



**Tabu v Capital Realty Limited & another (Civil Application
E384 of 2020) [2021] KECA 17 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 17 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E384 OF 2020
HM OKWENGU, F SICHALE & J MOHAMMED, JJA
SEPTEMBER 23, 2021**

BETWEEN

SARAH AYIMBA TABU APPLICANT

AND

CAPITAL REALTY LIMITED 1ST RESPONDENT

HOUSING FINANCE COMPANY LIMITED 2ND RESPONDENT

(An application for an injunction pending hearing and determination of an appeal from the ruling of the Environment & Land Court at Machakos (Angote, J.) dated 23rd October, 2020 in ELC Cause No. 136 of 2019 as determined in ELC Cause No. 123 of 2019 and consolidated with ELC Cause No. 133 of 2019)

RULING

1. Before us is a notice of motion dated 4th December, 2020 in which Sarah Ayimba Tabu (the applicant) prays for a temporary injunction pending the hearing and determination of this application and the intended appeal from the ruling of the Environment & Land Court (ELC) (Angote, J.) dated 23rd October, 2020 and seeks inter alia an order of injunction restraining the respondents, their servants or agents from selling, alienating, transferring or evicting the applicant from Town House No.B19 & Town House No. C12 Gables Park (the Town Houses) erected on Land Reference Number 12715/617 (Original Number 12715/11742) (the suit property) located in Syokimau area of Machakos County, or otherwise interfering with the applicant's possession of the Town Houses pending the hearing and determination of this application and the intended appeal. Capital Realty Limited is the 1st respondent and Housing Finance Co. Limited is the 2nd respondent herein.
2. The application is brought under Rule 5(2) (b) of the *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Ano.* (this Court's Rules) and is premised inter alia on the grounds that: the applicant was aggrieved by the ruling of the ELC and has since preferred an appeal which raises substantial and arguable points



of law as stated in the annexed memorandum of appeal; that the intended appeal will be rendered nugatory if an injunction is not granted as the 2nd respondent is in the process of evicting the applicant from the Town Houses by disposing them to third parties having already advertised the Town Houses for sale by public auction; that the impending sale by public auction will defeat the rights and interests of the applicant in the Town Houses which includes being evicted; and that her right of appeal will be grossly impaired and hindered thereby causing her substantial and irreparable harm.

3. The application was further supported by the applicant's affidavit in which she reiterated the grounds on the face of the application; that she purchased the Town Houses from the 1st respondent and paid the full purchase price which was acknowledged by the 1st respondent's letter dated 14th July, 2017; that the documentation and information regarding the applicant's purchase was subsequently acknowledged by the 2nd respondent through its advocates, Kimani & Michuki Advocates who undertook the process of registration on behalf of the parties; that despite receiving all the requested documents and information, the 2nd respondent delayed or declined to respond and or execute the partial discharge of charge to facilitate the applicant to register the lease in respect of the Town Houses and instead threatened to dispose the Town Houses to third parties; that on 23rd April, 2018 the 2nd respondent's erstwhile advocates, Gachanja & Company Advocates demanded payment of further costs towards Stamp Duty and legal fees in respect of the purchase of the suit property being the closing costs of the transaction; that the applicant was advised by the advocates on record that the applicant had paid all costs; that on 23rd October, 2019 the 2nd respondent's advocates acknowledged receipt of the original bank deposit slips from the applicant as evidence of payment of the full purchase price and disbursements in respect of the Town Houses; and that the 2nd respondent cannot therefore deny knowledge or having approved the sale of the applicant's Town Houses.
4. The applicant further contended that the learned Judge ought to have considered and appreciated that the 2nd respondent was estopped from subsequently taking any action prejudicial and detrimental to the applicant's occupation and possession of the Town Houses, having previously made explicit representations, and having conducted themselves in a manner that affirmed the applicant's proprietary rights in the Town Houses.
5. In a replying affidavit sworn by Christine Wahome, the 2nd respondent's Legal Manager (Litigation) deponed inter alia that: there exists a legally binding and valid charge and further charge in respect of the suit property that has not been vitiated; that the said charge and further charge secure the 2nd respondent's loan facility of Kshs. 350,000,000/- to the 1st respondent; that further to the charges, the respondents entered into an escrow agreement to have the proceeds from the sale of the Town Houses deposited in an escrow account with the 2nd respondent; that had the applicant conducted due diligence with respect to the Town Houses she would have been aware of her obligations under the charge and further charge including the pre-requisite to obtain the 2nd respondent's written consent prior to the transfer of the Town Houses; that the 1st respondent failed to honour the repayment terms of the loan facility and was in default of Kshs. 246,074,832.71 as at 11th January, 2021; that the applicant's claim of having a beneficial interest in the Town Houses is unsubstantiated as there is no evidence that she acquired her interest from the agreement between the respondents; that the agreement between the applicant and the 1st respondent against the 2nd respondent could only be enforced upon written consent of the 2nd respondent and evidence of deposit of the purchase price in the escrow account.
6. It was the respondents' further contention that Section 28 of the Land Act recognizes the hierarchy in disputes relating to chargor-chargee relationships and it is clear that where the chargor defaults, as in the instant case, the chargee's interest to realize its security takes priority over any other party claiming an interest in the charged property; that the applicant has no registrable or superior interest to that of the



