



IN THE COURT OF APPEAL

AT NYERI

(CORAM: G.B.M. KARIUKI, F. SICHALE & S. KANTAI JJA)

CIVIL APPLICATION NO. NYR. 85 OF 2017

BETWEEN

ELYJOY KAGENI.....APPLICANT

AND

BANK OF AFRICA (K) LTD.....1ST RESPONDENT

MUGA AUCTIONEERS & GENERAL MERCHANTS.....2ND RESPONDENT

UNITED BROTHERS CAMPS LTD.....3RD RESPONDENT

HUMPHREY MBABU MBAKA.....4TH RESPONDENT

(Being an application for injunction pending the hearing and determination of Civil Appeal No. 54 of 2017 against the Ruling of the Environment and Land Court of Kenya at Chuka, (Njoroge, J.) dated 16th March, 2017

in

E. L. C. No. 69 of 2017, formerly Meru ELC No. 74/15)

RULING OF G.B.M. KARIUKI JA

Elyjoy Kageni, the applicant herein has applied for an injunction order under Rule 5 (2) (b) of the Court of Appeal Rules. The applicant states that she is married under the African Customary Law to **Humphrey Mbabu Mbaka**, the 4th respondent in this appeal who is the registered proprietor of the property known as **Chuka/Township/39**. The said property was in the year 2012 charged by the 4th respondent to the Bank of Africa (K) Limited, the 1st respondent, to secure a loan of Kshs 20.6 million advanced by the latter to United Brothers Camps Ltd, the 3rd respondent which was the borrower/loanee following a charge instrument dated 7th August 2012 made between the 4th respondent *qua* chargor, the 3rd respondent *qua* borrower/loanee, and the 1st respondent *qua* lender/chargee.

As the loan advanced was not serviced, the 1st respondent as the 'lender and chargee gave statutory notice to realize the security, to wit, the charged property, in 2015 through Muga Auctioneers and General Merchants who are the 2nd respondent in this appeal.

The applicant avers that on or about 29th July 2015, she noticed an advertisement for the sale of Chuka/Chuka Township/39. The applicant confronted her husband, the 4th respondent, who declined to discuss the matter. On learning that the said property had been charged to the 1st respondent and was being auctioned for non-payment of the loan secured on it as aforesaid, she instituted a suit No. 74 of 2015 in the Environment and Land Court (E & L Court) in Meru which was later transferred to Chuka E & L Court as ELC case No. 69 of 2017 in which she named the Bank of Africa Kenya Ltd, Muga Auctioneers & General Merchants, United Brothers Camps Ltd and Humphrey Mbabu Mbaka as the 1st, 2nd, 3rd and 4th defendants respectively in an attempt to save the said property from the auctioneer's hammer.

Contemporaneously, the applicant made an application in the E & L Court seeking temporary orders of injunction to restrain the 1st and 2nd respondents from selling the property, Chuka/Chuka Township/39 (hereinafter referred to as "the matrimonial home"). The main thrust of the application was that as the wife of the 4th respondent, the applicant was not consulted and her consent for the charge was never sought although as the 4th respondent's wife she lives in the matrimonial home. The applicant contended that the provisions of **Section 79 (3) of the Land Act (No. 6 of 2012)** were not complied with.

After considering the applicant's said application, the E & L Court (**P. M. Njoroge, J**), dismissed it on 16th March 2017. This is the decision that precipitated the applicant's appeal No. 54 of 2017, now pending in this Court, which has led to the making of the applicant's application to us under Rule 5 (2)(b) of the Court of Appeal Rules seeking injunction to restrain the 1st and 2nd respondents from selling the matrimonial home or otherwise dealing with it in any other manner until the applicant's said appeal is determined.

When the application came up for hearing before us on 28th July 2017, the applicant was represented by **Ms Carolina Rimita** of Maitai Rimita & Company Advocates and the respondents were represented by **Mr. Sean Omondi** and **Mr. Eddy Owiti** of Coulson Harney Advocates.

Ms Rimita, learned counsel for the applicant urged us to grant the injunction sought to restrain the 1st and 2nd respondents from disposing of the matrimonial home pending the determination of the appeal. Relying on the applicant's affidavit sworn on 20th July 2017 in support of the application, Ms Rimita urged that the date of 1st August 2017 which was then yet to dawn was the date on which the law on registration of customary marriages was to come into force and that this notwithstanding, the learned Judge erred in requiring in the impugned ruling proof of customary marriage when such proof could be furnished by other means as the applicant had done. It was Miss Rimita's submission that the learned Judge erred in looking into a law on registration of customary marriages when such law had not taken effect. Moreover, counsel contended that the learned Judge misapprehended the facts and wrongly focused on the debt owed to the 1st respondent. Counsel focused in her submissions before us on the merits of the impugned decision. In effect, counsel seemed to urge that the applicant had an arguable appeal.

Mr. Sean Omondi, learned counsel for the respondents submitted that the applicant was enjoined to show that the appeal was arguable and that unless the injunction order sought was granted, the appeal would be rendered nugatory if it succeeds. It was Mr. Sean Omondi's submission that the applicant's appeal was not arguable as the only two issues, first, whether the applicant was the 4th respondent's spouse and secondly, whether the charge instrument was valid were not arguable. It was counsel's submission that while there was no evidence to demonstrate that the applicant was the wife of the 4th respondent, the applicant had failed to show that the charge instrument was invalid. As to whether the appeal would be rendered nugatory if injunction was declined and the appeal succeeded, counsel contended that the matrimonial home was a trading commodity which had been used to secure a loan facility. In counsel's view, if injunction was declined and the appeal succeeded, damages would be an adequate remedy and the applicant could be compensated by an award of damages. Counsel urged us to dismiss the application seeking injunction pending the determination of the appeal.

I have carefully perused the application and duly considered the rival submissions made by counsel for the parties.

This is an application under Rule 5(2)(b) of this Court's Rules. The power to grant orders under Rule 5(2) (b) is discretionary. It is exercised on principles that are designed to balance the interest of a successful litigant with that of an intending appellant who has an undoubted right of appeal. While a successful litigant should not be deprived of the fruits of a judgment delivered in his/her favour without just cause, an intending appellant who has an undoubted right of appeal must not be deprived of his right to challenge the impugned decision to the next higher court (see **Butt vs. Rent Restriction Tribunal [1982] KLR 417** and **Kenya Shell Limited vs. Kabiru & Another [1986] KLR 410**).

The twin principles require first that an applicant demonstrates that he has an arguable appeal. To do this, an applicant must show that the appeal or intended appeal is not frivolous. This Court has repeatedly held that an arguable appeal is not necessarily one that is bound to succeed. It is sufficient that the appeal raises a point or points that require Court's consideration. It is also now settled that an applicant need not show a plethora of arguable points. It is sufficient even if there be a solitary arguable point. In determining whether the appeal is arguable, the Court will advisedly eschew delving into the merits or otherwise of the appeal so as to avoid prejudicing the appeal or embarrassing the court that shall hear it.

In this application, it is an issue whether the court correctly considered the customary law nature of the applicant's marriage and whether the applicant was a spouse of the 4th respondent. A finding in the affirmative on the issue would have far reaching legal implications especially in light of **Section 79(3)** of the **Land Act**. (Act No. 6 of 2013, now Cap 280), which states: **79 (3) "A charge of a matrimonial home shall be valid only if any document or form used in applying for such a charge or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons."**

In this application, the contention that the trial Judge did not properly or correctly consider whether the applicant is a spouse of the 4th respondent cannot be said to be idle or untenable. In my view, it is a serious issue that requires proper consideration and determination. It is an arguable matter.

The second principle is whether the applicant has shown to the satisfaction of the court that if the injunction sought is not granted, the appeal, if successful, shall be rendered nugatory. It was contended by counsel for the respondents that the matrimonial home is a commodity that was used to secure a loan and therefore if the injunction is not granted and the appeal succeeds, monetary compensation shall be an adequate remedy and consequently the appeal would not be rendered nugatory. The fact that resolution as to whether the applicant was the 4th respondent's spouse is intrinsically intertwined with the issue whether the charge was valid shows the inherent weakness of this argument. In my view, if the court were to find in favour of the applicant that a customary marriage existed and therefore the applicant was a spouse, the validity of the charge would be impugned. Consequently the matrimonial home would in such event not be said to be a trading commodity and damages could not be said to be adequate compensation. In my view, the appeal would be rendered nugatory if stay is not granted and the appeal succeeds. Balancing the interest of the applicant as a party with an undoubted right of appeal with that of the 1st respondent as the successful party entitled to the fruits of the judgment, it seems to me that the scales of justice tilt in favour of the applicant who would suffer irreparable damage if she were to succeed in the appeal as opposed to the 1st respondent which would only be delayed in collecting its debt if the appeal fails.

In the result, I am inclined to allow the application, which I hereby do. As my brother the Hon. Mr. Justice S. ole Kantai JA is in agreement, the majority decision of the Court is to allow the application. Accordingly, an order of injunction as prayed for in the application shall issue. As the appeal is in place, it shall be fast tracked. The costs of this application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 5th day of October 2017

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G. B. M. KARIUKI SC

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGIST

RULING OF F. SICHALE, J.A.

The applicant **ELYJOY KAGENI** filed a Notice of Motion dated 20th July 2017 and sought inter alia, the following order:

“That pending hearing and determination of the appeal or until further orders of the court an injunction be issued restraining the 1st and 2nd respondents, their agents servants or/and employees or whomsoever acting on their behalf or instructions from selling advertising for sale or in any other manner whatsoever from dealing with Land Reference No. CHUKA TOWNSHIP/39

BANK OF AFRICA (K) LTD, MUGA AUCTIONEERS AND GENERAL MERCHANTS, UNITED BROTHERS CAMPS LTD and HUMPHREY MBABU MBAKA were named as the 1st, 2nd 3rd and 4th respondents respectively. The motion was supported by the affidavit of the applicant dated 20th July, 2017. In her affidavit the applicant deposed as follows:-

“1. That I am the Appellant in this court’s Appeal No.54 of 2017 and the Applicant in this application and therefore competent to make and swear this affidavit.

2. That I pray for the injunction against the 1st and 2nd Respondents and their agents pending hearing and determination of my Civil Appeal No. 54 of 2017 which has no date as yet but is in course of being fixed for hearing.

3. That I had applied and obtained a temporary injunction before the Superior Court but when the application was determined the same was dismissed on 16th March, 2017 and the orders vacated as the Honourable Judge relied on a statute which was not applicable then, (Annexed is a copy of the Ruling marked “E.K.ai”) and copy of the Kenye Gazette marked “E.K.iii”).

4. That I was not satisfied and appeal to this court vide Appeal No. 54 of 2017 (Annexed is a copy of the Memorandum of Appeal marked “E.K.b”).

5. That Respondent have been served with the record of Appeal but on 14th July, 2017 I was surprised to see NOTIFICATION OF SALE posted on the gate of the property and I picked the same and took it to my advocate.

6. That according to the said notification of Sale the sale is on 28th July, 2017 at 9.00 a.m. outside Chuka Post Office in Chuka town (annexed is a copy of the said notification of sale marked “E.K.c”).

7. That if the sale is allowed to take place my appeal will be rendered nugatory and I and my son will be left homeless.

8. That it is in the interest of justice that the 1st and 2nd respondents are restrained from selling suit property until my Appeal is heard and determined.

9. That the foregoing is true to the best of my knowledge, information and understanding.”

In opposition to the motion **MONICA KAMAU** a Recoveries Officer with the 1st respondent bank swore an affidavit dated 27th July 2017. She deposed that the applicant is a stranger to the 1st respondent; that

in the year 2012, the 3rd respondent through the 4th respondent and his wife **MS LUCYLINE KANYUA MUTINDWA (LUCYLINE)** charged property known as Chuka Township/37 (the suit property) for a sum of Ksh.20,600,000; that the two provided personal guarantees and indemnities for the said sum of Ksh,20,600,000; that a charge dated 7th August, 2012 was effected and **MS LUCYLINE** gave spousal consent for the 4th respondent to charge the suit property; that the 3rd respondent failed to repay the loan as agreed; that on 1st August, 2013, the 1st respondent notified the 4th respondent and **LUCYLINE** that the loan amount had fallen into arrears; that sometime in September, 2013 the 3rd respondent and **LUCYLINE** approached the 1st respondent and requested for the loan to be restructured; that vide a letter dated 26th September, 2013, the 1st respondent acceded to the request to restructure the loan; that the above notwithstanding the 3rd respondent failed to meet his part of the bargain; that on 9th October, 2014 and 11th December, 2014 the 1st respondent issued demand letters to the 3rd respondent & **LUCYLINE**; that on 3rd February, 2015 the 1st respondent issued a statutory notice to the 4th respondent and copied to the 3rd respondent; that on 21st May, 2015 a notice to sell was issued to the 4th respondent and **LUCYLINE** and the County Government of Tharaka Nithi; that consequently a redemption Notice was served upon the 4th respondent and **LUCYLINE**; that in September, 2015 the applicant filed Meru ELC Cause No. 75 of 2015 (now Chuka ELC No. 69 of 2017) and sought an injunction; that although the applicant was granted an interim order of injunction, this was subsequently discharged in a ruling delivered on 16th March, 2017; that the sum due and owing as at 27th June, 2017 stood at Ksh.57,233,961.36 which is way beyond the market value of the charged property which in June, 2015 was Ksh.29,000,000; that the applicant is a stranger to the 1st respondent as they have all along dealt with **LUCYLINE** who is the 4th respondents spouse; that the applicant did not present any evidence of being the 4th respondent's spouse and that she does not reside on the suit property, that the applicant has filed the motion in collusion with the 4th respondent in a bid to frustrate the realization of the debt owed to the 1st respondent.

On 28th July, 2017 the motion came before us for hearing. Miss Rimita learned counsel for the applicant in urging the motion submitted that the applicant is the 4th respondent's wife by virtue of a customary marriage. It was her submission that the learned Judge failed to appreciate as much and further that the applicant is unable to present a certificate of the customary marriage as certificates of marriage under customary law were due for issuance in August 2017.

Mr. Omondi learned counsel for the 1st respondent (teaming up with Mr. Eddy Owiti) vehemently opposed the motion. It was Mr. Omondi's position that the applicant had not demonstrated that she had an arguable appeal that will be rendered nugatory unless an order of stay is granted. Further, that the applicant had failed to demonstrate that she was married to the 4th respondent as she does not provide any specifics of her alleged customary marriage; that the charge is dated 12th August, 2012 and the applicant by being economical with details of her alleged customary marriage in terms of time and date does not assist the Court in the determination of whether her spousal consent was necessary;; that **LUCYLINE** gave consent as the spouse of the 4th respondent; that the birth of a child is not proof of marriage; that there is no allegation of the charge having been invalid and finally that all conditions precedent before the realization of the security were undertaken by the 1st respondent. On the aspect of the appeal being rendered nugatory it was counsel's contention that once property has been given as security for a loan, then the property becomes a commodity for sale. For this proposition he relied on the authority of **JOSEPH GITAHU GACHAU & ANOTHER VS PIONEER HOLDINGS LTD & 2 OTHERS [2009] eKLR**. Counsel reiterated the averments in the affidavit in opposition to the motion to the effect that the loan has continued to escalate as the 3rd and 4th respondent had stopped payment for the last 3 years and the loan outstanding far exceeds the value of the charged property. He pointed out that given the circumstances of this case where the 1st respondent had continued to suffer for the non-payment, the appropriate remedy may be damages, in the event that the applicant was to succeed in her appeal.

In a brief response Miss. Rimita contended that the charge was not valid.

The application before us is premised under Rule 5 (2) (b) of the Rules of this Court. In order for an applicant to avail himself/herself of the reliefs contemplated in Rule 5 (2) (b), an applicant must demonstrate that he/she has an arguable appeal and secondly, that the appeal shall be rendered nugatory, unless an order of stay is granted pending appeal.

An arguable appeal, however, need not be one that will necessarily succeed. Suffice to state however that it must not be frivolous. (See **STANLEY KANGETHE KINYANJUI VS TONY KETER & 5 OTHERS [2013]eKLR.**

The facts of this matter are fairly straightforward. The 4th respondent executed a charge dated 7th August, 2012. In the same charge document, **LUCYLINE** provided spousal consent. She stated:

“I LUCYLINE KANYUA MUTINDWA do hereby grant my consent within written charge and unreservedly acknowledge that in the event of default the Bank may exercise its statutory powers of sale, appoint a receiver lease and exercise all its rights under the charge including but not limited to the rights under Sections 82 and 83 of the Land Act 2012.”

It is common ground that the 3rd respondent failed and/or neglected to pay the sum lent to it by the 1st respondent. It is also not disputed that in September 2013 the 4th respondent together with his wife approached the 1st respondent and requested for a restructuring of the loan. The 1st respondent acceded to the request. However, no monies were forthcoming, as a result of which the 1st respondent took the necessary steps to exercise its statutory power of sale. The charge property was due for sale on 28th July, 2017.

The applicant contends that the charge dated 7th August, 2012 is not valid. The details of the invalidity were however not provided. However, it is not disputed that the charge was signed by the 4th respondent and his wife, **LUCYLINE** provided the spousal consent. Although the applicant alleges that she is married to the 4th respondent, she was extremely economical with the specifics of the customs, date and time of the marriage. She also did not provide evidence of the relevant ceremonies in which she allegedly contracted the marriage. Whereas it is appreciated that registration of customary marriages was to commence on 1st August, 2017, there are conditions precedent before issuance of a marriage certificate. Section 44 of the Marriage Act provides:

“The parties to a customary marriage shall notify the Registrar of such marriage within three months of completion of the relevant ceremonies or steps required to confer the status of marriage to the parties in community concerned.”

The law anticipates customary rites before the Registrar issues a certificate. The birth of a child is not one such evidence of marriage that would lead to the issuance of a certificate. In my view it is idle for the applicant to invoke the status of marriage without any semblance of evidence of a marriage. I note further that even the 4th respondent who chose to be away during the hearing of the motion (inspite of being aware of the hearing date) did not support the applicant’s assertion. In my view the applicant has not established an arguable appeal. I find that the 4th respondent who has defaulted in repaying the loan lent to him may have been looking for a way of averting the looming sale of the charged property. Having come to the above conclusion, I do not deem it necessary to address the issue of the appeal being rendered nugatory unless stay is granted as the applicant has failed to satisfy the first limb. I would dismiss the motion. However, in view of the majority decision of my two brothers, Kariuki & Kantai, JJA, the orders of this Court shall be as stated in the majority decision.

Dated and delivered at Nairobi this 5th day of October, 2017.

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR