



REPUBLIC OF KENYA



Panchamatia & 3 others v Prime Bank Limited & another; District Lands Registrar Kisumu East District & 3 others (Interested Party) (Civil Appeal E122 of 2021) [2021] KECA 89 (KLR) (22 October 2021) (Ruling)

Neutral citation: [2021] KECA 89 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E122 OF 2021
A MBOGHOLI-MSAGHA, J MOHAMMED & HA OMONDI, JJA
OCTOBER 22, 2021**

BETWEEN

**KAUSHIK PANCHAMATIA 1ST APPLICANT
SUNRISE HAULIERS LIMITED 2ND APPLICANT
RISHI HAULIERS LIMITED 3RD APPLICANT
DUNGA WHOLESALERS LIMITED 4TH APPLICANT**

AND

**PRIME BANK LIMITED 1ST RESPONDENT
GARAM INVESTMENT AUCTIONEERS 2ND RESPONDENT**

AND

**DISTRICT LANDS REGISTRAR KISUMU EAST DISTRICT ... INTERESTED PARTY
MAHESHKUMAR G.S. PATEL INTERESTED PARTY
PASAKA VENTURES LIMITED INTERESTED PARTY
HIRAN HIRJI KARSAM INTERESTED PARTY**

*(Being an application from the Ruling the High Court of Kenya at Kisumu
(Jackline Kamau, J.) dated 28th June 2021 in H.C.C.C. NO. 2 of 2020)*

RULING

1. There is a pending suit between the parties herein at the High Court in Kisumu being HCCC No. 2 of 2021 in the Commercial Division. The dispute centres on two properties to wit



(KISUMU/ MUNICIPALITY/BLOCK12/310 and KISUMU/MUNICIPALITY/BLOCK 6/63 (the suit properties). Alongside the plaint dated 3rd June, 2020 the applicants filed an application seeking to restrain the respondents from conducting the sale of the two properties by way of public auction. For the record, the suit properties are registered in the names of the 1st and 4th applicants respectively.

2. The application for injunction was first heard by Musyoka J who gave an interim injunction on 19th September, 2020. Subsequently the said injunction order was lifted by Cherere J on 1st October, 2020. The applicants then moved the court to review the order by Cherere J. which application was dismissed by Kamau J. on 28th June, 2021.
3. Aggrieved by the order of Kamau J. who held that the prayers were res judicata, the applicants filed an appeal. The appeal was followed by the present application dated 28th July, 2021 seeking injunction orders to restrain the respondents from taking possession and or evicting the applicants from the suit properties pending the hearing and determination of the appeal. There is also a prayer that there be stay of further proceedings in Kisumu High Court Commercial Case No. 2 of 2020 between the parties herein pending the hearing and determination of the appeal.
4. That application is brought under sections 3 (1), (2), and (3), 3 A and 3B of the [Appellate Jurisdiction Act](#), Rules 5 (2) (b), 31,41,42 and 47 of the *Court of Appeal Rules* and Articles 50 and 159 of the Constitution of Kenya.
5. As at the time of filing the present application the suit properties had already been sold in a public auction. The applicants are apprehensive however that they shall be evicted, notwithstanding that they have an arguable appeal and that if the orders sought are not granted, the appeal will be rendered nugatory. We have considered the rival positions taken by the parties in their respective affidavits and submissions.
6. This Court has stated in its numerous decisions that once the two conditions are satisfied, then the applicant should be granted the orders sought. It matters not that the application is for a stay of execution, stay of further proceedings or injunction under rule 5 (2) (b). An injunction under rule 5 (2) (b) does not follow the same considerations set out in the case of *Giella v. Cassman Brown EA [1973] 358*. It is enough that the twin principles set out above are satisfied. – see *Stanley Kangethe Kinyanjui vs Tony Ketter & Others 2013 eKLR*
7. Going by the supporting affidavit to the application the validity of the sale has been questioned in that the applicants contend that the suit properties were sold at a throw away price viewed against the commercial valuations.
8. An arguable appeal must not necessarily be one that must succeed but one that is deserving the court's consideration. The applicants stand risk of eviction or the change of the substratum of the subject matter. Granted, the properties are immovable, but the purchasers may elect to demolish and reconstruct the same. That is a threat that may impact on the appeal rendering the same nugatory. The balance of convenience tilts in favour of the applicants by maintaining the status quo. See – *Stanley Kangethe Kinyanjui V Tony Ketter & Others [2013] Supra and Co – operative Bank of Kenya Ltd V Banking Insurance & Finance Union Kenya [2014] eKLR*.
9. We have considered the issue of prejudice and noted that if the appeal fails, possession of the suit properties shall take place and therefore no prejudice has been demonstrated.
10. On our part we are persuaded that the applicants have demonstrated an arguable appeal which may be rendered nugatory if the prayers sought are not granted. We allow the application in terms of prayers 4 and 5 of the application whereby the respondents as well as their servants, representatives



and/or agents are hereby restrained from harassing, distressing, taking possession and or evicting the appellants from the suit premises title No. KISUMU/MUNICIPALITY/BLOCK 12/310 and KISUMU/ MUNICIPALITY /BLOCK 6/63. Further, there shall be a stay of proceedings in Kisumu High Court, Commercial Case No. 2 of 2020 between the parties herein pending the hearing and determination of the appeal.

The costs shall abide by the outcome of the appeal.

DATED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

J. MOHAMMED

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

H. OMONDI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