- 2nd respondent over the suit property and her only recourse is an indemnity against the 1st respondent; that should the injunction sought be granted, the 2nd respondent will suffer great financial hardship as interest on the outstanding principal amount will continue to accrue and the 1st respondent may not be position to repay the same.
7. It was the respondents' further contention that the 2nd respondent is a custodian of public funds and has a moral, legal and statutory obligation to recover loans from defaulters and secure its credibility and integrity by ensuring that depositors' funds are safeguarded; and that the 2nd respondent conducted a public auction on 18th November, 2020 and sold some of the Town Houses on the suit property and had further scheduled another auction on 26th January, 2021 in an effort to realize its security by selling the remaining Town Houses.
 8. The respondents further contend that the applicant does not have an arguable appeal as the value of the Town Houses can be ascertained and the applicant has not established that the 2nd respondent is not capable of meeting any claim for damages. Submissions by Counsel
 9. The application was dispensed with by written submissions. Learned Senior Counsel, Mr. Philip Murgor represented the applicant. On whether a prima facie case was established, counsel faulted the learned Judge for declining to grant an injunctive relief yet it was his finding that the dispute concerned the applicant as a purchaser and the 2nd respondent as a chargee. The applicant relied on *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Ano. [2015] eKLR* in support of this proposition.
 10. On the nugatory aspect counsel maintained that the applicant would be rendered destitute by the advertisement, sale and subsequent eviction from the Town Houses. Counsel referred to the draft memorandum of appeal to emphasize that she has an arguable appeal with high chances of success.
 11. As to whether the appeal will be rendered nugatory, counsel submitted that the 2nd respondent has since advertised the Town Houses for sale by public auction and should this Court decline to grant an injunction, the 2nd respondent will proceed to exercise its statutory power of sale, have the suit property transferred and in so doing render the applicant destitute. Counsel urged us to preserve the status quo and allow the application with costs.
 12. Mr. Charles Kanjama, learned counsel for the 2nd respondent submitted that the applicant did not have an arguable appeal as set out in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR* ; that the applicant had failed to demonstrate that the appeal would be rendered nugatory since the value of the suit property can be ascertained as KShs. 22.75 million and as such damages can reasonably compensate the applicant in the event of a successful appeal; that the applicant has not shown that the 2nd respondent is incapable of meeting any claim for damages and that in the event that an injunction is granted, greater financial hardship will be visited upon the 1st respondent and the 2nd respondent as interest will continue to accrue on the outstanding principal amount.
 13. Counsel further submitted that Town House No. B19 was sold by public auction on 18th November, 2020; and that there is a 3rd party purchaser whose interests should be protected. Counsel conceded to the grant of orders sought in respect of Town House No. C12 and urged us to dismiss the application with costs.
 14. In a brief rejoinder, Mr. Philip Murgor submitted that they were not aware of the particulars of the auction in respect of Town House No. B19 and the alleged 3rd party purchasers. Counsel further submitted that he applicant is still in possession of Town House No. B19 and Town House No. C12. Counsel urged us to grant the orders sought which included restraining the respondents from transferring the Town Houses or evicting the applicant from the Town House.



15. On the basis of the fact that the public auction in respect of Town House No. C12 was scheduled for the day after the hearing of the instant application, this Court issued orders of interim injunction in regard to Town House No. C12 and an order of status quo in regard to Town House No. B19, pending the delivery of this ruling.

Determination

16. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction of this Court under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice.

17. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's 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...”

18. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR this Court described an arguable appeal in the following terms:

“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.

viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

19. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, it is arguable inter alia whether the learned Judge having determined that the applicant had an interest in the Town Houses, erred in determining the applicant's claim summarily at an interlocutory stage. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.

20. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (*supra*) this Court stated that:

“ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

x). Whether or not an appeal will be rendered nugatory 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.



- 21. 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 considered on its merits. We find that in the circumstances of the instant application, even though the applicant can be compensated in damages, the applicant faces the risk of being evicted from her home and thus face undue hardship. In *Housing Finance Company of Kenya Limited v Sharok Kber Mohamed Ali Hirji & Ano. [2015] eKLR* the Court addressed itself as follows on the issue of monetary decrees:

“With time it became necessary to put certain riders to the legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree”.
- 22. In the circumstances of the instant application, we are persuaded that the applicant has demonstrated an arguable appeal which will be rendered nugatory if the orders sought are not granted since the subject matter of the intended appeal will have been auctioned to third parties.
- 23. From the circumstances of the application before us, we are satisfied that the applicant has satisfied the twin principles for the grant of an injunction pending the hearing and determination of the intended appeal in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in the case of Stanley Kange’the Kinyanjui (supra).
- 24. The upshot is that the application dated 4th December, 2020 is allowed. Costs shall abide the outcome of the intended appeal.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

