



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, KOOME & MAKHANDIA, J.J.A.)

CIVIL APPLICATION NO. 72 OF 2020

BETWEEN

KAUSHIK PANCHAMATIA.....1ST APPLICANT

SUNRISE HAULIERS LIMITED.....2ND APPLICANT

RISHI HAULIERS LIMITED.....3RD APPLICANT

DUNGA WHOLESALERS LIMITED.....4TH APPLICANT

VERSUS

PRIME BANK LIMITED.....1ST RESPONDENT

GARAM INVESTMENT AUCTIONEERS.....2ND RESPONDENT

(Being an Application for stay of execution pending the hearing and determination of an intended appeal arising from the Judgment and Decree of the High Court of Kenya (Hon. T.W. Cherere, J.) dated 24th June 2020

in

Nairobi Commercial Case No. 2 of 2020)

RULING OF THE COURT

Before us is a Notice of Motion dated 3rd July 2020, brought under **Section 3A** of the Appellate Jurisdiction Act, Rule 5(2)(b), 41 and 47 of the Court of Appeal Rules, 2010, and the inherent power of the court seeking orders as follows:

“4. Pending the hearing and determination of the intended appeal, there be a stay of execution of the ruling and order of the High Court sitting at Kisumu (Cherere, J.) delivered on 24th June 2020 in Commercial Case No. 2 of 2020, Kaushik Panchamatia & 3 Others vs. Prime Bank Limited & Another.

5. Pending the hearing and determination of the intended appeal against the ruling and decree of the High Court sitting at Kisumu (Cherere, J.) delivered on 24th June 2020 in Case No. 2 of 2020, Kaushik Panchamatia & 3 Others vs. Prime Bank Limited & Another, there be temporary injunction restraining the 1st and 2nd respondents as well as their servants, representatives and/or agents from advertising and/or putting for sale and/or selling land title number Kisumu/Municipality/Block 12/310 and Kisumu Municipality/Block 6/63 by way of public auction or in any other manner pending inter partes hearing and determination of the intended appeal.

6. The costs of this application be provided for.”

The application is supported by grounds on its body and a supporting affidavit of **Kaushik Panchamatia** together with annexures thereto. It has been opposed by a replying and further affidavit of **George Mathui** on behalf of the 1st respondent, deposed on 14th July 2020 and 17th July 2020 respectively, together with annexures thereto. The application was canvassed by written submissions and legal authorities relied upon by the respective parties in support of their opposing positions without oral highlighting. The set for the applicants is dated 17th July

2020, while that for the 1st respondent is also dated 17th July 2020.

The background to the application is that on 24th June 2020, the High Court (**T.W Cherere, J.**) sitting in Kisumu delivered a ruling in which was it ordered that the application filed by the applicants seeking stay of sale of properties known as **Kisumu Municipality Block 12/310** and **Kisumu Municipality Block 6/63** (suit properties) be dismissed with costs to the respondents.

The dispute triggering the litigation resulting in the above ruling is that the 1st and 4th applicants are the registered proprietors of the suit properties. In the year 2011, the 1st respondent extended loan facilities to the 2nd and 3rd applicants, which were secured by joint and several guarantees and indemnities executed by the 1st and 4th applicants in favour of the 2nd and 3rd applicants, secured against the suit properties.

In the year 2017, upon the 3rd applicant acknowledging its inability to pay, the 1st respondent issued statutory notices of intention to dispose of the suit properties which prompted the applicants to file in the High Court of Kenya at Kisumu Commercial Division, Civil Suit No. 2 of 2020 seeking various reliefs, and on which basis the applicants anchored an application for an injunction to restrain the respondents from disposing of the suit properties which was dismissed on merit on 24th June 2020.

Being aggrieved by that ruling, the applicants filed a Notice of Appeal on 24th June 2020 and subsequently lodged the notice of motion under consideration. The applicants' case is that they have satisfied the twin principles for the grant of relief under Rule 5(2)(b) of the Rules of the court. Firstly, because the draft memorandum of appeal annexed to the application demonstrates that the intended appeal is arguable with high chances of success; and second that if the stay sought is not granted the intended appeal will be rendered nugatory.

Applicants rely on the case of **Kenya Commercial Bank Limited vs Nicholas Ombija [2009] eKLR**; and the case of **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR** to reinforce the above principles that guide the Court in the exercise of its discretionary mandate under Rule 5(2)(b) of the rules of the Court.

On whether the applicant will suffer a substantial loss if a stay of execution is not granted, the applicants contend that the 1st and 2nd applicants, who are the registered owners of the suit properties will suffer loss as their proprietary interest will not only be threatened but also extinguished contrary to their right to property as protected for under the Kenya Constitution, 2010.

In rebuttal, the 1st respondent submitted that the applicants are seeking stay of negative orders incapable of being issued; that a chargee can only be restrained from exercising its statutory power of sale if the applicants pay the entire amount claimed in Court, which the applicants have failed to do; and also that the property title number **Kisumu Municipality Block 12/310** was sold by way of public auction to a bona fide third party on 17th July 2020 rendering the application under consideration not only overtaken by events but also inconsequential.

Relying on the case of **Republic vs The Commissioner for Investigations & Enforcement 'Ex-Parte' Wanainchi Group Kenya Ltd[2014] eKLR**, **Bawan Roses Limited vs Barclays Bank of Kenya [2008] eKLR**, and **Mukua Tutuma vs Cooperative Bank of Kenya Ltd [2008] eKLR** among others, also on the principles that guide the Court on the exercise of its discretionary mandate under Rule 5(2)(d) of the Rules of the Court, the 1st respondent urged that the application under consideration is a waste of Courts valuable time and it should be dismissed with costs to them.

We have considered the record in light of rival pleadings, authorities and submissions of learned counsel for the respective parties who participated in the hearing of the application. Our invitation to intervene on behalf of the applicants has been invoked under the provisions of law cited above. Rules 42 and 47 are merely procedural and therefore need no further interrogation. **Section 3A** of the Appellate Jurisdiction Act enshrines the overriding objective of the court. It provides:

“3A(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(1) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(2)

The principles that guide the invocation of this provision have been crystallized by case law. See the case of **City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008)**; and **Kariuki Network Limited & Another vs. Daly & Figgis Advocates Civil Application No. Nai 293 of 2009**, in which it was stated *inter alia* that: the purpose of the overriding objective principle is first, to enable the court achieve fair, just, speedy, proportional, time and cost-saving disposal of cases before it. Secondly, to embolden the court to be guided by a broad sense of justice and fairness. Thirdly, to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.

Rule 1(2) of the Court of Appeal Rules enshrines the inherent power of the court. It provides as follows:

“1(2) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

The principles that guide the court on the invocation of this rule are as follows: the case of **Equity Bank Limited vs. West Link Mbo Limited [2013]eKLR**; **Musinga, JA** *inter alia* made observations on the instances when this inherent power can be invoked thus:-

“Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their Constitutional mandate.....

Inherent power is therefore the natural or essential power conferred upon the Court irrespective of any conferment of discretion.”

The Supreme Court in the case of **Board of Governors, Moi High School, Kabarak & Another vs. Malcolm Bell [2013]eKLR**; *inter alia* added the following observations:

“...inherent powers are endowments to the Court such as will enable it to remain standing, as a constitutional authority, and to ensure its internal mechanisms are functional; it includes such powers as enable the court to regulate its internal conduct, to safeguard itself against contemptuous or disruptive intrusions from elsewhere, and to ensure that its mode or discharge or duty is conscionable, fair and just.”

The substantive rule of access for the relief sought is Rule 5(2)(b) of the CAR provides as follows:

“(b) in any civil proceedings, where a notice of appeal had been lodged in accordance with rule, Order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”

The principles that guide the court’s exercise of its jurisdiction under the above rule are now well settled. In **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR**, the guiding principles 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. 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 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. 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. 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. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.*

We have applied the above threshold to the rival positions herein. Our simple role is to determine whether on the facts on record before us the applicants have satisfied the above prerequisites for us to grant them the relief sought in the application under consideration. Starting with the first prerequisite on whether the appeal is arguable, the applicants have annexed to the application a memorandum of appeal raising nine (9) grounds of appeal. In summary applicants intend to argue on appeal *inter alia* that the learned judge erred both in law and fact by finding that: the 1st respondent’s replying affidavit of 15th June 2020 together with annexures thereto were not incompetent; the 1st and 4th applicants had not been freed from their obligation as guarantors of the 2nd and 3rd applicants even though the guarantors had made payments over and above the amount the charged properties secured; 1st respondent’s statutory power of sale had arisen over the charged properties even though the 1st respondent failed to establish to the court that he had exhausted all forms of recovery from the 2nd and 3rd

applicants before going for guarantors security; applicants had not established a prima facie case

with a probability of success; any alleged irreparable loss likely to be occasioned to the applicants was capable of compensation by way of damage; the balance of inconvenience for issuing the injunction order was not in favour of the applicants; and lastly by erroneously dismissing the applicants well merited application for injunction without sufficient basis.

We have revisited those grounds and considered them in light of the above principles. We are satisfied that the applicants intend to present an arguable appeal. This is nonetheless with the usual caution that it may not ultimately succeed as in law an arguable appeal need not be one that will ultimately succeed.

The above finding notwithstanding, we cannot lose sight of the fact that the order that the applicants seek to stay is the order of the High Court issued on 24th June 2020 dismissing their application. This is a negative order. We are guided by the decision in the case of **Western College Farts and Applied Sciences vs. Oranga & Others [1976] KLR 63**, the court whilst considering whether an order of stay can be granted in respect of a negative order and which we fully adopt stated *inter alia* as follows:-

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”

We reiterate the position taken by the Court in the above case that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.

As regards the nugatory test, we are not satisfied that the appeal will be rendered a mere paper victory if it succeeds. As the Court reiterated in **Stanley Kangethe Kinyanjui vs. Tony Keter & 5 Others** (supra) and which we fully adopt:

“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.” [emphasis added]

The applicants have argued that the proprietary interest of the 1st and 2nd applicants in the suit property will not only be threatened but also extinguished contrary to their right to property as protected for under Article 40 of the Constitution. Second, that the applicant and his family reside on one of the charged properties while the other is used as business premises. The applicants did not however allege or demonstrate that the respondents would be unable to adequately pay them any damages as may be ordered should the intended appeal ultimately succeed. In light of the above assessment and reasoning, it is our finding that the applicants have not satisfied us that the intended appeal shall be rendered nugatory if the stay order is not granted. Additionally, it is apparent in the further affidavit of **George Mathui** sworn on 17th July 2020 that the suit property known as **Kisumu Municipality/Block 12/310** was sold to Pasaka Ventures Limited at the price of Kenya Shillings Twenty-four Million, one Hundred Thousand only and a deposit of Eight Million paid to the 2nd Respondent. The 1st respondent has therefore demonstrated that what the applicants seek to restrain has been overtaken by events. Any order made with regard thereto would therefore be an order granted not only in vain but also in the exercise of the courts mandate in futility.

For those reasons this application fails and it is accordingly dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 7th day of August, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR