



**Wangai & 12 others v Kimani & Lekasi & 3 others (Civil Application
E372 of 2020) [2021] KECA 40 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 40 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E372 OF 2020
HM OKWENGU, F SICHALE & J MOHAMMED, JJA
SEPTEMBER 23, 2021**

BETWEEN

**PAUL GATETE WANGAI 1ST APPLICANT
MICHAEL KANYI WAMBUGU 2ND APPLICANT
ANNE STELLA ONYANGO 3RD APPLICANT
JANE WANJIRA NJOGU 4TH APPLICANT
SAMUEL MWANGI NDUATI 5TH APPLICANT
RUTH KWALI 6TH APPLICANT
DANIEL STEPHEN OUMA 7TH APPLICANT
LUCY KATILO WAMWANDU 8TH APPLICANT
DOROTHY ACHIENG AMOLO 9TH APPLICANT
CHARLES WAHOME MURIUKI 10TH APPLICANT
JOHN WAWERU KARANJA 11TH APPLICANT
SULWE AGENCIES LIMITED 12TH APPLICANT
DAMUMA INVESTMENTS LIMITED 13TH APPLICANT**

AND

**WILLIAM KIMANI & GRACE TITO LEKASI 1ST RESPONDENT
CAPITAL REALTY LIMITED 2ND RESPONDENT
HOUSING FINANCE COMPANY LIMITED 3RD RESPONDENT
LEGACY AUCTIONEERING SERVICES 4TH 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 E.L.C. Cause No.123 of 2019)

RULING

Background

- 1) By way of a notice of motion dated 26th November, 2020, Paul Gatete Wangai, Michael Kanyi Wambugu, Anne Stella Onyango, Jane Wanjira Njogu, Samuel Mwangi Nduati, Ruth Kwali, Daniel Stephen Ouma, Lucy Katilo Wamwandu, Dorothy Achieng Amolo, Charles Wahome Muriuki, John Waweru Karanja, Sulwe Agencies Limited & Damuma Investments Limited (the applicants) urge this Court to exercise its discretion under Rule 5(2)(b) of the *Court of Appeal Rules, 2010* (this Court's Rules) and grant orders in the main:
 - a) that pending the hearing and determination of the intended appeal before this Court, this Court be pleased to restrain the 3rd respondent and the 4th respondent whether by themselves, their servants, employees, assigns, relatives and/or agents from disposing, selling, transferring, taking possession or in any way dealing with the 13 maisonettes numbered B16, A19, C14, A8, A24, B10, C13, B1, B22, B25, C9 and C23 (the maisonettes) situated on the property known as Land Reference Number 12715/11742 (Original Number 12715/11742) (the Suit Property).
 - b) that pending the hearing and determination of the intended appeal, this Court be pleased to restrain Housing Finance Company Limited (the 3rd respondent) and Legacy Auctioneering Limited (the 4th respondent) whether by themselves, their servants, employees, assigns, relatives and/or agents from disposing, selling, transferring, taking possession or in any way dealing with the maisonettes; and
 - c) that the costs of the application be provided for.
- 2) William Kimani & Grace Tito Lekasi and Capital Realty Limited, are the 1st and 2nd respondents respectively.
- 3) The grounds upon which the Notice of Motion are based are inter alia that between July, 2013 and October, 2017, the applicants entered into sale agreements with the 2nd respondent for the purchase of the maisonettes; that the applicants paid Kshs. 147,975,680.00 in respect of the purchase price and took possession of their respective maisonettes where the applicants have lived for over 4 years and made improvements thereon including sinking a borehole and building a bio-digester plant in the common areas of the suit property.
- 4) The applicants contend that together with their erstwhile advocates they consistently followed up with the 2nd respondent on the registration of leases in their favour; that on diverse dates in 2019, the 3rd respondent's advocates contacted the 2nd, 3rd, 5th, 7th, 11th and 13th applicants to enable them complete the registration of the leases in their favour; that the 3rd respondent requested for and received sale agreements from the other applicants; and that registration in favour of the applicants was not effected despite the 2nd and 5th applicants paying to the 3rd respondent Kshs. 1,357,880.00 being stamp duty and legal fees to facilitate registration of the leases in their favour.



- 5) Further, that the 3rd respondent lent the sum of Kshs 350 Million to the 2nd respondent to develop the suit property; that the 3rd respondent has recovered approximately Kshs 630 Million; and that despite receiving the said amount, the 4th respondent on the instructions of the 3rd respondent served the applicants with a 45 day redemption notice requiring the payment of Kshs 267,894,874.93 failing which the maisonettes would be sold by public auction.
- 6) Aggrieved, the applicants filed a Notice of Motion dated 14th November, 2019 in the Environment and Land Court (ELC) seeking orders to restrain the 2nd and 3rd respondents, their servants, employees, assigns and/or agents from disposing, selling, transferring, taking possession of or in any way dealing with the maisonettes; and costs of the application. The learned Judge of the ELC (Angote, J.) dismissed the application with costs.
- 7) Dissatisfied by that decision, the applicants filed a Notice of Appeal and the instant application supported by the affidavit of Samuel Mwangi Nduati (the 5th applicant) in which he reiterated the grounds in the face of the application: that the intended appeal raises arguable grounds and that the learned Judge erred inter alia: in holding that the applicants had not established a prima facie case after finding that the applicants had paid for their properties in full and had paid some of the stamp duty and legal fees for the properties to the 2nd respondent; in failing to consider that the conduct of the 2nd respondent of contacting and receiving money from the applicants to facilitate registration of the properties estopped them from denying the applicants' rights and interests over the maisonettes; and by holding that the applicants would not suffer irreparable harm and loss upon the auction of the properties yet they had established that they had lived in the properties for more than four years, had paid for the properties in full and had made significant improvements to the properties and the common areas. It was the applicants' contention that it is in the interest of justice that the prayers sought be granted failing which the intended appeal will be rendered nugatory.
- 8) Opposing the application, the 3rd and 4th respondents filed a replying affidavit sworn by Ms. Christine Wahome, the 3rd respondent's Legal Manager (Litigation). The 3rd and 4th respondents contended that the applicants have no arguable appeal and have failed to demonstrate that the intended appeal will be rendered nugatory on the grounds that the value of the suit property can be ascertained and damages can therefore reasonably compensate the applicants in the event that the intended appeal succeeds; that the applicants have not shown that the 3rd respondent is incapable of meeting any claim for damages; and if the orders sought are granted, the net effect will prejudice and inflict greater financial hardship on the 2nd and 3rd respondents as the outstanding amount will continue to escalate.

Submissions by Counsel

- 9) Prof. Githu Muigai, Senior Counsel who appeared for the applicants submitted that the instant application is a special and unique case since the applicants bought the suit property with the knowledge of the 3rd respondent who accepted legal fees and stamp duty but subsequently claimed that the 2nd respondent as the developer herein did not pay the 3rd respondent in full.
- 10) Counsel further submitted that in the unique circumstances of this case, this Court has an overriding duty to protect the applicants who purchased the maisonettes and paid the 2nd respondent herein in full; that the 3rd respondent's advocates subsequently asked the applicants to pay stamp duty and registration fees to facilitate the transfer of the maisonettes in their respective names; and that the intended appeal is therefore arguable and the learned judge misdirected himself by comparing the instant case with cases where there are only two parties: the buyers and the financier, in which instance where the buyers renege on their obligations to pay the outstanding amount, the respective financier resorts to exercising its statutory power of sale.



- 11) It was Counsel's further contention that the applicants have lived on the suit property for over four years with their families and have extensively developed the suit property. Counsel argued that the scales of justice tilt in favour of granting the orders sought.
- 12) Mr. Kanjama, counsel for the 3rd respondent opposed the application and submitted that the applicants' counsel had failed to disclose the fact that the maisonettes were sold by way of public auction on 18th November, 2020. Further, that the maisonettes were purchased by 3rd parties who have not been enjoined to these proceedings. Counsel maintained that the trial court recognized that the statutory power of sale had arisen following default on the part of the 2nd respondent. Further, that the jurisprudence regarding the interest of a chargee bank was consistent that the interests of a financier are superior to that of a borrower in the event of default. Counsel further submitted that the amount owed by the 2nd respondent to the 3rd respondent is a colossal sum of over Kshs 300 million and the interest of the 3rd respondent's depositors should be considered as the money lent out by the 3rd respondent is that of its depositors.
- 13) On the limb of arguability, counsel submitted that the applicants had not demonstrated an arguable appeal and the 3rd party purchasers of various maisonettes having not been enjoined in the instant application, their right to be heard has been infringed. On the nugatory aspect, counsel referred to the impugned ruling where the learned Judge stated that once property has been charged to a bank it has a specific monetary value and the applicants can therefore be compensated by way of damages. It was counsel's submission that damages are a sufficient remedy and the instant application will therefore not be rendered nugatory. Counsel further argued that authorities are consistent that an injunction pending appeal will not issue to stop the exercise of a chargee's statutory power of sale.
- 14) Ms. Wanjiru Ngigi, learned counsel for the applicants in a brief rejoinder submitted that the notification of sale served on the applicants clearly stated that the auction would take place on 26th January, 2021; that if the orders sought are not granted, the applicants will suffer prejudice and they will be rendered homeless; that the 3rd respondent having asked the applicants to pay stamp duty and registration fees to facilitate the registration of the maisonettes in their respective names, it is estopped from exercising its statutory power of sale to the detriment of the applicants when it is fully aware that the applicants paid the full purchase price of their respective maisonettes to the 2nd respondent. Counsel urged the Court to grant status quo orders pending the hearing and determination of the instant application.
- 15) On the basis of the fact that the public auction was scheduled for the day after the hearing, this Court granted an interim injunction 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 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.
- 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. For example, this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* 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) 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.

19) On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* where 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.”

20) 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 erred in law and in fact in holding that the applicants had not established a prima facie case after finding that the applicants had paid for the maisonettes in full and had communicated and paid some of the stamp duty and legal fees for the maisonettes to the 2nd respondent; and whether the 2nd respondent’s conduct of contacting and receiving money from the applicants to facilitate registration of the maisonettes had estopped them from denying the applicants’ rights and interests over the maisonettes. 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.

21) 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”.

22) 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. In the instant application, the applicants’ main contention is that the 3rd and 4th respondents who have already advertised the maisonettes for sale by public auction, will proceed to auction the subject matter of the intended appeal, the maisonettes; that this will render the intended appeal nugatory as the applicants and their families have lived in the maisonettes for more than four (4) years and have made extensive developments on the maisonettes and the common areas. We therefore find that in the circumstances of this case the intended appeal will be rendered nugatory if the orders sought are not granted and the intended appeal succeeds.



23) In the circumstances, the applicants have satisfied both limbs of the requirements under Rule 5(2)(b) of this Court's Rules. We therefore issue an order restraining the 3rd and 4th respondents, their servants, employees, assigns, relatives and/or agents from disposing, selling, transferring, taking possession or in any way dealing with the Maisonettes identified as B16, A19, C14, A8, A24, B10, C13, B1, B22, B25, C9 and C23 situated on the property known as Land Reference Number 12715/11742 (Original Number 12715/11742) pending the hearing and determination of the intended appeal. Costs of the application shall abide the outcome of the intended appeal.

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

HANNAH OKWENGU

.....

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

