



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. NAI. 198 OF 2018

(UR NO. 158 OF 2018)

(CORAM OUKO (P), M'INOTI, & SICHALE JJA)

BETWEEN

BETRUDA WAIRIMU MIGWI.....1ST APPLICANT

NJOROGE GUITATI.....2ND APPLICANT

AND

U & I MICRO FINANCIAL BANK LIMITED.....1ST RESPONDENT

STANLEY T. MUGACHA T/A

GALAXY AUCTIONEERS.....2ND RESPONDENT

(Application for an order of stay pending appeal under rule 5 (2), Rule 42 of the Court of Appeal Rules from the Ruling of Justice L. Gacheru dated the 19th day of June, 2018

in

Thika High Court ELC Cause No. 715 of 2017)

REASONS FOR THE RULING

On 7th August, 2018, the motion dated 4th July, 2018 came before us for hearing. We heard **Mr. Ogwe**, learned counsel holding brief for **Mr. Nganga** for the applicant as well as **Mr. Kamande**, learned counsel for the respondents. Upon conclusion of the arguments, we dismissed the motion and reserved our reasons for doing so to 12th October, 2018. We shall now proceed to give those reasons. The motion which was filed under a certificate of urgency sought the following orders:-

“1. Spent

2. That this Honourable Court be pleased to order a stay of execution of the decree and any ensuing order pursuant to the ruling of Justice L. Gacheru delivered on h 19th of June, 2018 pending the hearing and determination of the intended applicants’ appeal.

3. That in the alternative, an injunction do issue restraining the respondents, his agents or otherwise from selling and/or disposing of the Plaintiffs’ parcels number KABETE/KARURA/2806 pending the determination of the intended appeal.

4. That the costs of and incidental to this application abide in the result of the said appeal.”

The motion was supported by the affidavit of **BETRUDA WAIRIMU MIGWI** sworn on the 4th July, 2018 in which she deponed that on 19th

June, 2018, **Gacheru, J** dismissed her application for injunction to restrain the respondents from selling **KABETE/KARURA/2806**; that no “prior notice” was given for the intended sale; that the charge document was irregularly witnessed by one advocate (as there were two chargors); that she had made significant payments after previous notices; that the suit property is matrimonial property and finally, that she has an arguable appeal which will be rendered nugatory, absent stay.

In a replying affidavit sworn by **PHILIP GITAU** (the Credit manager of the 1st respondent) dated 3rd August, 2018, it is deponed that the suit property was charged for a loan of Kshs.1,890,000 advanced to the 1st applicant; that the loan was guaranteed by the 2nd applicant; that the 1st applicant defaulted in the repayments; that on 20th January 2017, the respondent issued a Statutory Notice of 90 days and all other attendant notices; and finally that the 1st applicant does not deny owing the 1st respondent the loan sum.

During plenary hearing before us on 7th August, 2018, **Mr. Ogwe** relied on the grounds on the face of the motion and the supporting affidavit. It was counsel’s view that the suit property is matrimonial property and that the 1st appellant is willing to pay what is truly owed to the 1st respondent. The 1st applicant, however, disputed the amount being demanded from her by the 1st respondent.

In opposing the motion, **Mr. Kamanda** relied on the replying affidavit and averred that the 1st applicant does not have an arguable appeal as she does not deny indebtedness. Further, it was counsel’s contention that the appeal will not be rendered nugatory as the 1st respondent is a banking institution with the ability to repay should the 1st applicant succeed in the intended appeal. As for the contention that the charged property is matrimonial home, it was counsel’s position that nothing turns on this as once property has been offered as security for a loan, it become a commercial property.

We have considered the motion, the supporting affidavit, the replying affidavit, the annexure thereto and the arguments made before us during plenary and the law.

The principles to be considered in an application brought under **Rule 5(2) (b)** of this Court’s Rules are now well defined. In the case of **MULTIMEDIA UNIVERSITY & ANOTHER –VS- PROFESSOR GITILE N. NAITULI (2014) eKLR** wherein this court whilst considering an application under **Rule 5 (2) (b)** expressed itself as follows:-

*“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR** 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.*
- v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.*
- vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.*
- vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.*
- viii. An applicant must satisfy the Court on both the twin principles.*
- ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.*
- x. 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.*
- xi. 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.*
- xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.*
- xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”*

In the motion before us, the 1st applicant does not deny being indebted to the 1st respondent. However, she disputes the amount being demanded from her; that no notice was served upon her spouse; that the notice issued intimating sale by public auction was irregular; and that the charged property is matrimonial property. Whereas we do not at this point wish to go into the merits and demerits of the arguments raised by the 1st applicant, it is clear to us that the 1st applicant did not demonstrate that the appeal will be rendered nugatory. It was not stated, for instance, that the 1st respondent will not be able to refund the decretal sum, should the applicant succeed in her intended appeal. The two limbs of arguability and the nugatory aspect must be satisfied before this Court can exercise its discretion in favour of the 1st

applicant, short of which, our hands are tied and we cannot grant an order for stay. In our view the motion is devoid of merit. It is in view of this conclusion that we dismissed the motion of 7th August 2018.

Costs of this motion to the respondents.

Dated at Nairobi this 9th day of November, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

K. M'INOTI

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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.

DEPUTY REGISTRAR