over of the loan by the 2nd respondent of Ksh.31,500,000. We would, in any event, say that once the applicants approached the 2nd respondent to take over the loan they owed the 1st respondent this would ordinarily be done by an exchange by the banks of what is in the loan book. But let us not go further so that we do not embarrass the trial court or the court on appeal.

In the premises on the facts of the case we cannot discern any arguable point on appeal and the applicants are not entitled to an injunction. Being of that mind we need not consider whether the intended appeal would be rendered nugatory if we do not grant stay of execution.

The Motion fails and is dismissed with costs.

Dated and delivered at Nairobi this 4th day of June, 2021.

R.N. NAMBUYE

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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