



Tropicana Hotels Limited v SMB Bank Kenya Limited formerly known as Fidelity Commercial Bank Limited (Civil Appeal 9 of 2020) [2021] KECA 249 (KLR) (3 December 2021) (Ruling)

Neutral citation: [2021] KECA 249 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 9 OF 2020
RN NAMBUYE, AK MURGOR & J MOHAMMED, JJA
DECEMBER 3, 2021**

BETWEEN

TROPICANA HOTELS LIMITED APPLICANT

AND

**SMB BANK KENYA LIMITED FORMERLY KNOWN AS FIDELITY
COMMERCIAL BANK LIMITED RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya (J. O. Olola,
J.) dated 25th May, 2018 in Malindi ELC Case No. 220 of 2015)*

RULING

1. Before us is a Notice of Motion dated 14th July, 2020, brought under sections 3, 3A and 3B of the *Appellate Jurisdiction Act* and Rule 5(2)(b) of the *Court of Appeal Rules* substantively seeking prayers as follows:

“4. The respondent SBM Bank Kenya Limited by itself and its agent Keysian Auctioneers be restrained from offering for sale and from auctioning land portion numbers 775 and 776 registered as CR Numbers 10407 and 10431 (hereinafter referred to as the suit premises) pending the hearing and determination of this appeal.

5. Costs of this application be provided for.”

2. It is supported by grounds on its face, a supporting affidavit sworn by Kamal Bhatt together with annexures thereto, a further affidavit sworn by the same Kamal Bhatt on 22nd September, 2020, appellant/applicant’s (hereinafter referred to only as applicant) submissions dated 10th September, 2020 and list of authorities dated 22nd September, 2020. It is opposed by a replying affidavit of Mr. Gikandi Ngibuini the advocate on record for the respondent, sworn on 21st September, 2020 together with annexures thereto.



3. The application was canvassed via the Go-To-Meeting platform through the rival pleadings, applicant's written submissions and authorities without oral highlighting but in the presence of learned counsel, Mr. Kinyua Muyaa appearing for the appellant/applicant and learned counsel, Mr. Gikandi Ngibuini on record for the respondent, pursuant to the consent endorsed herein by the advocates for the respective parties on 25th November, 2021 vacating the orders of the court made in the court's ruling dated and delivered herein on 23rd October, 2020.
4. Cumulatively, it is the applicant's position that they were dissatisfied with part of the judgment delivered by J. O. Olola, J. in Malindi ELC Case No. 220 of 2015. They timeously filed a notice of appeal in June, 2018 and a record of appeal on 6th February, 2019. The application under consideration was triggered by the conduct/action of the respondent's agents Keysian Auctioneers serving the applicant with a 45 days' notice and a notification of sale of immovable property forming the substratum of the appeal already filed, in the auction then scheduled to take place on the Thursday of 24th September, 2020.
5. The applicant sought the Court's intervention to forestall the then scheduled auction for the reasons that the respondent had not as at that point in time served the applicant with the mandatory ninety (90) days statutory notice. According to the applicant, the respondent's failure to comply with the above mentioned mandatory prerequisite for service of the ninety (90) days statutory notice upon them before moving to exercise its statutory power of sale rendered the 45 days' notice and notification of sale served upon them on 13th July, 2020 not only premature, but also incompetent.
6. Turning to the prerequisites for granting relief in an application of this nature, the applicant relies on the grounds of appeal set out in the memorandum of appeal in the record of appeal already filed and in which the application under consideration was filed and or anchored as sufficient support of their assertion that the appeal already filed is not only arguable but also has high chances of success.
7. In summary, the applicant intends to argue on appeal, inter alia, that the learned Judge erred in law in failing to properly appreciate the proper meaning and application of section 69(4) of the *Indian Transfer of Property Act (ITPA)* (now repealed) and the right to privacy guaranteed under Article 31 of the *Constitution of Kenya, 2010* that includes the right to have a determination of whether any debt is owing and if so how much; in totally misapprehending the evidence adduced in favour of the applicant's suit hence arriving at an erroneous conclusion thereof that the applicant's claim against the respondent was untenable; failing to appreciate and hold that the respondent abused its stronger position and fettered the applicant's right of redemption and lastly, failing to appreciate and hold that payment or enforcement of payment of more than Kshs.30,000,000.00 on facilitation of Kshs.15,000,000.00 or that enforcement of payment of more than Kshs.50,000,000.00 on facilitation of Kshs. 25,000,000.00 would be in violation of section 44A of the *Banking Act*.
8. On the alleged satisfaction of the second prerequisite, the applicant argues that the property intended to be realized as security pursuant to the respondent's impugned forty-five (45) days' notice and notification of sale then scheduled to take place on the Thursday of 24th September, 2020 is substantially what forms the substratum of the appeal already filed and once altered the appeal will be rendered nugatory should it ultimately succeed.
9. To buttress the above submission, the applicant among others cited the decision in *National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & Another [2006] eKLR* for the holding/proposition, inter alia, that the validity or otherwise of a notice of appeal does not affect the Court's determination of an application for stay or injunction brought under Rule 5(2)(b) of the Court of Appeal Rules as what falls for consideration by the Court in an application under the said Rule is a determination as to whether the appeal or intended appeal as the case may be is arguable and not



frivolous and, second, whether if the stay sought is not granted and the appeal or intended appeal eventually succeeds would be rendered nugatory by the earlier refusal to grant stay or an injunction.

10. In rebuttal, the respondent in the replying affidavit filed on its behalf by the advocate on record for them averred, inter alia, that there is no competent appeal in place as firstly, the record of appeal on which the application under consideration is anchored was filed out of time and without leave of the Court. Second, the record of appeal as filed is also incompetent for the failure of the applicant to comply with the rule on compiling a record of appeal for lack of inclusion therein of a certified copy of the impugned decree and judgment impugned.
11. It is also the respondent's position that the application under consideration is not only frivolous but also mischievous as the applicant does not deny that the filing of the said application was triggered by the action of the respondent, serving upon them the auctioneer's notice of sale. It is therefore the respondents' opinion, that the applicant who does not deny having benefited from sums of money advanced to it by the respondent and which sums are undeniably not paid is merely using the legal process to frustrate the respondent from realizing the debt due and owing to it by the applicant.
12. Neither have they taken any steps at all to regularize its already filed appeal nor even made any attempt to have it listed for merit disposal. On account of the totality of the above averments in rebuttal to the applicant's application, the respondent urged the Court to find the applicant undeserving of the exercise of the court's discretionary mandate in its favour and disallow the application.
13. Our invitation to intervene on behalf of the applicant is basically anchored under Rule 5(2)(b) of the Court of Appeal Rules. It is now trite that the court's exercise of its mandate under the said Rule, is original, independent and discretionary. See *Githunguri vs. Jimba Credit Corporation Ltd No. (2) [1988] KLR 88*. It is a procedural innovation designed to empower this Court to entertain interlocutory applications for the preservation of the subject matter of the appeal where one has been filed or is intended. See *Equity Bank Ltd vs. West Link NBO Civil Application No.78 of 2011 (UR)*. The jurisdiction under Rule 5(2)(b) only arises where the applicant has lodged a notice of appeal. See *Safaricom Ltd vs. Ocean View Beach Hotel Ltd & 2 others, Civil Application No. 327 of 2009 (UR)*.
14. The conditions to be met before a party can obtain relief under Rule 5(2) (b) have been numerously restated by the Court. We take it from the crystallization of these in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR*, wherein the guiding principles for the court's exercise of its mandate under Rule 5(2)(b) of the Court of Appeal Rules were summarized as hereunder;

“(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 *Reuben & 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. See *Halai & Another vs. 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 facts and peculiar circumstances. See *David Morton Silverstein vs. Atsango Chesoni, Civil Application No. Nai 189 of 2001*;

(v) an applicant must satisfy the Court on both of the twin principles;



(vi) in whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. See *Damji Pragji Mandavia vs. 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. See *Joseph Gitahi Gachau & Another vs. 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. See *Damji Pragji* (supra);

(ix) the term “nugatory” has to be given its full meaning. It does not only mean worthless, futile, or invalid. It also means trifling. See *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 impunity, the onus shifts to the latter to rebut by evidence the claim. See *International Laboratory for Research on Animal Diseases v Kinyua*,__ [1990] KLR 403.”

15. We have applied the above principles to the rival arguments made before us herein. We are satisfied that our jurisdiction has been properly invoked under the applicable rule as there is a notice of appeal in place and the appeal record already filed on the basis of which the application under consideration has been anchored. See the case of *Githunguri vs. Jimba Credit Corporation Ltd* (Supra).
16. Our next task is to determine whether the applicant on the facts as laid before us highlighted above has brought itself within the ambit of the twin principles for granting of a relief under Rule 5(2)(b) of this Court’s Rules. The first prerequisite to be established is the demonstration of the existence of an arguable appeal. The applicant herein has displayed before us a copy of the memorandum of appeal with a whopping litany of twenty-five (25) grounds of appeal already summarized in the body of the ruling.
17. We have reconsidered them and are in agreement with the applicant’s position that the issues intended to be raised on appeal both in the memorandum of appeal annexed to the application and also as summarized above by us and which we find no need to rehash here for purposes of the determination of the application warrant the Court’s interrogation as well as the respondent’s response thereto.
18. In the result, we are satisfied that the applicant’s intended appeal already filed is therefore not frivolous, but arguable. We find no harm in us reiterating that one arguable point will suffice. See the case of *Kenya Railways Corporation vs. Edermann Properties Ltd* (supra). Herein, we have identified several issues for determination as already highlighted above. Second, that an arguable appeal need not be one that will necessarily succeed. See *Sammy Mwangi Kiriethi & 2 Others vs. Kenya Commercial Bank* [2020] eKLR. *Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others*, Civil Application No. 124 of 2008.
19. On the nugatory aspect, we find this ingredient also satisfied in view of the undisputed contention by the applicant that the property sought to be realized as security pursuant to the notice of sale that triggered the filing of the application under consideration is in fact, that which forms the very



substratum of the appeal already filed and once realized, there will be no basis for pursuing the appeal already filed. See *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004*.

20. Also falling for consideration is the requirement that both prerequisites must be satisfied before relief can be granted under Rule 5(2)(b). Herein, we are satisfied as already demonstrated above that both limbs have been satisfied by the applicant in the application under consideration.
21. Lastly, also falling for consideration is the applicant's right to be heard on the appeal already filed. The position in law on the right to be heard is now crystallized both constitutionally and statutorily. We take it from the case of *Richard Nchapi Leiyagu vs. IEBC & 2 Others [2013] eKLR*; *Mbaki & Others vs. Macharia & Another [2005] 2EA 206*; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003*; in which it was variously held, inter alia, that: the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.
22. Applying the above principles to the rival positions herein, it is our position that unless and until vitiated the applicant is entitled to be heard on the appeal already filed. It is therefore only prudent for us to accord them an opportunity to do so.
23. In light of the totality of the above assessment and reasoning, we are satisfied that the applicant has met the threshold for granting relief under Rule 5(2)(b) of the Court of Appeal Rules. We therefore, grant orders as follows:
 1. The respondent SBM Bank Kenya Limited by itself and its agent Keysian Auctioneers is restrained from offering for sale and from auctioning land portion numbers 775 and 776 registered as CR Numbers 10407 and 10431 (hereinafter referred to as the suit premises) pending the hearing and determination of this appeal.
 2. Costs of this application be provided for.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

