



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, GATEMBU & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. NAIE239 OF 2020

BETWEEN

JERUSHA NAIMUTIE SHANI .....1<sup>ST</sup> APPLICANT

JERUSHA SEMEYIAN SHANI.....2<sup>ND</sup> APPLICANT

AND

EMMANUEL MATHEWS.....1<sup>ST</sup> RESPONDENT

KENYA COMMERCIAL BANK LIMITED.....2<sup>ND</sup> RESPONDENT

(An application under Rule 5(2)(b) of the Court of Appeal Rules for stay of execution of the decision of the Environment and Land Court (C. Ochieng, J) delivered on 21st May, 2020 pending hearing and determination of this application and the intended appeal in **Nairobi ELC Case No. 949 of 2017**

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#### RULING OF THE COURT

##### Background

1. By way of a notice of motion dated 14th August, 2020 **Jerusha Naimutie Shani** (the 1st applicant) and **Jerusha Semeyian Shani** (the 2nd applicant) urge this Court to exercise its discretion under **Rule 5(2)(b)** of the **Court of Appeal Rules** (this Court's Rules) and grant them orders in the main:

- a. That pending the hearing and determination of the application herein, an order be granted staying execution of the Order made by C. Ochieng, J on 21st May, 2020;
- b. That pending the hearing and determination of the intended appeal herein an order be granted, staying execution of the order made by C. Ochieng J;
- c. That the costs and incidentals of this application do abide the outcome of the appeal.

2. A brief background of the application is that **Melton Ole Shani** (the Chargor) who was the husband of the 1st and 2nd applicants borrowed monies from **Kenya Commercial Bank Limited** (the 2nd respondent) secured by a continuing legal charge over land parcel number **L.R. No. Loitoktok/Enkariak-Rongena/243** (the suit property) and an additional security over legal charge over **L.R. No. Kajiado/Torosei/7**. From the record, the Chargor defaulted in the loan repayments and the 2nd respondent caused a statutory notice dated 9th February, 1991 to be served on him demanding payment of the outstanding sum within three months failing which **L.R.No. Kajiado/Torosei/7** would be sold by public auction. Further, the 3rd respondent caused a statutory notice dated 11th February, 1991 to be served on the Chargor demanding payment of the outstanding sums, failing which the suit property would be sold by way of public auction.

3. The Chargor died on 9th April, 2001 and a notification of sale was served upon his estate demanding payment of the outstanding amounts failing which the suit property would be sold by way of public auction. Following default and advertisement for sale of the suit property by way of public auction, a public auction was conducted and **Emmanuel Mathews** (the 1st respondent) was the highest bidder whereupon the 2nd respondent transferred the suit property to him and a title was subsequently issued in his name.

4. Subsequently, the 1st respondent filed suit which was subsequently amended by way of a plaint dated 4th August, 2004 which sought for judgment against the applicants by way of a permanent injunction restraining them jointly and/or severally, their agents, employees and /or servants from trespassing, alienating, damaging and/or removing property or otherwise howsoever from interfering with the suit property and that the applicants jointly, and/or severally be evicted from the suit property.

5. The applicants filed an amended statement of defence and a counterclaim contending *inter alia* that the registration of the 1st respondent as proprietor of the suit property was illegal, unlawful, fraudulent and wrongful. In the impugned judgment the learned Judge found in favour of the 1st respondent and made the following order:

**“That a permanent injunction do issue against the applicants herein restraining them jointly and severally, their agents, employees and or servants from trespassing, alienating with the respondents’ plot title number LTK/ENKARIAK-RONGENA/243 (the suit land) and further directed the applicants to grant vacant possession from the suit land after 90 days from the date of the judgment failure of which eviction to issue.”**

6. Aggrieved by that decision, the applicants filed a Notice of Appeal and the instant application. In the written submissions filed on behalf of the applicants, learned counsel, **M/S Salonka & Company Advocates** submitted that the intended appeal is arguable; that the arguable points include; whether the learned Judge erred in law and fact in holding that the 45 days statutory notice dated 25th September, 2001 issued by the 2nd respondent under **Section 74 of the Registered Land Act (Repealed)** was valid despite the express provisions of the law that such notice should be a 90 days’ notice; whether the applicants were served with the statutory notice dated 25th September, 2001; whether the learned Judge failed to appreciate that by issuing the statutory notice dated 25th September, 2001 to the applicants, the 2nd respondent was estopped from relying on the previous statutory notices which were served upon the Chargor during his lifetime; and whether the transfer of the suit property from the 2nd respondent to the 1st respondent was null and void for want of a valid consent under the provisions of the Land Control Act.

7. On the nugatory aspect, counsel submitted that the 1st applicant is a widow aged 82 years and has been in occupation of the suit property since 1968 and if the orders sought are not granted, the 2nd respondent will proceed to evict her and she will be rendered homeless; that if stay of execution is not granted, there is danger that the suit property which is the substratum of the intended appeal may be transferred to a third party; that it will therefore be out of the reach of the orders of this Court and that the applicants will suffer substantial loss rendering the intended appeal nugatory. Counsel further submitted that in the event that the intended appeal is unsuccessful, the applicants will be in a position to satisfy the resultant decree and attendant costs. Counsel urged us to allow the application.

8. The application was opposed by way of written submissions filed by **M/S Macharia-Mwangi & Njeru Advocates**, learned counsel for the 2nd respondent. Counsel submitted that the applicants’ appeal is not arguable; that the 2nd respondent issued the statutory notices dated 9th February, 1991 and 11th February, 1991 which notices gave the Chargor three (3) months within which to settle the outstanding loan amount failing which the suit property would be sold by way of public auction; that the statutory notice dated 25th September, 2001 which was served on the Chargor’s Estate was not defective; and that the transfer of the suit property to the 1st respondent was lawful as the requisite consent was obtained from the Land Consent Board.

9. On the nugatory aspect, counsel submitted that the applicants have not demonstrated that the intended appeal will be rendered nugatory as the suit property was put up for sale by way of public auction upon failure by the applicants to settle the outstanding loan amount. Counsel further submitted that the applicants failed to prove any grounds that would warrant cancellation of the 1st respondent’s title. Counsel urged us to dismiss the application.

### **Determination**

10. We have considered the application, the affidavits, the rival submissions, the authorities cited and the law. It is trite that in an application under **Rule 5(2)(b)** of this Court’s Rules, the applicant must establish that there is an arguable appeal and secondly, that the appeal or intended appeal would be rendered nugatory if stay of execution is not granted – See **Ishmael Kagunyi Thande v Housing Finance Company Limited Civil Application No 156 of 2006 (UR)** where these principles were restated thus:-

**“The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant to succeed, he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”**

11. On the limb of arguability, counsel for the applicants contended that the statutory notice issued was defective for failing to re-issue another notice when the initial auction had been postponed to accommodate the Chargor’s Estate who had proposed to sell the suit property by way of private treaty which transaction did not materialize. In **Mbuthia vs Jimba Credit Finance Corporation & Another [1988] eKLR** this Court stated as follows:

**“It is plain that Section 74 did not impose on the chargee, the giving of more than one notice and there is no sound policy reason why he should be obliged to give fresh notice to the chargor any time a sale was suspended to accommodate him. If such were a legal requirement, no chargee in his right mind would suspend a projected sale as a matter of favour or indulgence to a defaulting mortgagor.”**

By parity of reasoning, we find that in the instant application, the applicants were not entitled to being issued a further notification of sale.

Regarding the contention by counsel for the applicants that the statutory notice dated 25th September, 2001 was never served on the

applicants, from the record, the notice was served and acknowledged by Major (Rtd.) L. Ole Shani on behalf of the Chargor's Estate. We therefore find that the intended appeal is not arguable.

12. On the nugatory aspect, from the record, the applicants have not demonstrated that the intended appeal will be rendered nugatory as the 2nd respondent demonstrated that it sold the suit property to the 1st respondent under its statutory power of sale upon failure by the applicants to pay the outstanding amounts. Further, we note that the 2nd respondent is a sound financial institution that could compensate the applicants by way of damages if the appeal succeeds. In **Integrated Wood Complex Ltd & another V Kenya National Corporation Ltd [2005] eKLR** this Court stated as follows:

**“In dealing with the issue whether or not success in the intended appeal will be rendered nugatory if stay is not granted, we consider the fact that the respondent is an established financial institution and would have no difficulty if required to pay back the full decretal amount.”**

In the circumstances, we find that the intended appeal will not be rendered nugatory, if stay is not granted and the appeal succeeds.

13. From the circumstances of the application before us, the applicant has failed to demonstrate the existence of both limbs as required by **Rule 5(2)(b)** of this Court's Rules and in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in **Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR**.

14. Accordingly, we decline to grant a stay of execution pending the hearing and determination of the appeal. The application dated 14th August, 2020 is accordingly dismissed. Costs to abide the outcome of the intended appeal.

**Dated and delivered at Nairobi this 9th day of October, 2020.**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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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**