



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, SICHALE & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO NAI 258 OF 2019

BETWEEN

EQUITY BANK KENYA LIMITED.....APPLICANT

AND

PENNINAH NJERI THIONGO.....1ST RESPONDENT

LUCY NDUTA THIONGO.....2ND RESPONDENT

ROSE NJOKI KENJU.....3RD RESPONDENT

THE LAND REGISTRAR, KIAMBU COUNTY.....4TH RESPONDENT

SUSAN CAROLINE GATHIGIA WERU.....5TH RESPONDENT

(An application for injunction pending the hearing and determination of an intended appeal against the judgment and decree of the Environment and Land Court at Nairobi (Mbugua, J) dated 3rd November 2017

in

Environment and Land Court Case No 902 of 2014)

RULING OF THE COURT

BACKGROUND

1) The applicant, **Equity Bank Kenya Limited** filed a Notice of Motion dated 2nd August, 2019 seeking orders *inter alia* that:

a) This Honourable Court be pleased to issue an order of stay of execution of the judgment and decree dated 3rd November, 2017 issued by the Environment and Land Court (ELC) in Nairobi in Civil Case No 902 of 2014 pending the hearing and determination of Nairobi Civil Appeal No 168 of 2019.

b) This Honourable Court be pleased to issue an order of injunction restraining the 1st respondent herein whether by herself, agents, servants, employees, invitees, and/or otherwise whomsoever from entering upon or trespassing, constructing of any structures, offering for sale, selling, disposing of, charging sub-dividing, dealing, alienating, occupying, managing, letting, receiving rent or otherwise using, residing and remaining or representing to any person as being the duly registered owner of all that piece of land formerly known as LR No. Kiambaa/Thimbigua/5137 and now subdivided into LR No. Kiambaa/Thimbigua/5144 and LR No. Kiambaa/Thimbigua/5145 pending the hearing and determination of Civil Appeal No 168 of 2019.

c) The applicant be at liberty to apply for further orders and/or directions as the Court may deem fit and just to grant.

d) The costs of the application do abide the outcome of the main appeal.

2) In the motion, **Peninah Njeri Thiongo** was named as the 1st respondent, **Lucy Nduta Thiongo** as the 2nd respondent, **Rose Njoki Kenju** as the 3rd respondent, the **Land Registrar, Kiambu County** as the 4th respondent while **Susan Caroline Gathigia Weru** was named as the 5th respondent.

3) The motion was supported by the affidavit of **John Njenga**, the applicant's Associate Director, Legal Services, sworn on 2nd August, 2019 in which he deposed that in the judgment, the subject of the appeal the learned Judge *inter alia* made the following declarations: that the 1st respondent is the legal owner of **Land Parcel Title No. Kiambaa/Thimbigua/5317**; that the transfer of **Title No Kiambaa/Thimbigua/5144** from the 1st respondent to the 2nd respondent was illegal; that the transfer of **Title No Kiambaa/Thimbigua/5145** from the 1st respondent to the 3rd respondent was illegal; that the amalgamation of **Title Nos Kiambaa/Thimbigua/5144** and **Kiambaa/Thimbigua/5145** in the name of the 3rd respondent was illegal; that the transfer of **land parcel No Kiambaa/Thimbigua/5317** by the 3rd respondent to the 5th respondent was illegal; and that any encumbrances including charges, executed over **Land parcel No Kiambaa/Thimbigua/5317** was illegal and were thereby nullified. The learned Judge also issued an order to the 4th respondent to cancel **Title No Kiambaa/Thimbigua/5317** and in its place restore the **Title Nos Kiambaa/Thimbigua 5144** and **Kiambaa/Thimbigua 5145** in the name of the 1st respondent.

4) The applicant further averred that it is dissatisfied by the judgment and has filed **Civil Appeal No 168 of 2019**; that it has an arguable appeal with high chances of success on grounds *inter alia* that the learned Judge erred: in finding that the applicant had not filed a defence while a defence was filed on 9th December, 2014 and served on all the parties; and in holding that the property was charged fraudulently while there was no evidence of fraud or knowledge of fraud on the part of the applicant. **John Njenga** averred that the applicant stands to suffer irreparable loss and damage if the orders sought are not granted as the charge registered against **Land Reference Number Kiambaa/Thimbigua/5147** which was registered in the name of the 5th respondent and charged in favour of the applicant will be discharged.

5) In a replying affidavit sworn by the 1st respondent, it was deposed that the application lacked merit; and that the application has been overtaken by events as execution of the impugned judgment has already been effected.

SUBMISSIONS BY COUNSEL

6) At the plenary hearing, **Mr. Obuya**, learned counsel for the applicant, stated that the applicant had suffered prejudice on account of an outstanding loan that had been secured by properties registered in the name of the 5th respondent; that interest continues to accrue on the outstanding loans; and that rental payments from apartments built on **Title No Kiambaa/Thimbigua/5137** in respect of which the 5th respondent had assigned to the applicant towards loan repayment, would be prejudiced if the orders sought are not granted. Counsel urged us to grant orders as prayed pending the hearing and determination of the appeal.

7) The 1st respondent opposed the application through learned counsel, **Mr. Mburu**, who argued that the applicants do not have an arguable appeal.

8) On the nugatory aspect, **Mr. Mburu** submitted that the impugned judgment was delivered in 2017 and the orders made therein had since been executed and a new title issued in the 1st respondent's name. Counsel urged us to dismiss the application with costs.

DETERMINATION

9) We have considered the record, the rival submissions, the authorities cited and the law. Our jurisdiction under **Rule 5(2)(b) of this Court's Rules** is discretionary, fairly wide and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted, the appeal will be rendered nugatory.

In **Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR (Civil Application Nai. 258 of 1999)** this Court set out the jurisdiction of this Court in an application under **Rule 5(2)(b)** of this Court's Rules and rendered itself 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....”

10) In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.

11) 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 applicant in order to warrant ventilation before this Court. See **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR (Civil Application No. Nai. 31 of 2012)** where 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.”

12) We have carefully considered the grounds set out in the motion as well as in the memorandum of appeal. In our view, it is arguable whether the applicant's rights as chargee should have been considered by the ELC. On our part, without saying more and embarrassing the bench that will be seized of the main appeal, we are satisfied that the intended appeal is not frivolous.

13) We now turn to the second aspect, which is whether or not the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought. In *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others (supra)* the 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.

xi). Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's impecunity, the onus shifts to the latter to rebut the allegation.”

14) The factors which can render an appeal nugatory have to be considered on a case by case basis and in doing so, the Court is bound to consider the conflicting claims of both parties. In the impugned judgment, the ELC ordered that the title in respect of **Kiambaa/Thimbigua/5147** which is charged to the applicant, be cancelled and that any encumbrance or charges including the charge registered in favour of the applicant be declared null and void. We find that in the circumstances, the appeal will be rendered nugatory if the applicant's rights are not safeguarded by grant of the orders sought as the charges registered in favour of the applicant will be discharged and the applicant will have no security for the repayment of the sum of KShs 40.5 Million secured by a charge over all that property known as **Land Reference Number Kiambaa/Thimbigua/5147**.

15) Having satisfied both limbs of **Rule 5(2)(b)** of the Rules of this Court, the application succeeds and is hereby allowed. Costs of the motion shall be in the appeal.

Dated and delivered at Nairobi this 10th day of July, 2020

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR