



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & GATEMBU, J.J.A.)

CIVIL APPLICATION NO. E032 OF 2021

BETWEEN

PAMELA KAWIRA ARUNGA.....APPLICANT

AND

NCBA BANK KENYA PLC.....1ST RESPONDENT

ATHINYA MUTHURI HARON.....2ND RESPONDENT

LYDIA WAWERU T/A

PURPLE ROYAL AUCTIONEERS.....3RD RESPONDENT

THE DISTRICT LAND REGISTRAR KIAMBU.....4TH RESPONDENT

MICHAEL ANGAYA ARUNGA.....5TH RESPONDENT

(An application for stay of the decision and orders of Environment and Land Court at Nairobi (Okongo, J.) given on 21st January 2021, pending the hearing and determination of an intended appeal against the Ruling and Orders of the Environment and Land Court at Nairobi in ELC Case No. 4 of 2018)

RULING OF THE COURT

1. In her un-dated application presented mainly under Rule 5(2)(b) of the Court of Appeal Rules, Pamela Kawira Arunga, the applicant, has sought an order of stay of execution of the ruling of the Environment and Land Court (ELC) (*Okongo, J.*) delivered on 21st January 2021 ordering the removal of a restriction the applicant had placed on a property known as Title Number Kiambaa/Kihara/2861(the property).
2. The facts in brief, as they emerge from her supporting affidavit as well as a replying affidavit sworn by Jackson Nyaga, legal counsel for the 1st respondent, NCBA Bank Kenya PLC (the Bank), are that the applicant and Michael Angaya Arunga, the 5th respondent, charged the property to the Bank to secure banking facilities. It would appear there was default in repayment of those facilities whereupon the Bank commenced the process of exercising its statutory power of sale. Attempts by the applicant and the 5th respondent to obtain restraining orders to prevent sale of the property in their suit against the Bank in ELC No. 4 of 2018 failed when the court dismissed their application for injunction in a ruling delivered on 24th January 2019. Thereafter the Bank sold the property in a public auction to the 2nd respondent although the applicant asserts that no auction was in fact held, maintaining that the sale was by private treaty at gross under value.
3. Undeterred, the applicant filed before the High Court Petition No. 88 of 2020 against the present respondents, including the 5th respondent contending that her constitutional rights had been violated. That petition was transferred to ELC and became ELC petition No. 17 of 2020 on the basis of which the applicant registered a restriction against the title to prevent dealings with the property.
4. Hindered by the restriction from completing the transfer in favour of the 2nd respondent in exercise of its power of sale, the Bank applied, in ELC No. 4 of 2018 for the removal of the restriction and in his ruling the subject of the intended appeal delivered on 21st January 2021 *Okongo J.* stated that in procuring the Land Registrar to register the restriction, the applicant and the 5th respondent abused the Registrar's

powers and obtained from the Registrar what they failed to obtain from the court with the aim of preventing the Bank from transferring the property to the 2nd respondent.

5. The Judge concluded that after failing in their application for injunction to restrain the Bank from exercising its power of sale, their recourse was to challenge the decision on appeal as opposed to moving to “*any other adjudicatory body or authority for similar orders.*” The Judge concluded that the restriction placed on the property was baseless, illegal, null and void and ordered its removal.

6. It is on that basis that the applicant filed a notice of appeal on 28th January 2021 on which the present application is hinged. To succeed in her application, the applicant should demonstrate that the intended appeal is arguable and that should the Court decline to stay the impugned ruling, and the appeal succeeds, it will be rendered nugatory. See for instance ***Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya) [2015] eKLR***. Against those principles, we have considered the application and the affidavits as well as the submissions by the applicant and those of Ms. Wainaina Ireri Advocates LLP for the Bank.

7. Sympathetic as we are to the plight of the applicant who says she is in occupation of the property with her family, we entertain doubts that the intended appeal is arguable. It is not contested that the property was charged to the Bank; and that attempts to restrain it from exercising its power of sale failed when the applicant’s application for injunction was declined.

We do not see that it was then open to the applicant to have a restriction placed on the property. We are not persuaded that the intended appeal is arguable.

8. Moreover, we are also not satisfied that the intended appeal will be rendered nugatory if we decline the orders sought and the appeal eventually succeeds, considering that the property was sold and transferred with the result that the equity of redemption is extinguished. Furthermore, if it is ultimately established, as the applicant asserts, that the sale of the property was irregular, a remedy would perhaps lie in damages.

9. The result is that the application fails and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2021.

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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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