



**Kihagi & another v Jamii Bora Bank & 2 others (Civil Application E011 of 2020) [2021] KECA 265 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 265 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E011 OF 2020  
AK MURGOR, J MOHAMMED & HA OMONDI, JJA  
DECEMBER 3, 2021**

**BETWEEN**

**JOHN KARANJA KIHAGI ..... 1<sup>ST</sup> APPLICANT**

**LEAH NJERI KARANJA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JAMII BORA BANK ..... 1<sup>ST</sup> RESPONDENT**

**RIDHIKA CAPITAL LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JOLANS TRANSPORTERS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for stay of execution and injunction from the judgment and orders of the High Court of Kenya at Naivasha (Mwongo, J.) dated 12th November, 2020 in H.C.C.C No. 1 of 2019)*

**RULING**

1. Before us is a notice of motion dated 23rd February, 2021 in which John Karanja Kihagi & John Karanja Kihagi (the applicants) pray for orders in the main: that pending the hearing and determination of the intended appeal, this Court do grant a stay of execution of the judgment of the High Court (Mwongo, J.) delivered on 12th November, 2020; that pending the hearing and determination of the intended appeal, there be a temporary injunction restraining the 1st respondent as well as its servants, representatives and/or agents from advertising and or putting up for sale and/or selling all that parcel of land known as Naivasha/maraigushu Block 2/2732 (nyondia) (the suit property) by way of public auction or in any other manner; that the applicants be at liberty to apply for such further orders and/or directions as the Court may deem just and expedient to grant; that this Court do grant such further, other and/or consequential orders that this Court deems fit and just to ensure that the applicant's appeal is not rendered nugatory; and that the costs of this application be provided for.



2. Jamii Bora Bank, Ridhika Capital Limited & Jolans Transporters Limited are the respondents herein.
3. The application is brought under Rule 5(2)(b) of the Court of Appeal Rules (this Court's Rules) and is premised inter alia on the grounds that; on or about 24th January, 2019, the applicants received a statutory notice to sell the suit property (the statutory notice), under Section 96(2)(3) of the Land Act (the Land Act) from the 1st respondent who was purporting to, without proper reason or justifiable cause, sell the suit property; that the applicants on making an enquiry into the impending sale, the 1st respondent informed them that the 2nd respondent as the borrower, had failed to service the facility advanced to it and the applicants, having allegedly availed the suit property as collateral together with a personal guarantee for the loan facility advanced to the 2nd respondent, left the 1st respondent with no choice but to exercise its statutory power of sale over the suit property; that while the applicants had executed a letter of offer dated 13th May, 2015 which was declined, they had neither executed the alleged personal guarantee dated 24th September, 2015 which was a forgery nor the Supplemental Letter of Offer dated 31st August, 2015 both of which gave rise to the impugned facility and the subsequent threatened sale; that based on this premise, the applicants as the proprietors of the suit property and in seeking to safeguard their interests in the same, filed suit in the High Court challenging the 1st respondent's acts and/or omissions regarding the suit property; and that on 12th November, 2020, the High Court delivered its judgment in which it dismissed the applicants' suit and inter alia validated the personal guarantee over the suit property which was allegedly given by the applicants, thus holding that the 1st respondent was justified in seeking to exercise its statutory power of sale against the applicants; that the intended appeal is arguable and will be rendered nugatory if the orders sought are not granted.
4. The 1st respondent opposed the application vide a replying affidavit sworn by Jackson Kimathi, (Mr. Kimathi) the 1st respondent's Legal Manager. Mr. Kimathi stated that the instant application is a thinly veiled attempt by the applicants to frustrate the 1st respondent's right to exercise its statutory power of sale and realize its security; that the 1st applicant is a director of the 2nd respondent and together with his co-directors sought the loan facility from the 1st respondent; that by a letter of offer dated 2nd April, 2014 and supplemental letter of offer dated 28th May, 2014, the 1st respondent advanced the 2nd respondent a loan facility of Kshs. 2,360,000/=; that the facility was accepted by the 2nd respondent and authorized by its Board of Directors; that the suit property was charged in favour of the 3rd respondent as security for the loan; that the 2nd respondent failed to meet its obligation to make payments to service the loan and fell into default and arrears; that the 2nd respondent requested that it be granted further loan facilities in order to raise more capital injection and enable it to regularize its existing loan facilities; and that the request was accepted by the 1st respondent and additional facilities extended to the 2nd respondent by way of various letters of offer dated 13th May, 2015, 31st August, 2015 and 20th June, 2017 for various additional facilities. Mr. Kimathi further averred that the additional facilities were secured by a charge over L.R. No. 3000 C.R. No. 65414 and Naivasha/Maraigushu Block 2/2732; that the said properties were not sufficient security for the additional facilities and the said facilities were further secured by personal guarantees made by the 2nd respondent's directors, including the 1st applicant, as well as consolidation of the additional facilities and the pre-existing facility secured by the suit property; that the 2nd respondent still proceeded to default on its loan facility, and despite several requests, reminders and demands, the outstanding amount has not been repaid; and that the 1st respondent had no option but to exercise its statutory power of sale to safeguard its interests.
5. Mr. Kimathi further stated that the applicants are seeking a stay of execution of a judgment which struck out their suit and did not ask the parties to do or refrain from doing anything; that the decision of the High Court was negative in nature and the same is incapable of being stayed; that there is no



positive and enforceable order and/or decree which should be the subject matter of the application; that it therefore follows that the application is incompetent and should be dismissed by this Court; that the appeal is not arguable for various reasons including that the debt was not disputed, that the 1st applicant being a director of the 2nd respondent was at all times aware of the loan facilities advanced by the 1st respondent, that the 1st respondent voluntarily offered the suit property as security for the facilities advanced to the 2nd respondent; that the applicants have not demonstrated how the intended appeal will be rendered nugatory should the orders sought not be granted; that the applicants have not met the required threshold for the grant of injunctive reliefs; and that the balance of convenience heavily tilts in favour of the 1st respondent given that there is a valid debt owed to it over a valid security.

#### Submissions by Counsel

6. The application was heard by way of written submissions. Counsel for the applicants submitted that Rule 5 (2)(b) of the Court of Appeal Rules empowers this Court to entertain an interlocutory application for preservation of the subject matter of the appeal to ensure the just and effective determination of appeals. Counsel cited the case of *Oliver Collins Wanyama v Engineers Board of Kenya [2019] eKLR* reflecting this position.
7. On the question whether the applicants had met the twin requirements for grant of reliefs under Rule 5 (2)(b), of the *Court of Appeal Rules*, counsel submitted that they have an arguable appeal on the basis that the intended appeal challenges the legality of the letter of offer and personal guarantee; and that unless the 1st respondent is restrained by this Court, it may proceed to sell the suit property which may result in an irreversible consequence or one that would involve considerable hardship and expense to reverse should the appeal succeed. Counsel contended that damages may not be reasonable compensation should the intended appeal succeed as the applicants did not sign the letter of offer giving rise to the impugned facility. Counsel cited the case of *George Otieno Gachie & another v Judith Akinyi Bonyo & 5 others [2017] eKLR* for the proposition that the appeal should not be reduced to an academic exercise in situations where salvaging the subject matter may be impossible or where damages may not be an adequate remedy.
8. Counsel for the 1st respondent submitted that the impugned judgment merely struck out the suit and did not ask any party to do anything or refrain from doing anything; and that therefore the decision of the court was negative in nature and the same is incapable of being stayed. Counsel cited several cases including *Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR*, *Oliver Collins Wanyama v Engineers Board of Kenya [2019] eKLR* and *Shimmers Plaza Limited v National Bank of Kenya Ltd [2013] eKLR* where this Court held that it lacked jurisdiction to entertain the orders sought as there were no positive orders made in the trial court to be stayed or to which injunctive orders could be granted.
9. On the question whether the application meets the threshold for stay of execution under Rule 5(2) (b), of this Court's Rules, counsel reiterated that the intended appeal is not arguable as there is an undisputed valid and existing debt owed to the 2nd respondent secured by the suit property and that the 1st respondent was at all times aware of the loan facilities being advanced and duly executed the letters of offer and guarantees; that the applicants failed to adduce any evidence to support their averment that there was fraud and illegality in the transactions;  
  
that the intended appeal will not be rendered nugatory should the orders sought not be granted as the 1st respondent being a reputable financial institution has the financial capacity to pay compensation in the form of damages.

#### Determination



10. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction of this Court under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice.
11. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled as was observed by this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR* where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
12. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR* this Court described an arguable appeal in the following terms:

“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.

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.”
13. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, it is arguable inter alia the validity of the letter of offer dated 31st August, 2015 which gave rise to the impugned facility. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
14. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (supra) this Court stated that:

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

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.
15. In determining whether or not an appeal will be rendered nugatory the Court has to consider the conflicting claims of both parties and each case has to be considered on its merits. We find that in the circumstances of the instant application, even though the applicants can be compensated in damages, the applicants face the risk of an irreversible consequence or one that would likely be reversed after considerable hardship or expense and would therefore be highly prejudicial to the applicants. *In the Estate of Harish Chandra Hindocha (Deceased) [2021] eKLR* this Court in granting an injunction



observed that the appeal before it would be rendered nugatory in the event that the Court did not grant an order of injunction as the respondent therein was likely to deal with the suit property leading to “an irreversible consequence or one that would likely be reversed after considerable hardship or expense and would therefore be highly prejudicial to the applicant.”

16. We note that the applicants seek a stay of execution and a temporary injunction. While we agree with the respondents that the High Court issued a negative order, the applicant also seeks a temporary injunction which this Court has the jurisdiction to grant under Rule 5(2)(b) of this Court’s Rules.
17. In the circumstances of the instant application, we are persuaded that the applicants have demonstrated an arguable appeal which will be rendered nugatory if the orders sought are not granted since the subject matter of the intended appeal will have been auctioned to third parties and be out of the reach of the applicants and this Court.
18. From the circumstances of the application before us, we are satisfied that the applicants have satisfied the twin principles for the grant of an injunction pending the hearing and determination of the intended appeal in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in the case of Stanley Kange’the Kinyanjui (supra).
19. The upshot is that the application dated 23rd February, 2021 is allowed. Costs shall abide by the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF DECEMBER, 2021.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

