



**Wanjohi v Njuguna & 3 others (Civil Application E019 of 2020)
[2021] KECA 45 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 45 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E019 OF 2020
AK MURGOR, F SICHALE & S OLE KANTAI, JJA
SEPTEMBER 23, 2021**

BETWEEN

MICHAEL MWANGI WANJOHI APPLICANT

AND

PATRICK KANG'ETHE NJUGUNA 1ST RESPONDENT

EDWARD NJUGUNA KANG'ETHE 2ND RESPONDENT

GEORGE JAMES KANG'ETHE 3RD RESPONDENT

COMMERCIAL BANK OF AFRICA LIMITED 4TH RESPONDENT

(An Application for injunction pending the filing, hearing and determination of an intended Appeal against part of the Ruling and Orders of the High Court of Kenya at Nairobi (Tuiyot, J) dated 18th December 2020.) in Nairobi HCCC NO. E132 OF 2018)

RULING

1 Michael Mwangi Wanjohi (the applicant herein), has by a motion dated 22nd January 2021 and brought pursuant to the provisions of Rule 5 (2) (b) of the [Court of Appeal Rules, 2010](#), sought the following orders:

“1. THAT this Honourable court be pleased to grant an Injunction Order restraining the 4th respondent whether by itself, auctioneers, employees, servants and/or persons purportedly acting on its behalf from doing any of the following acts, that is to say, commencing realization of security, exercising power of sale, advertising for sale, selling, disposing, alienating, transferring, completing the sale or registering any interest in favour of a third party and/or in any other manner interfering with the quiet possession, occupation and enjoyment of all that piece of land known as Land Reference Number 209/ 12513, Moi



Avenue (hereinafter referred as the suit property) and registered to and owned by Ndonga Limited.

2. THAT the costs of and incidental to this application do abide in the results of the intended appeal.”

- 2 The motion is supported by the grounds on the face of the motion and an affidavit of Michael Mwangi Wanjohi sworn on 22nd January 2021 in which he deposed inter alia that he had moved the High Court in Nairobi seeking permanent injunction order restraining the 4th respondent whether by itself its auctioneers, employees, servants, agents and/or persons purportedly acting on its behalf from doing any of the following acts, that is to say, commencing realization of security, exercising power of sale, advertising for sale, selling, disposing, alienating, transferring, completing the sale or registering any interests in favour of a third party and/or in any other manner interfering with the quiet possession, occupation and enjoyment of all that piece of land known as Land Reference Number 209/12513, Moi Avenue, Nairobi and registered and owned by Ndonga Limited.
- 3 That, he also sought court orders allowing him to continue with the suit as a derivative action on behalf of Ndonga Limited as well as orders for the 1st, 2nd and 3rd respondents to indemnify him as well as the company against all and any liability (including, without prejudice to the generality of the indemnity, all and any liability for interest and cost arising on the part of the company from the action and all and any costs incurred by or on his behalf and the company in prosecuting the action).
- 4 He further deposed that vide a ruling delivered on 18th December 2020, the learned Judge overlooked the substance of the compelling claims made by him that the said loan facility was unlawfully obtained without proper approval by the board of directors of Ndonga Limited, of which he was a member and that the subsequent charge over the suit property and which property belonged to the company, was illegal and unprocedurally registered and that the 4th respondent should be restrained from realizing the security in any manner thereof and that being dissatisfied with the aforesaid ruling, he had appealed against the same.
- 5 That, he had an arguable appeal which raised serious triable issues and that he was apprehensive that the intended appeal would be rendered nugatory should the security be realized since there were no injunctive orders in place.
- 6 The application was opposed vide a replying affidavit sworn by Jackson Nyaga, the Legal Counsel of the 4th respondent dated 11th March 2021, who deposed inter alia that as at the time of granting the facility, the applicant and the 1st respondent were not listed as directors of the company and that notwithstanding, the board meeting authorized the transaction as per the company’s memorandum and articles of association and thus the decision to charge the suit property was validly taken and that the 4th respondent was not alive to any internal wrangles between the directors and or shareholders of the Company at the time of creation of the security.
- 7 That, the claim for derivative action by the applicant was made to protect the company property that was allegedly offered illegally as security to the 4th respondent by the 1st, 2nd and 3rd respondents’ and that therefore, the claim against the 4th respondent could not be allowed to stand as the bank had proved its case to the extent that it legitimately granted financial facilities to the company and owing to its default in servicing the loan, the bank was looking to realize the property to recover the monies borrowed and that the applicant was maliciously delaying the realization process yet the trial court allowed him to institute a claim against the 1st, 2nd and 3rd respondents who authorized the transaction.



8 The applicant in his submissions urged the court to consider the fact that there were no injunctive orders in place against the intended and threatened subdivision, transfer, disposal or alienation of the suit property and that in light of the foregoing, he would stand to suffer breach of his guarded constitutional right to property and fair administrative action and that in the event he succeeds in his appeal, an award of damages would not be sufficient to restore him against the impending loss of the suit premises.

Consequently, he urged the court to grant the injunctive orders sought.

9 On the other hand, the 4th respondent reiterated the contents of the replying affidavit sworn by Jackson Nyaga on 11th March 2021 and submitted that the claim against the 4th respondent could not be allowed to stand as the 4th respondent proved its case to the extent that it legitimately granted financial facilities to the company and owing to its default in servicing the loan, the 4th respondent was looking to realize the property to recover the monies owed and that the claim by the applicant could only stand against the 1st, 2nd and 3rd respondents, who he alleges acquired finances from the 4th respondent for private use.

10 As to whether the appeal would be rendered nugatory, it was submitted that the applicant had not demonstrated to the court that an award of damages would not be adequate because in giving out the suit property as security, it became a commodity for sale and that further the 4th respondent was not suited to answer the intended appeal and that consequently, the applicant had not laid any basis upon which orders of interlocutory injunction could be granted nor satisfied the requirements of Rule 5 (2) (b) of the Court Rules.

11 The 1st, 2nd and 3rd respondents did not file any reply or submissions to the application.

12 We have carefully considered the motion, the grounds thereof, the supporting affidavit, the 4th respondents replying affidavit, the rival submissions by the applicant and the 4th respondent, the cited authorities and the law.

13 The applicant's motion is brought under Rule (5) (2) (b) of this Court's Rules. Rule 5 (2) (b) of the Rules, which guides the Court in applications of this nature provides:

“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:

(a)...

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

14 The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay or injunctions are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal.

However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles were summarized by this Court (differently constituted), in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2013] eKLR as follows:



“i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge’s discretion to this Court.

v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.

vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

vii In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.

viii. An applicant must satisfy the Court on both the twin principles.

ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.

x. 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.

xi. 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.

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

xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

15 A cursory perusal of the pleadings herein does not show that the applicant has satisfied the 1st limb for consideration in an application such as this one. It is not in dispute that the 4th respondent advanced a loan facility to Ndonga Limited in the sum of Kshs 100,000,000/= to finance the balance of the purchase price in respect of all that property known as L.R No. 209 12513 after the company presented extract of minutes of the board of directors approving and authorizing the issuance of the facility which was a condition precedent to the granting of the facility. Secondly, as at the time of granting of the facility, the applicant and the 1st respondent were not listed as directors/shareholders of the company and that fact notwithstanding, the board had authorized the transaction as per the company’s memorandum and articles of association, thirdly, the 4th respondent was not alive to any internal wrangles between the directors and or shareholders of the company at the time of creation of the security, which facts have not been contested by the applicant. Lastly, we note that vide the ruling delivered by the High Court on 18th December 2020, the applicant was granted leave to institute a derivative claim on behalf of Ndonga Limited against the 1st, 2nd and 3rd respondents. It is not clear from the record whether that suit has been instituted. However, we shall not say more regarding this issue lest we embarrass the bench that will be eventually seized of the appeal.

16 Be that as it may, from the circumstances of this case, we are not satisfied that the applicant has demonstrated that he has an arguable appeal.

17 As to whether the appeal will be rendered nugatory if an order of injunction is not granted, it has not been demonstrated to the satisfaction of this Court that an award of damages would not be an adequate remedy. Similarly, and as observed earlier, the applicant was granted leave to institute a derivative claim on behalf of the company against the 1st, 2nd and 3rd respondents. Finally, the 4th respondent is a



financial institution and will be able to refund any amount/damages that may be awarded on appeal in the event that the applicant succeeds on appeal.

18 Ultimately, we are not satisfied that the appeal will be rendered nugatory if an order of injunction is not granted.

19 In view of the above, and the applicant having failed to establish the twin principles for consideration in an application under Rule 5 (2) (b) of this Court's Rules to warrant grant of an order of injunction, the motion dated 22nd January 2021 must fail.

20 The upshot of the foregoing is that the motion dated 22nd January 2021 is without merit and the same is hereby dismissed with costs to the 4th respondent.

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

A.K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

