



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: WARSAME, MURGOR & SICHALE, JJ.A]

CIVIL APPLICATION NO. 172 OF 2020

BETWEEN

LEVNEL ENTERPRISES LIMITED.....1ST APPLICANT

FREDRICK G. NDEGWA.....2ND APPLICANT

AND

GROFIN SGB KENYA LIMITED.....2ND RESPONDENT

ANTIQUA AUCTIONEERS.....3RD RESPONDENT

(Being an application for an injunction pending the hearing and determination of an intended appeal against the Ruling of the High Court of Kenya at Nairobi (Maureen Odero, J) dated 16th June, 2020

in

CIVIL APPEAL NO. 179 OF 2019

RULING OF THE COURT

1. UPON perusing the Notice of Motion dated 25th June, 2020, said to be brought pursuant to **Article 159 of the Constitution, Rule 5 (2) (b) of the**

Court of Appeal Rules and all other enabling provisions of the Law where the applicants seek, in the main:

“(b) THAT this Honourable Court be pleased to issue orders restraining the Respondents, their workers, agents or anyone acting on their behalf from attaching, transferring, alienating, advertising, selling or in any other way interfering with the property known as L.R NO. SAMURUMWITINGIRI/BLOCK 1/798 or any other property of the Applicants pending the hearing and determination of this Application.

(c) THAT this Honourable Court be pleased to issue orders restraining the Respondents, their workers, agents or anyone acting on their behalf from attaching, transferring, alienating, advertising, selling or in any other way interfering with the properties known as L.R NO. SAMURUMWITINGIRI/BLOCK 1/798 or any other property of the Applicants pending the hearing and determination of the Applicant’s intended appeal”, from the order/decree of the High Court in Civil Case No. 129 of 2019 delivered by **Odero, J** on 16th June, 2020; and

2. UPON perusing the affidavit of **Fredrick Ndegwa**, the 2nd applicant sworn on 25th June, 2020 in support of the application; and

3. UPON noting that there was no replying affidavit filed by the respondents; and

4. UPON perusing the applicants’ submissions dated 8th July, 2020 where it is submitted *inter alia* that the applicants filed a Notice of

Appeal on **23rd June, 2020**; that the applicants have an arguable appeal as it seeks to challenge the sale of the charged property on account of failure to serve the statutory notice of sale; that unless enjoined, the respondents shall “**irregularly**” sale the 2nd applicant’s family and matrimonial home which the 2nd applicant holds with sentimental and family attachments which cannot be compensated by way of damages; and

5. HAVING considered the principles that guides this Court in determination of **Rule 5 (2)(b)** applications as summarized in the decision of **Stanley Kang’ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR**; and

6. NOTING that the applicants have not demonstrated that they have an arguable appeal which may be rendered nugatory, absent stay, given that the statutory notice was served upon the applicant using the 2nd applicant’s postal address and given that the fact that the 2nd applicant does not deny indebtedness, save for the alleged “**irregularity of the sale;**” and

7. GIVEN the fact that it was not established that the respondent, a financial institution will not be able to refund the sum to be recovered, and further bearing in mind that the applicants’ application for injunction was dismissed, thus the applicants seek to stay a negative order refusing grant of an order of injunction, (See **Kenya Commercial Bank Limited vs. Tamarind Meadows Limited & 7 others [2016] eKLR**), we are not satisfied that the applicants have demonstrated an arguable appeal that will be rendered nugatory, absent stay.

Having reached that conclusion, we make the following orders:

- (i) The Notice of Motion dated **25th June, 2020** is disallowed.
- (ii) The applicants shall bear the costs of the application.

Orders accordingly.

Dated and Delivered at Nairobi this 23rd Day of October, 2020.

M. WARSAME

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR