



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KOOME, SICHALE & KANTAL, JJA]

CIVIL APPLICATION NO. 123 OF 2019

(UR NO. 117 OF 2019)

BETWEEN

STANLEY MWANGI KURIAAPPLICANT

AND

THE CO-OPERATIVE BANK OF KENYA LTD.....RESPONDENT

(Being an application under Rule 5(2) (b) and Rule 42 of the Court of appeal rules for an order of stay of execution of the ruling of the High Court of Kenya at Nairobi (Maureen A. Odero, J) dated 6th March, 2019

IN

CIVIL CASE NO. 23 OF 2018)

RULING OF THE COURT

The applicant, **Stanley Mwangi Kuria** filed before the High Court, a notice of motion dated **18th January, 2018** and the principal order sought was that:

“The Court be pleased to grant an injunction restraining the respondent whether by itself, its auctioneers, agents and/or servants from dealing, interfering, alienating or otherwise disposing of the property known as L.R No. Dagoretti/Karandini/82 pending the hearing and determination of this suit”.

The respondent herein was the respondent therein.

In a ruling rendered on **6th March, 2019**, **Odero, J** dismissed the applicant’s motion. Aggrieved by the said outcome, the applicant has now filed the motion dated **12th April, 2019** seeking an order, again, principally:

“THAT pending the hearing and determination of the intended appeal by the applicant herein, this Honourable Court be pleased to grant an order of stay of execution of the ruling issued by the Hon. Justice Maureen Odero on the 6th March, 2019 in Civil Case No. 23 of 2018”.

On **24th October, 2019**, the motion came up before us for plenary hearing. **Mr. Mburu**, learned counsel for the applicant urged us to find that the applicant has an arguable appeal. He contended that the respondent owed the applicant rent in respect of premises known as **L.R No. Dagoretti/Karandini/82** which rent continues to accrue, and which should have been considered vis-à-vis the loan owed to the respondent by the applicant.

On the nugatory aspect, counsel submitted that the suit property is a high value city property that should be preserved pending the hearing of

the intended appeal.

In opposing the motion, **Mr. Ratemo**, learned counsel for the respondent pointed out that the applicant does not deny indebtedness to the respondent; that no steps have been taken to off-set the loan balance from the year 2015; that the alleged rent arrears have no bearing on the sum borrowed as the lease agreement is distinct and separate from the sum secured vide a charge of the suit property.

On the nugatory aspect, counsel contended that the respondent has a sound financial base and is in a position to refund sums recovered from the sale of the suit property should the appeal succeed.

In an application such as this one, an applicant has to demonstrate that he/she has an arguable appeal that will be rendered nugatory, absent stay. These two principles have been enunciated in several decisions of this court including the case of **Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR** wherein it was held 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-vs- 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. Gitahi Gachau & Joseph another v Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2018

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 impecuniness, the onus shifts to the latter to rebut by evidence the claim”.

International Laboratory for Research on Animal Diseases v. Kinyua, [1990] KLR 403.

In the instant matter, the applicant does not dispute the fact that he borrowed money from the bank. The loan money was secured by a charge on the suit property. We are in agreement with the respondent that even if the applicant is owed rent by the applicant, the issue of rent is distinct and separate from the loan borrowed by the applicant. In our view, we do not think that the applicant has demonstrated that he has an arguable appeal.

On the nugatory aspect, the respondent was the lender of the sum borrowed by the applicant. The respondent states that it is in a sound financial footing should it be required to re-pay the applicant the proceeds of the auction of the charged property should the appeal succeed. Again, we do not think that the applicant has satisfied the 2nd limb of establishing that his appeal will be rendered nugatory absent stay.

The upshot of the above is that we find no merit in the motion dated **18th January, 2018**. It is hereby dismissed with costs.

Dated and Delivered at Nairobi this 3rd day of April, 2020.

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR