



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 202 of 2009

WINFRED WAMBUI KINGORI.....APPLICANT

AND

PARAMOUNT UNIVERSAL BANK LIMITED.....1<sup>ST</sup> RESPONDENT

JOHN IRUNGU WACHIRA.....2<sup>ND</sup> RESPONDENT

DAVID SWAO.....3<sup>RD</sup> RESPONDENT

*(Being an application in an intended appeal from the ruling of the High Court of Kenya at Nairobi  
(Kimaru, J.) on 1<sup>st</sup> July, 2009*

*in*

*HCCC NO.605 OF 2009)*

\*\*\*\*\*

**RULING OF THE COURT**

In this notice of motion brought under **Rule 5(2)(b)** and **42** of the **Court of Appeal Rules**. **Winfred Wambui Kingori** (applicant) seeks two principal orders as hereunder:-

**(1) That an injunction be granted to restrain the 1<sup>st</sup> respondent from selling or disposing of all that property erected on LR No. 14600 situate at Karen within the Republic of Kenya pending hearing and determination of an intended appeal from the decision of Honourable Mr. Justice Luka Kimaru delivered on 1<sup>st</sup> July, 2009 in HCCC No. 605 of 2003 at Nairobi (Milimani Law Courts).**

**(2) That an injunction be granted to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from selling or disposing all that parcel of land known as LR.No. 13824 situate at Karen within the Republic of Kenya pending hearing and final determination of an intended appeal from the ruling of Honourable Mr. Justice Luka Kimaru delivered on 1<sup>st</sup> July 2009 in HCCC No. 605 of 2003 at Nairobi (Milimani Law Courts).**

It is premised on the two grounds on its face and on the 92 paragraph supporting affidavit of the applicant sworn on 9<sup>th</sup> July, 2009.

The same is opposed by the respondents vide the 1<sup>st</sup> respondent's replying affidavit sworn on 21<sup>st</sup> July, 2009 and that of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents sworn on 22<sup>nd</sup> July, 2009. The said affidavits are accompanied by several annexures. The parties also filed list of authorities citing several cases in support of their respective propositions.

In order for us to place the application in its proper perspective, a brief history of the matter is necessary. The applicant who is a business lady used to operate bank accounts with the 1<sup>st</sup> respondent – **Paramount Universal Bank Limited**. The two developed a good working relationship over the years and the applicant was advanced credit facilities by the said bank in the normal way. It is not necessary for us to delve into the nitty gritty of these transactions for purposes of this ruling as the same are still the subject of litigation before the High Court in Milimani Commercial Court, Civil Case No.605 of 2003. It suffices to say, however, that according to the 1<sup>st</sup> respondent and the annexures that have been placed before us, the applicant was unable to meet her obligations to service the loan/credit facilities.

According to the 1<sup>st</sup> respondent, it issued the necessary statutory notice to the applicant but after she failed to respond the 1<sup>st</sup> respondent exercised its power of sale and sold the property in question to 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Pending the hearing of the main suit, the applicant moved the High Court by way of an application for orders of interlocutory injunction to stop the respondent from selling, transferring, charging or taking possession of the properties in question. The application was heard by the High Court (Kimaru, J) who found no merit in the same and dismissed it. In his ruling, Kimaru J found that the suit property had already been sold to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, and further that the applicant's remedy lies in damages.

That is the ruling that forms the basis of this application.

In his oral submission to Court, **Mr. Kilonzo**, junior learned counsel for the applicant, conceded that prayer one in the application had been overtaken by events as the properties had already been sold by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on 17<sup>th</sup> March, 2005 and transferred to them on 4<sup>th</sup> July, 2005 which was in fact long before the High Court (Waweru, J) issued restraining orders against the 1<sup>st</sup> respondent.

He informed the Court that the applicant is therefore, seeking the 2<sup>nd</sup> prayer which is to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from selling or retransferring the said properties. He urged that they have an arguable appeal and that if the orders sought are not granted, the appeal, if it succeeds will be rendered nugatory.

It is now settled law that for an application of this nature to succeed, the applicant must satisfy two twin principles namely;-

- (i) ***That the appeal or intended appeal is an arguable one; that is not a frivolous one, and***
- (ii) ***That if an order of stay or injunction, as the case may be is not granted, the appeal, or intended appeal, were it to succeed would have been rendered nugatory by the refusal to grant the stay or the injunction.***

(See **RELIANCE BANK LIMITED** (in liquidation)**Vs. NORLAKE INVESTMENTS LIMITED**, Civil Application No. Nai 93 of 2000)

The applicant need only establish that there is one arguable point in his/her appeal but in addition, establish the nugatory aspect. See **IL NWESI COMPANY LTD & TWO OTHERS VS. WENDY MARTIN** (Civil Application No. 291 of 2010).

Learned counsel for the applicant urged us to find that the applicant has established these two principles on the arguability aspect, learned counsel submitted that there were three charges that form the

basis of the application and that charge documents were not signed before an advocate and hence the same were defective and the 1<sup>st</sup> respondents exercise of the power of sale could not crystallise on account of the said defect. On this point however, **Mr. Wandabwa**, learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that the charge annexed to the respondents supplementary affidavit was clearly signed before **Salim Danji & Co. Advocates** and that it was the applicant who had failed to annex the last page of the charge document on which page the advocates names appeared.

The other point proffered by the applicant as arguable is that the applicant was not given proper notice before the 1<sup>st</sup> respondent could exercise the power of sale.

In answer to this, learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents referred us to a copy of certificate of posting which according to him was conclusive evidence that the notice was sent to the applicant. We have seen the said certificate of posting. We must at this stage however eschew from making any definitive findings on these issues and leave it for the court seised of the appeal to determine the same.

After considering all the material placed before us including the oral submissions of all counsel for the parties, we are not persuaded on the arguability of the appeal in question. Having so found, it will not even be necessary for us to delve into the nugatory aspect but we can justifiably state that if the appeal were to succeed, the applicant has a remedy in the realm of damages and the appeal would not therefore be rendered nugatory in the circumstances.

In sum, we are not persuaded that this application meets the threshold required for such applications to succeed. It must therefore fail and the same is dismissed with costs to the respondents.

***Dated and delivered at Nairobi this 12<sup>th</sup> day of April, 2013.***

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

**R. N. NAMBUYE**

.....  
**JUDGE OF APPEAL**

**W. KARANJA**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**