



REPUBLIC OF KENYA



KENYA LAW
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**Madhyan v Wema Transporters Limited & 4 others (Civil Application
211 of 2021) [2021] KECA 189 (KLR) (19 November 2021) (Ruling)**

Neutral citation: [2021] KECA 189 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 211 OF 2021
AK MURGOR, P NYAMWEYA & JW LESSIT, JJA
NOVEMBER 19, 2021**

BETWEEN

LATA SURESH MADHYAN APPLICANT

AND

WEMA TRANSPORTERS LIMITED 1ST RESPONDENT

PRIME BANK LIMITED 2ND RESPONDENT

**JOSEPH M. GIKONYO T/A GARAM INVESTMENT AUCTIONEERS 3RD
RESPONDENT**

PETER GAITHO KAMANDE 4TH RESPONDENT

COVERGYS PROPETIES LIMITED 5TH RESPONDENT

*(An application for orders of injunction, stay of proceedings and stay of
execution against the Ruling of the High Court at Nairobi (Mativo, J.) dated
2nd June 2021 in HC (Commercial and Tax Division) No. 319 of 2019)*

RULING

1. By a Notice of Motion dated 21st June 2021, Lata Suresh Madhyan (the applicant) has sought orders of injunction, stay of execution and stay of proceedings of HC (Commercial and Tax Division) No. 319 of 2019 against the ruling of High Court pending the hearing and determination of this application and an intended appeal.
2. The motion was brought on the grounds that the applicant is aggrieved by the ruling of the trial court of 2nd June 2021 in which the Court granted the Peter Gaitho Kamande, the 4th respondent herein, and Convergys Properties Limited, the 5th respondent herein, a mandatory injunction to compel the applicant to handover the property known as Flat No. 3A L R No. 209/18/2 Nairobi (the suit



premises) situated at Krishna Park in Parklands, Nairobi pending the hearing and determination of the suit.

3. The applicant's claim was that she had filed a suit in the High Court seeking a permanent injunction against the respondents to restrain them, or their servants or agents from alienating or transferring or disposing or selling the suit premises by way of public auction or in any other way; that the auction that was scheduled for 13th August 2019 was premature, illegal and contrary to the law; and that the sums claimed were not due. The applicant further contended that she had since filed a Notice of Appeal against the ruling of the trial court, and that if the orders sought were not granted, the applicant will be evicted and the substratum of the intended appeal would be lost, which would render the appeal nugatory.
4. It was further argued that the applicant had an arguable appeal with a high chance of success as, the learned judge wrongly found that the 4th and 5th respondents' application met the test for grant of orders of mandatory injunction, and for granting such orders without hearing the parties' case inter partes. The applicant finally contended that the respondents would not suffer any prejudice if the orders sought were granted. The motion was supported by the sworn affidavit of the applicant, as well as by written submissions.
5. In a replying affidavit sworn on 1st July 2021 by George W. Mathui, the 2nd respondent's Manager, legal and in the written submissions, it was asserted that the 2nd respondent granted the applicant financial accommodation of an amount of Kshs. 20,000,000, and created a legal charge over the suit premises to secure repayment of the sums advanced; that the applicant failed to repay the sums borrowed which compelled the 2nd respondent to instruct the 3rd respondent in its capacity of a legal auctioneer to sell the suit premises by way of public auction; that the applicant sought orders from the High Court (M. Odera, J.), to forestall the sale following which, she was granted a conditional stay of execution provided that she paid the auctioneers charges, and deposited a sum of Kshs. 5 million into a joint interest earning account; that the applicant failed to comply with the orders, and instead sought to have them varied which request the trial judge subsequently granted.
6. It was further deponed that the variation notwithstanding, the applicant again failed to comply with the court's orders, whereupon the public auction took place soon thereafter on 8th October 2019 leading to the sale and transfer of the suit premises to the 4th and 5th respondents and the transfer duly registered in their name.
7. It was deponed that the sale and transfer of the suit premises to the 4th and 5th respondent was in accordance with the 2nd respondent's statutory powers of sale under the charge, and as a consequence, the intended appeal was not arguable and did not have any chance of success. The 4th and 5th respondents also filed a replying affidavit and written submissions which to a large extent reiterated the averments made by the 2nd respondent.
8. In so far as applications filed under rule 5 (2) (b) of this Court's rules are concerned, the threshold requirements to be satisfied as exemplified in the case of *Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR*, are that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”



9. On whether the intended appeal is arguable, we are cognisant that the applicant's appeal seeks to challenge the exercise of discretion by the trial court. Needless to say, the applicant's grievance is that the trial court was wrong in granting the mandatory injunction order yet, she was not provided an opportunity to present her case in full. If indeed this were the case, and this is a matter that the bench hearing the appeal will require to determine, on the basis of the applicant's inalienable right to be heard, we would find the appeal to be arguable.
10. As concerns the nugatory aspect, the applicant's case is that she has yet to be evicted, and that if this were to happen, the substratum of the intended appeal would be lost, which would render the appeal nugatory. It is not in dispute that the suit premises has been sold and the title transferred to the 4th and 5th respondents. What seems to be the issue is that the applicant is still in possession of the suit premises, as she has not yet been evicted. Given the circumstances, there is no doubt that were she to be evicted, and the appeal was successful, there is every chance that her appeal would be rendered nugatory.
11. In sum, the two threshold criteria having been met the motion dated 21st June 2021 is merited. We will accordingly grant a stay of execution of the ruling of Mativo J. dated 2nd June 2021 in *HC (Commercial and Tax Division) No. 319 of 2019*, but only on condition that the applicant herein files and serves the record of appeal within forty-five (45) days of today's date, and in default the stay orders granted herein will automatically lapse.
12. Costs shall abide the outcome of the appeal.
13. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF NOVEMBER, 2021.

A.K. MURGOR

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

