



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MURGOR, J.J.A)

CIVIL APPLICATION NO. NAL. 132 OF 2018 (UR 111/2018)

BETWEEN

MURAD EBRAHIM MURAD.....1<sup>ST</sup> APPLICANT

HAMID MURAD.....2<sup>ND</sup> APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED .....1<sup>ST</sup> RESPONDENT

ANNE WANGUI MWICHARO.....2<sup>ND</sup> RESPONDENT

*(An application for stay of execution pending the lodging, hearing and determination of the intended appeal from the entire Orders and Judgment of the High Court of Kenya at Nairobi (Tuiyott, J) dated 19<sup>th</sup> April, 2018*

*in*

*H. C. C. No. 525 of 2003)*

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**RULING OF THE COURT**

The applicants herein, who are husband and wife, have been struggling for the last 15 years, to save their ownership of LR. No. 209/7725 **(the house)** situate in Golf Course estate, Nairobi. Their story is a familiar one. They borrowed money from the 1<sup>st</sup> respondent **(the bank)** in 1992, defaulted on the terms of repayment, the bank exercised its statutory power of sale in 2004, and sold the house by public auction to the 2<sup>nd</sup> respondent, who is now the registered owner. They have only been kept in possession by an interlocutory court order.

The applicants, however, accused the bank of fraud, malice and breach of contract. They raised several issues including: auctioning and transferring the house with full knowledge that there was a court order staying the sale; not supplying them with bank statements; exaggerating the interest charged on the principal amount; failure to issue a proper notification of sale before the auction; selling the house before expiry of 90 days as provided for under **section 69A** of the **Transfer of Property Act**; receiving the deposit of auction proceeds even before the auction date; and receiving the balance of auction proceeds outside the stipulated time.

In their suit filed in December 2004, they sought the following remedies, which we paraphrase:

*"a) A permanent injunction restraining the bank, its employees, servants and or agents and or auctioneers from interfering with the quiet possession of LR. NO. 209/7725, Nairobi .*

*b) A declaration that no valid Statutory Redemption Notices were served on the Plaintiffs.*

*c) An Order of declaration that the purported sale and transfer of the Plaintiffs' property is wrongful and illegal.*

*d) A declaration that the Plaintiffs are the owners of LR. NO. 209/7725.*

*e) An Order for rectification of the register to reflect the Plaintiff's names.*

f) *Costs of the suit and interest on costs.*

g) *Any other relief that this Honorable Court may deem fit."*

The bank resisted the claims as did the 2<sup>nd</sup> respondent who filed a counterclaim for eviction, general damages for trespass, and *mesne profits* from the date of purchase of the house. Upon analysing and considering the evidence and submissions placed before it, the trial court (**Tuiyott, J.**) made findings that the applicants were in breach of the terms of the overdraft; that the bank had supplied them with regular statements; that the interest charged on the loan was lawful; that the 90-day statutory notice served by the bank was proper despite a finding to the contrary at an interlocutory stage; that the notification of sale served by the auctioneers was in conformity with statute; that a court order issued to stop the auction was served after the event; that the applicants' right of redemption was extinguished at the fall of the hammer at the auction; that the sale made to the 2<sup>nd</sup> respondent was regular despite the late payment of the balance of the purchase price; that the doctrine of *lis pendes* was not pleaded or urged before the court; that no issue of sale at undervalue was pleaded; that the counterclaim on *mesne profits* was unproved; and that the counterclaim on possession was successful. The applicants were given 60 days from 19<sup>th</sup> April, 2018 to vacate and hand over possession of the house to the 2<sup>nd</sup> respondent.

The applicants were aggrieved and intend to appeal against those findings. In the meantime, they have placed before us a motion under **Rule 5 (2) (b)** of the Court's rules seeking orders that:

*"3 there be stay of execution of the orders/decrees made by the Judge in a judgement delivered on 19<sup>th</sup> April 2018 (2017) sic in HCCC No. 525 OF 2013 pending the hearing and determination of the intended appeal.*

**4. an order be and is hereby issued to all the Respondents, by way of an injunction, restraining, their agents and or servants, from occupying the suit premises, trespassing, evicting, wasting, developing, selling, subdividing, registering any charge or transfer of the suit properties pending the hearing and determination of the intended appeal."**

As always, in order to succeed in obtaining such orders, the applicants must surmount the two twin principles, and demonstrate, firstly, that the intended appeal is not frivolous in that it is arguable even on one *bona fide* issue; and secondly, that if we do not grant the prayers sought, the intended appeal, if successful, shall be rendered nugatory. See ***Stanley Kangethe Kinyanjui vs Tony Ketter & Others [2013] eKLR***. In that attempt, learned counsel for the applicants **Ms. Nakili Fitzwanga** instructed by M/s Onindo Onindo & Associates, made oral submissions and drew our attention to a draft memorandum of appeal raising 13 grounds. They essentially challenge each of the findings above made by the trial court. Counsel however emphasized that the statutory notices upon which the auction was based were defective as declared by another Judge and the issue remains alive. As for the nugatory aspect, counsel stressed that the applicants have been in possession of the house for a long time and it would be inconvenient to evict them only to reinstate them if their appeal is successful. She urged us to allow the application.

For his part, learned counsel for the bank **Mr. D. Makori**, instructed by M/s Macharia Mwangi & Njeru Advocates, submitted, without more, that the intended appeal was not arguable. According to him, the loan advanced by the bank had not been paid and the bank was entitled to sell the security offered for it. Finally, **Ms. Judith Guserwa** for the 2<sup>nd</sup> respondent, instructed by M/s Guserwa & Company Advocates, pleaded with us to dismiss this application since the grounds of appeal are frivolous. She added that the 2<sup>nd</sup> respondent is suffering after paying out a huge amount of money towards the purchase of the house only to be kept away from it for the last 15 years and without receiving any return on the investment.

On our part, we are prepared to give the benefit of doubt to the applicants and find that some, if not all, the issues raised in the draft memorandum of appeal are not frivolous. As was stated in the case of ***Joseph Gitahi Gachau & Another vs Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008***, '*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*'. It would follow that the applicants surmount the first test.

What troubles us is the second test, the nugatory aspect, which must also be satisfied for a proper exercise of our discretion. We are aware that each case must depend on its own facts when grappling with the issue, and that "*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*". See ***David Morton Silverstein vs Atsango Chesoni, Civil Application No. Nai 189 of 2001*** and ***Reliance Bank Ltd vs Norlake Investments Ltd [2002] 1 EA 227*** at page 232.

The house in issue was offered in a commercial transaction as security, and the loss of it through auction in the event of default, was anticipated. Most of the complaints raised in the intended appeal are directed at the bank and there is no contention that the bank is capable of compensating the applicants if they ultimately succeed in the intended appeal. On the other side of the justice scales is the 2<sup>nd</sup> respondent who has a judgment in her favour but who, for the last 15 years, has not benefitted at all from her investment, even through *mesne profits* which she sought but was denied by the court. In our view, this is a proper case for making the finding, which we now do, that the applicants have not demonstrated that the success of the intended appeal shall be rendered nugatory if we do not grant the order sought. It follows that this application is not for grant, and we order that it be and is hereby dismissed with costs.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of November, 2018.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**