



**Nyaboke v Ncba Bank Kenya Plc & another (Civil Application
E308 of 2021) [2021] KECA 323 (KLR) (20 December 2021) (Ruling)**

Neutral citation: [2021] KECA 323 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E308 OF 2021
RN NAMBUYE, P NYAMWEYA & JW LESSIT, JJA
DECEMBER 20, 2021**

BETWEEN

JUDITH NYABOKE APPLICANT

AND

NCBA BANK KENYA PLC 1ST RESPONDENT

JAMES ONYANGO T/A NYALUOYO AUCTIONEERS 2ND RESPONDENT

(An application for injunction pending an appeal from the ruling and orders of the High Court of Kenya at Nairobi (Majanja J.) dated 27th August 2021 in HCCOMM No. E716 of 2021)

RULING

1. The Notice of Motion application herein dated 30th August 2021, is brought by the Applicant under Section 3A and 3B of the [Appellate Jurisdiction Act](#) and Rule 5 (2) (b) of the [Court of Appeal Rules](#), and seeks an order prohibiting and/or restraining the 1st Respondent from transferring, alienating, disposing or, altering the land records or changing ownership of property known as LR No. 330/250 situate in Lavington within Nairobi County, and/or interfering with the Applicant's possession thereof pending the inter partes hearing and determination of the application and the intended Appeal. Further, that the costs of the application be provided for.
2. The application is supported by an affidavit sworn by the Applicant on 30th August 2021. The Applicant also annexed a copy of the impugned ruling delivered on 27th August 2021 in Nairobi H C COMM E716 of 2021, a Notice of Appeal against the said judgment dated 27th August 2021 and lodged in the trial Court on 30th August 2021, and a draft memorandum of appeal dated 30th August 2021. Having lodged the Notice of Appeal within 14 days of the judgment pursuant to Rule 75 of the Court of Appeal Rules, this court is properly seized of the application, as prescribed by Rule (2)(b) and held in [Halai & Another vs Thornton & Turpin \(1963\) Ltd. \(1990\) KLR 365](#).



3. The background to the application is that the 1st Respondent advanced a loan facility to the Applicant's spouse, which was secured by the Applicant's property known as Penthouse Number C7 erected on land reference Number 330/250 Nairobi (the suit property), and a charge was subsequently created over the said property. The payment of the loan fell into arrears, and the 1st Respondent initiated the recovery process which culminated in a sale by public auction of the suit property. On 27th July 2021, the High Court dismissed the Applicant's application which sought a temporary injunction against the 1st Respondent for restraining them from transferring and /or disposing of the suit property. The Applicant being aggrieved, lodged the Notice of Appeal dated 27th July 2021, and subsequently moved this Court by way of the instant application.
4. The Applicant states that she has an arguable appeal, having raised substantial grounds, namely that, notwithstanding that the High Court found and held that the 1st Respondent did not issue statutory notices under sections 90(2) and 96(2) of the Land Act, it proceeded to hold that the purported auction held on 27/07/2020 was proper and conferred proprietary rights; the High Court erred in determining the Applicant's suit at an interlocutory stage by concluding and declaring that her right to equity of redemption was extinguished; and further that the High Court erred by holding and finding that section 99 of the Land Act insulates the chargee irrespective of non-compliance with sections 90(2) and 96(2) of the Land Act. The Applicant further avers that she will be prejudiced if the stay orders are not granted, as she is in possession of the suit property, which is occupied by her tenants.
5. The Respondents responded to the application by way of a replying affidavit sworn on 10th September 2021 by Stephen Atinya, the 1st Respondent's Senior Legal Counsel. The Respondents detailed the background to the application, and averred, inter alia, that the subject loan account still remained in default with an outstanding amount of Kshs 10, 232,468.16, and that the High Court, having considered the submissions by both parties, reached its decision based on the reasoning that the sale had been finalized and thus extinguished the right of redemption of the chargor under section 99 of the Land Act.
6. Further, that the High Court exercised restraint in granting an order of injunction since a third party had acquired a good title to the suit property. The appeal therefore lacked merit. The Respondents also drew this Court's attention to prayer (d) of the Plaint filed in the High Court, vide which the Applicant had sought the release of the balance of the proceeds from the public auction sale. The 1st Respondent also annexed various documents evidencing the subject loan facility, charge, and statutory sale of the suit property.
7. The principles applicable in the exercise of this Court's discretion under Rule 5(2) (b) to grant an order of stay of execution pending appeal are well settled. Firstly, an applicant has to satisfy that he or she has an arguable appeal. Secondly, an Applicant has to demonstrate that unless the order of stay sought is granted the appeal or intended appeal would be rendered nugatory.
8. These principles have been restated and amplified by this Court in [*Stanley Kangethe Kinyanjui vs Tony Ketter & 5 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. See *Ruben & 9 Others v Nderitu & Another (1989) KLR 459*.
 - ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.



- iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin (1963) Ltd.* (1990) KLR 365.
 - iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
 - v. An applicant must satisfy the court on both of the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
 - 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. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
 - 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.
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
 - 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.
 - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403
9. The parties submitted on these principles during the hearing of the application on 17th November 2021. Mr. Nicholas Abidha, the learned counsel for the Applicant, highlighted their written submissions dated 16th November 2021, while Mr. Emmanuel Mumia, learned counsel for the Respondents, also relied on written submissions dated 16th November 2021. On the appeal being arguable, the counsel for the Applicant reiterated the grounds of appeal, and made reference to the decision in the case of *Stanley Kang'ethe Kinyanjui vs Tony Ketter and 5 others* [supra] as basis for their submission that they have an arguable appeal. The counsel further submitted that the Applicant was not given a fair hearing, and that the ruling made on 27th August 2021 went beyond the considerations of a prima facie case.
10. On the nugatory aspect, counsel for the Applicant submitted that the 1st Respondent was likely to transfer the suit property to a third party at a grossly undervalue amount, and that it would be a herculean task to recover the property or agree on the value of the property should the appeal succeed. Further, that since the value of the suit property is contested, damages would not be an adequate



remedy. The counsel concluded by submitting that the Respondents had not brought any evidence to show that the suit property had been transferred to a third party.

11. The Respondents' counsel on the other hand submitted that the parties were accorded equal opportunity to advance their cases at an inter partes hearing before the trial Court, and reiterated that the Applicant's equity of redemption was extinguished upon the sale of the charged property to a third party, as held in the case of *Mbutia vs Jimba Credit Finance Corporation & Another [1988] eKLR* and affirmed in section 99 of the *Land Act*. In addition, that since the loan has still not been serviced by the creditor, the Applicant, being a guarantor does not have an arguable appeal.
12. The Respondents' counsel further submitted that issuance of injunctive orders at this point in time would not serve any purpose, since the property in question had been sold to a third party who was protected under section 99 of the Land Act as a purchaser for value without notice, and would be prejudiced by being condemned unheard contrary to the principles of natural justice. Reference was made to the decision in this regard in *Pashito Holdings Limited & Another vs Paul Ndungu & 2 other, Nairobi CA no 138 of 1997 (1997) eKLR*. The Respondent reiterated the trial Court's position that the purchaser of the property ought to have been joined as a party at the proceedings, and that the Applicant's remedy lay in damages.
13. We reiterate at this point that an applicant in any application of this nature is obligated in law to demonstrate both the arguability and the nugatory aspect in order to succeed on an application under Rule 5(2)(b) of the Court of Appeal Rules. We have examined the draft memorandum of appeal, and note that the Applicant has raised multiple grounds of appeal summarized herein above, which have also been responded to with equal fervour by the Respondents. We are cognisant of the fact that in the first limb of an arguable appeal, the Applicant need only demonstrate one arguable ground, and further that an arguable appeal is not necessarily one that will succeed but one that warrants the court's interrogation and an invitation by the court to the opposite party to make a response thereto.
14. The Applicant has raised concerns on the legality and propriety of the statutory sale of the suit property, and whether her suit at the trial Court was determined at the interlocutory stage, which we find arguable and ought to be canvassed fully. The Applicant's appeal is therefore not frivolous. We however refrain from considering the merits of the arguments raised by the Respondent on the said issues raised above as in our view these will fall for consideration at the time of the hearing of the appeal. The first limb of arguability has therefore been satisfied by the Applicant.
15. On the nugatory aspect, it was stated by this Court in *Reliance Bank Limited vs Norlake Investments Ltd [2002] 1 E.A. 227*, that "the term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling." See also *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [supra]* wherein it was held, inter alia, that whether or not an appeal will be rendered nugatory depends on whether the status of the subject matter sought to be stayed is reversible; or if not reversible whether damages will be an adequate remedy for the party aggrieved.
16. The Respondents have urged that the only remedy available to the Applicant is damages, which we are in law obligated to weigh against the applicant's assertion that damages will not be an adequate remedy, in view of the circumstances highlighted above by the applicant in support of that position. Our take thereon, therefore, is that the record is explicit that the Respondent did not provide evidence of the transfer of the suit property to any third party, or its registration status. We cannot also lose sight of the Applicant's assertion that damages will not be an adequate remedy due to the undervaluing of the property, and that she is still in possession of the suit property. In the circumstances it is our view that the appeal will be rendered nugatory, if the current status quo with regard to possession and the status



of the title to the suit property as at 17th November, 2021 is disturbed before the determination of the Applicant's appeal.

17. On the totality of the above assessment and reasoning, we are satisfied that the applicant's application has met the threshold for granting relief under Rule 5(2)(b) of the Court of Appeal Rules. We therefore proceed to make orders as follows:

1. An order be and is hereby granted preserving the status quo obtaining as at 17th November, 2021 with regard to the possession and ownership of property known as LR No. 330/250 situate in Lavington within Nairobi County, pending the hearing and determination of the intended appeal.
2. The Applicant is directed to file and serve its intended appeal within ninety (90) days of today's date.
3. Upon default of Item 2 above by the Applicant, the orders on the preservation of the status quo granted herein shall automatically lapse.
4. By status quo is meant both the physical possession and registration status of the suit property as at 17th November, 2021.
5. The costs of the application dated 30th August 2021 to abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

