



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngonya & another v Chege & 3 others (Civil Appeal 23 of 2020)  
[2021] KECA 139 (KLR) (11 November 2021) (Ruling)**

Neutral citation: [2021] KECA 139 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 23 OF 2020  
DK MUSINGA, MSA MAKHANDIA & HM OKWENGU, JJA  
NOVEMBER 11, 2021**

**BETWEEN**

**REGINA NYAMBURA NGONYA ..... 1<sup>ST</sup> APPELLANT  
NYINAMU GAKONYA NGONYA (SUING IN THEIR CAPACITY AS LEGAL  
ADMINISTRATORS OF THE ESTATE OF THE LATE NGONYA WA  
GAKONYA) ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PETER GATHURE CHEGE ..... 1<sup>ST</sup> RESPONDENT  
ERNEST MWANIKI WANGUI ..... 2<sup>ND</sup> RESPONDENT  
CO-OPERATIVE BANK OF KENYA LIMITED ..... 3<sup>RD</sup> RESPONDENT  
CHIEF LANDS REGISTRAR NAIROBI ..... 4<sup>TH</sup> RESPONDENT**

*(An appeal from the Judgment of the Environment and Land Court at Nairobi  
(K. Bor, J.) delivered on 8th August 2019 in E.L.C Cause No. 1524 of 2014)*

**RULING**

1. The appellant's notice of motion dated 26th February 2021 brought under sections 3A and 3B of the *Appellate Jurisdiction Act* and rule 5(2)(b) of this Court's Rules seeks maintenance of the status quo ante in regard to a property known as Land Registration Plot NO. B/1648 (the suit property) pending the hearing and determination of this appeal.
2. The application is supported by the 1st appellant's affidavit, who is one of the administrators of the estate of the late Ngonya Wa Gakonya. The deponent states, inter alia, that vide a plaint dated 8th December 2014, the appellants filed a suit in the High Court against the respondents seeking, among others, a declaration that the suit property belonged to and forms part of the estate of Nyinamu Gakonya Ngonya (deceased) and that the charge created in favour of the 3rd respondent was invalid.



3. The said suit was heard and dismissed vide a judgment rendered by K. Bor, J. on 8th August 2019. Being dissatisfied with the said decision, the appellants preferred an appeal to this Court.
4. The appellants stated that the 3rd respondent, in exercise of its statutory power of sale, has severally advertised the suit property for sale by public auction, and there is an auction that is scheduled to take place on 12th November 2021. The appellants contend that if the intended auction takes place, they will be rendered homeless because they have been residing on the suit property since 1979.
5. The appellants further stated that their appeal is not frivolous and the balance of convenience tilts in their favour. On the aforesaid reasons they urged us to grant the orders sought.
6. The appellants filed submissions in support of the application and Ms Daudi Mumbi, learned counsel for the appellants, in her brief highlights of the submissions told the Court that the suit property is registered in the name of the 2nd respondent, who charged the same to the 3rd respondent. The appellants are however contending that the 2nd respondent obtained ownership of the suit property fraudulently. Counsel further submitted that the appeal, if successful, will be rendered nugatory if the suit property is sold by the 3rd respondent in the exercise of its statutory power of sale.
7. All the respondents were served with the application but only the 3rd respondent opposed the application through a replying affidavit sworn by Elissa Otemba, a legal officer of the 3rd respondent. She deposed, inter alia, that the orders sought are incapable of being issued as the appellants seek to stop dealings on the suit property, described as Plot No. B/1648 while the charge in favour of the 3rd respondent is in respect of a property known as Title No. Dagoretti/Riruta/1648 and there is no evidence that the two are the same; that even if the two properties are the same, no cause has been led to support the prayer for maintenance of the status quo ante as the appeal is not arguable for the reasons that the appellants have never been registered as the owners of the suit property and cannot therefore assert any rights over the same; that the appellants cannot fault the trial court's finding that a claim of ownership of the suit property by reference to a list of assets in a succession cause does not prove ownership; that the appellants did not adduce evidence as to when Ngonywa Wa Gakonya is alleged to have passed on; and that the claim for ownership was extinguished by the statute of limitation since the dispute arises from a sale agreement entered into in 1979.
8. The 3rd respondent further stated that an order for maintenance of the status quo ante will prevent the 3rd respondent from exercising its statutory power of sale as a chargee when the outstanding sum is Kshs.9,687,137.93 exclusive of interest, which amount continues to accrue interest and may outstrip the value of the suit property.
9. In his brief oral submissions, Mr. Kiplagat, learned counsel for the 3rd respondent, stated that the suit property was sold by the 1st respondent to the 2nd respondent who in turn charged it to the 3rd respondent. Counsel added that the appellants have no proprietary interest over the suit property; that the outstanding sum to date is nearly Kshs.16 million, and no security has been provided by the appellants. He urged us to dismiss the application.
10. We have considered the application and the affidavits on record. Although the appellants' substantive prayer is for maintenance of the status quo ante in respect of the suit property, this is essentially an application under rule 5(2)(b) of this Court's Rules, even though the appellants have invoked the Court's inherent jurisdiction. We do not quite agree with the appellant's learned counsel that the Court should not consider whether the appellants have satisfied the principles for grant of a relief under rule 5(2)(b) which empowers this Court to grant a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just. But even if we were to consider the application under the Court's inherent jurisdiction, pursuant to sections 3A and 3B of the Appellate Jurisdiction



Act, we would still have to invoke more or less the same considerations that an applicant is required to satisfy under rule 5(2)(b) of this Court's Rules. This is because an order for maintenance of status quo serves to preserve the existing status, for example, by staying sale over a property pending hearing and determination of an appeal.

11. The principles that guide this Court in a 5(2)(b) application are well settled. An applicant must satisfy the Court that the appeal or intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See *National Bank of Kenya Limited & Another vs Geoffrey Wabome Mubotia & Another* [2016] eKLR.
12. It is not in dispute that an arguable appeal is not one that must succeed, it is one that raises at least one bona fide issue that deserves the Court's consideration. That notwithstanding, it is doubtful whether the appellant's appeal is arguable, considering that the suit property is registered in the name of the 2nd respondent, who did not oppose the application and who lawfully charged the same to the 3rd respondent. The 3rd respondent is keen on exercising its statutory power of sale as a chargee.
13. But even if we were to accept the appellant's contention that the appellants have an arguable appeal for the reason that they reside on the suit property, the appellants did not satisfy the second limb that their appeal, if successful, shall be rendered nugatory unless the orders sought are granted. The 3rd respondent is a reputable bank that is capable of compensating the appellants in damages in the event that the appellants' appeal succeeds against the bank.
14. On the other hand, if the 3rd respondent is unnecessarily delayed from exercising its statutory power of sale, the outstanding loan balance will continue to escalate and outstrip the value of the suit property.
15. For the reasons stated above, we are not inclined to grant the orders sought. Consequently, we dismiss this application with costs to the 3rd respondent.

**DATED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**D. K. MUSINGA, (P)**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original.**

**DEPUTY REGISTRAR**

