



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, ASIKE-MAKHANDIA & SICHALE J.J.A.)**

**CIVIL APPLICATION NO. E054 OF 2021**

**BETWEEN**

**KENLINK GLOBAL LIMITED.....1ST APPLICANT**

**WINFRED KABURU KINYUA.....2ND APPLICANT**

**YOLETS AGENCIES LIMITED.....3RD APPLICANT**

**AND**

**PARAMOUNT UNIVERSAL BANK LIMITED.....RESPONDENT**

*(An application for an injunction pending the hearing and determination of  
intended appeal from the Ruling and Order of the High Court of Kenya*

*(D. Majanja, J.) dated 21st January, 2021*

*in*

*Nairobi Commercial and Tax Division E260 of 2020*

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**RULING OF THE COURT**

Before us is a Notice of Motion dated 23rd February 2021 brought under **Section 3A and 3B** of the **Appellate Jurisdiction Act, Rules 5(2) (b) ,41 and 47** of the **Court of Appeal Rules**, and **Rules 3 and 11** of the **Court of Appeal Practice Direction for Civil Appeals and Applications**, substantively seeking an interim order of injunction of the decision of **Hon. D. S. Majanja, J.** dated and delivered on 21st January 2021 in Nairobi High Court, Commercial and Tax Division **Civil Case No. E260 of 2020** pending hearing and determination of the intended appeal of the applicant herein and an order for costs.

The motion is supported by grounds on its body and a supporting affidavit of **Winfred Kaburu Kinyua**, the 2nd applicant herein together with annexures thereto. It has been opposed by a replying affidavit of **Timothy Kimani**, described as the Legal Consultant of the respondent, sworn on 8th March 2021 together with annexures thereto. It was canvassed virtually through rival pleadings, written submissions and legal authorities filed by advocates for the respective parties, without their attendance or oral highlighting at the conclusion of which we considered the rival pleadings, submissions and legal authorities relied upon by the rival parties in support of their respective opposing positions herein and made interim orders as follows:

- 1) Prayer (c) of the application is dismissed.**
- 2) Reasons for the ruling to be delivered on 7/5/2021.**
- 3) Costs of the application to abide the delivery of the Ruling on 7th May, 2021.**

The background to the application albeit in summary form is that the applicant filed in the High Court of Kenya at Milimani Law Courts Commercial and Tax Division Civil Case No. E260 of 2020 against the respondent simultaneously with a notice of motion seeking an

injunction to restrain the respondent from selling or otherwise dealing with the properties known as **Flat No. 2E on LR No. 5/44 Nairobi (“the Maruti Flat”)** and Unit No. 4 on **LR No. 5/153 Nairobi (“Jipe Villas”)** pending the hearing and determination of the suit.

The motion was canvassed before the trial court through rival pleadings and written submissions at the conclusion of which the learned Judge, **D. S. Majanja, J.** evaluated the record considered it in light of the rival positions before the court and dismissed the motion on 21st January, 2021 with costs to the respondent.

The applicants were aggrieved and timeously filed a notice of appeal dated 21st January, 2021 intending to appeal against the whole of the said ruling on which the application under consideration is anchored.

Supporting the application, the applicants aver and submit that they have satisfied the twin prerequisites for granting relief under the above rule. In support of the first prerequisite, the applicants rely on the annexed draft memorandum of appeal containing six (6) grounds of appeal. The applicants intend to fault the learned Judge *inter alia*; for holding that the applicants failed to establish a prima facie case with a probability of success, finding that the court could not proceed to make a determination affecting Jipe Villas property without hearing the third party, holding that the respondent had provided the applicants with full statements of their accounts, failing to appreciate the applicants rights as a customer to receive full and frank statements of accounts, failing to address himself on the inconsistencies in the figures produced by the respondent and, lastly, erroneously failing to uphold the applicants rights to property under the constitution.

Turning to the satisfaction of the second prerequisite, the applicants assert that if the relief sought is not granted, the respondent will proceed to sell the second property to a third party who is not a party to these proceedings thus rendering the substratum of the intended appeal to be out of reach of the applicants and also consequently rendering the applicants appeal nugatory should it ultimately succeed.

In support of their submissions, applicants have relied on the following authorities: **Alfred Mincha Ndubi vs. Standard Limited [2020] eKLR** on the principles/propositions that an arguable ground is not one which must succeed but it should be one which is not frivolous and that a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable;

**Harveer Investments Company Ltd vs. Equitorial Commercial Ltd & 3 Others [2009] eKLR**; on the need for the Court to exercise its discretion in such a manner so as to prevent an appeal/intended appeal from being rendered nugatory should it ultimately succeed; **Oliver Collins Wanyama vs. Engineers Board of Kenya [2019] eKLR** for the proposition that an appeal would be rendered nugatory in instances where the substratum of the appeal is likely to be transferred to third parties and put beyond the reach of the appellant should the appeal succeed.

In rebuttal it was the respondent’s case that it advanced the applicants banking facilities as per the letters of offer dated 12th March 2010 and 4th September 2011, disbursed funds in accordance therewith and when the applicants defaulted in making payment, it proceeded to issue statutory notices to pave the way for it to exercise its statutory power of sale in accordance with **section 90 of the Land Act** prompting applicants to approach the respondents for negotiations. Following successful negotiations, the respondent and applicants entered into a Settlement Agreement dated 4th December 2018 wherein Jipe Villas would be sold by way of private treaty to offset all the outstanding loan amounts pursuant to which the respondent would in turn release the original certificate of lease in respect of the Maruti Flat.

In fulfillment of the settlement agreement, the applicants executed a transfer of Jipe Villa dated 5th June 2019 in favour of Topaz Grey Ventures Limited for Kshs. 55,000,000.00 while the respondent executed a discharge of charge dated 24th May 2019 in respect of the Maruti Flat and released the original certificate of lease to the 2nd applicant. Further, that the application is a nonstarter as all that applicants purports to litigate on was in fact overtaken by events and the application is therefore an exercise in futility.

In support of their averments and submissions, the respondent relies on the following authorities; **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR** on the principle guiding the exercise of this court’s mandate

under **Rule 5(2)(b)** of the Court’s **Rules**; **Jampen Enterprises Limited vs. Nic Bank Kenya Plc & Another [2019] eKLR**; on the discretion of this court to grant an injunction ; **Jim Kennedy Kiriro Njeru vs Equity Bank (K) Limited [2019] eKLR** for the proposition that a dispute touching on the amount payable or interest chargeable without more is not a ground for restraining a chargee from exercising its statutory power of sale.

Our invitation to intervene on behalf of the applicants has been invoked substantively **Rule 5(2)(b)** of the Court’s **Rules**. It provides:

**“in any civil proceedings, where a notice of appeal had been lodged in accordance with rule, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”**

The principles that guide the Court in the discharge of its mandate under the said provision and which we fully adopt are as crystallized by the Court in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR**. These require an applicant to demonstrate that the appeal or the intended appeal is arguable and second, that the appeal will be rendered nugatory should it ultimately succeed after the substratum of the appeal is no more or out of reach of the successful appellant.

In satisfaction of the first prerequisite, applicants rely on the annexed memorandum of appeal whose contents are already highlighted above and which we find no need to rehash. Our take on the same is that in law an arguable appeal is not one which must necessarily succeed, but one which is not frivolous but raises a bona fide issue that can be argued fully before the Court. See the case of **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008**. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See the case of **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004**.

We have considered the above threshold in light of the rival positions herein on this prerequisite and are satisfied that the grounds of appeal

raised in the draft memorandum of appeal annexed to the application are arguable, their ultimate success or otherwise notwithstanding.

On the nugatory aspect, the position in law is that this 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. See the case of **Reliance Bank Ltd vs. Norlake Investments Ltd** [2002] 1 EA 227.

We have considered the above threshold, in light of the rival position herein on this prerequisite. It is our finding that the property threatened with disposal is capable of being valued. Applicants can therefore be compensated adequately by damages. We are therefore not satisfied that the applicants appeal will be rendered nugatory. This prerequisite has not therefore been satisfied.

The position in law is that in order to succeed under the above **Rule**, a party has to satisfy both limbs. Herein only one prerequisite was satisfied. The application therefore fails.

In the result and on the basis of the totality of the above assessment and reasoning, we find no merit in the application. It is accordingly dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.**

***R. N. NAMBUYE***

.....

***JUDGE OF APPEAL***

***ASIKE-MAKHANDIA***

.....

***JUDGE OF APPEAL***

***F. SICHALE***

.....

***JUDGE OF APPEAL***

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

*Signed*

**DEPUTY REGISTRAR**