



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: SICHALE, J. MOHAMMED & KANTAL, J.J.A)**

**CIVIL APPEAL (APPLICATION) NO. 179 OF 2020**

**BETWEEN**

**GOLDEN SERVICES ORGANIZATION.....1ST APPELLANT/APPLICANT**

**KANG'ALIKYA MALUKI.....2ND APPELLANT/APPLICANT**

**IBRAHIM MURITHI MAGIRI.....3RD APPELLANT/APPLICANT**

**PAUL JESSE MUNGATIA.....4TH APPELLANT/APPLICANT**

**AND**

**SIDIAN BANK LIMITED.....RESPONDENT**

*(An application for an injunction pending an appeal against the*

*Judgment of the Environment and Land Court at Mombasa (A. Omollo, J.) delivered on 9th June 2020*

*in*

*Mombasa E.L.C. Case No. 315 of 2017)*

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**RULING OF THE COURT**

**Background**

1) This application is brought pursuant to **Articles 40 and 159(2)** of the **Constitution**, **Sections 3, 3A and 3B** of the **Appellate Jurisdiction Act**, **Rules 5(2)(b), 42, and 47** of the Court of Appeal Rules. **Golden Services Organization, Kang'alikya Maluki, Ibrahim Murithi Magiri & Paul Jesse Mungatia** (the applicants) seek orders of injunction restraining **Sidian Bank Limited** (the respondent), their servants, auctioneers, licensees, agents or any other person acting on their behalf from howsoever advertising for sale, selling, auctioning, alienating, transferring, disposing, dispossessing, or in any way interfering with the right of ownership and proprietorship to **LR NO. MOMBASA/SHANZU SQUATTER/1464, TITLE NUMBER GATURI/GITHIMU/5556, TITLE NUMBER KILIFI/KIJIPWA/369** and **CR 21195/1** a subdivision of **MN/111/1512** (the suit properties) pending the hearing and determination of the appeal.

2) The application is premised on the grounds on the face of the application and supported by an affidavit by **Trifosa Ncororo Jesse (Ms. Jesse)**, a trustee of the 1st applicant. A brief background of the application is that; the applicants filed **Mombasa ELC Case No. 315 of 2017** seeking an injunction to restrain the respondent from auctioning or otherwise interfering with the ownership of the suit properties; an order for the immediate release of all title security documents in respect of the suit properties; orders that the respondent pay the 1st applicant a sum of Kshs. 142,806,841.16 as lost income and business resulting from material breach of contractual obligations; and costs of the suit plus interest. The main thrust of the applicants' suit was that the 1st applicant had applied for a loan facility of Kshs. 50 million from the respondent. The 1st applicant also requested the respondent to convert their existing overdraft of Kshs. 2 million into a term

loan, and to replace the securities for all their loan facilities (in the form of charges over the four suit properties) with one security in the form of a charge over **TITLE NUMBER KWALE/MSAMBWENI 'A'/2910**. It was the applicants' further contention that despite approving the loan facility, the respondent declined to disburse the funds or release the securities, occasioning the 1st applicant lost income and business. The impugned judgment was delivered on 9th June, 2020 dismissing the applicants' suit. Being dissatisfied with the judgment, the applicants lodged a notice of appeal on 16th June, 2020 and requested for typed proceedings to enable them file the appeal. The applicants further contend that they discovered that the respondent bank advertised the suit properties for sale by public auction on 3rd July, 2020.

### Submissions

3) The application was heard by way of written submissions. The applicants submit that they have a strong and arguable appeal; and that their appeal will be rendered nugatory if the respondent is allowed to dispose the suit properties by way of sale. The applicants contend that the respondent did not issue fresh statutory notices after the court nullified the previous notices; and that neither have they conducted any recent valuations of the suit properties. The applicants further contend that some of the suit properties comprise of matrimonial homes of the applicants and their only investments; that the purported exercise of the respondent's statutory power of sale is illegal and unlawful in the circumstances of this case; and that if the auction is allowed to proceed, the substratum of the intended appeal will be completely eroded.

4) The respondent opposed the application through a replying affidavit sworn by **Ms. Beverline Adhiambo Chweya, (Ms. Chweya)** the respondent's Legal Manager. **Ms. Chweya** described at length the nature and status of the credit facilities advanced to the 1st applicant leading up to the application by the 1st applicant for an additional Kshs. 50 million facility and the request to substitute the existing collateral consisting of legal charges over the suit properties with a legal charge over **KWALE/MSAMBWENI 'A'/2910**. **Ms. Chweya** further averred that the respondent approved the security substitution but, following a merit consideration, the respondent was unable to approve the Kshs. 50 million facility; that the respondent bank approved the discharge of charge over the substituted security on the request of the 1st applicant and continued to hold charges over the suit properties; that the 1st applicant however declined to sign the supplemental letter of offer to discharge and release the substituted security and defaulted on the terms of the securities; that the 1st applicant declined to sign further letters of offer to restructure the facility and continued to be in default; and that the charged suit properties became liable to be sold by the respondent in exercise its statutory power of sale. **Ms. Chweya** asserted that the applicants' allegation that the respondent had agreed to disburse an additional Kshs. 50 million had no basis in evidence and was an attempt to mislead the Environment and Land Court (ELC).

5) **Ms. Chweya** further averred; that the suit properties are not matrimonial properties as alleged since they are inhabited by tenants or are undeveloped plots; that **KILIFI/KIJIPWA/369** has been sold by auction to an innocent purchaser for value and therefore the application has been overtaken by events; and that the applicants were already in default before the institution of the proceedings before the ELC, and they remained in default during and after those proceedings.

6) The applicants filed a supplementary affidavit sworn by **Ms. Jesse** in response to the respondent's replying affidavit stating that they were not aware of the sale of **KILIFI/KIJIPWA/369** and that there was a violent attempt by third parties to take over **CR 21195/1**, a subdivision of **MN/111/1512**. The respondent's reply was in the form of a further affidavit sworn by its Legal Manager stating that **CR 21195/1** a subdivision of **MN/111/1512** was sold by the respondent via a public auction conducted on 21st September, 2020. The respondent annexed the relevant Memorandum of Sale dated 21st September, 2020.

### Determination

7) We have considered the application, the affidavits, the submissions by counsel, the authorities cited and the law. The jurisdiction under **Rule 5(2)(b)** of this Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.

8) The principles for granting a stay of execution, injunction or stay of proceedings under **Rule 5(2)(b)** of the Court of Appeal Rules are well settled as was observed by this Court in the case of ***Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR*** where the Court delineated the jurisdiction of this Court in such an application as follows:

***“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”***

9) In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be

demonstrated to the Court’s satisfaction.

10. Regarding the consideration of whether the appeal is arguable, this Court in Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR elaborated as follows:

*“vi) On whether the appeal is arguable, it is sufficient if a single bonafide 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.”*

11) We have carefully considered the grounds set out in the motion. In our view, it is arguable inter alia whether the respondent fundamentally breached the terms of the agreement between the parties and the charge registered against **KWALE/MSAMBWENI ‘A’/2910** by failing to disburse the sum of Kshs. 50 million; and whether the respondent were as a consequence of the breach entitled to special damages of Kshs. 142,806,841.16 being the value of lost income and business. The issues raised by these grounds are sufficient to demonstrate that the appeal is arguable and not frivolous.

12) In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. See

Reliance Bank Limited v Norlake Investments Ltd [2002]1 EA 227.

13) In the instant application, the respondent has demonstrated that two out of the four suit properties, namely **KILIFI/KIJIPWA/369** and **CR 21195/1 a subdivision of MN/111/1512**, have already been sold by way of public auction to innocent purchasers for value. While the applicants have not demonstrated that the remaining unsold properties comprise matrimonial homes as asserted, the content of the valuation reports annexed by the respondent indicates that in **GATURI/GITHIMU/5556**, a permanent residential house has been developed and that the property is partly occupied by the 2nd applicant and his family and partly let out to tenants. The valuation report on **LR NO. MOMBASA/SHANZU SQUATTER/1464** indicates that a semi-permanent single storey commercial cum residential building has been erected thereon. Should these properties be auctioned off to third parties, the appeal will be rendered nugatory as the applicants may not be able to recover the properties and developments thereon which they depend on for income and residence, should the intended appeal succeed.

14) In the circumstances of this application, we find that this application has been overtaken by events with regard to the properties **KILIFI/KIJIPWA/369** and **CR 21195/1 a subdivision of MN/111/1512**. We grant orders of injunction as sought in respect of the sale of **GATURI/GITHIMU/5556** and **LR NO. MOMBASA/SHANZU SQUATTER/1464** pending the hearing and determination of the appeal. Costs of the application will abide by the outcome of the appeal.

Dated and delivered at Nairobi this 23<sup>rd</sup> day of July, 2021.

SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

*Signed*

**DEPUTY REGISTRAR**