



Kitho Civil & Engineering Co. Ltd v National Bank of Kenya Limited & another (Civil Appeal (Application) E706 of 2021) [2023] KECA 387 (KLR) (31 March 2023) (Ruling)

Neutral citation: [2023] KECA 387 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E706 OF 2021
DK MUSINGA, HA OMONDI & PM GACHOKA, JJA
MARCH 31, 2023**

BETWEEN

KITHO CIVIL & ENGINEERING CO. LTD APPLICANT

AND

NATIONAL BANK OF KENYA LIMITED 1ST RESPONDENT

KENYA RURAL ROADS AUTHORITY 2ND RESPONDENT

(Being an application for injunction pending the hearing and determination of an appeal from the ruling and orders of the High Court of Kenya at Nairobi (D.S. Majanja, J.) dated 23rd September 2021 in H.C.C.C. E402 of 2020)

RULING

1. By an amended notice of motion application dated April 7, 2022 brought pursuant to rules 5(2)(b) and 42 of the *Court of Appeal Rules*, and supported by the affidavit of Simon Musyoka Kaingo sworn on November 29, 2021, the applicant seeks that an injunction of the orders made on September 23, 2021 do issue so as to restrain the 1st respondent and its agents from offering for sale, selling, and alienating the fifteen (15) suit properties that were charged as collateral for loan facilities advanced by the 1st respondent to the applicant, and categorised as Lot 1 and Lot 2, which were scheduled for auction on December 1, 2021, pending the hearing and determination of the intended appeal; and costs be in the cause.
2. The application is opposed, through a replying affidavit of Agnes M Mutisya dated December 8, 2021 who urges us to dismiss it on grounds that it is simply raising the same issues that were determined in the trial court and which the applicant is raising at every stage of litigation.
3. The background to this matter is that the 2nd respondent (Kenya Rural Roads Authority) awarded the applicant, a tender to maintain roads. To enable it carry out the said works, the applicant approached



the 1st respondent for financing to provide performance security in the form of a bank guarantee valid for the construction period. The loan facilities were secured by a debenture over all present and future assets and various charges over the applicant's properties. When facilities fell due for repayment, the applicant failed to repay and eventually the 1st respondent sought to exercise its power of statutory sale on the charged properties.

4. The applicant in a bid to save its properties filed an application in the High Court seeking to join the 2nd respondent in the suit and for a temporary injunction to issue restraining the 1st respondent from selling or in any way alienating the proprietary rights in the suit properties.
5. In a ruling delivered on September 23, 2021, the High Court dismissed the application, on grounds: that there was an undisputed indebtedness and default by the applicant to the 1st respondent; that, consequently, the property which had been offered as security, became a commodity for sale; and that there was no plausible grounds to restrain the bank from exercising its power of sale.
6. This is what has led to the present application as there is apprehension that the 1st respondent may auction the suit properties for recovery of the performance guarantee of Kshs 56,924,432.00 and advance payment guarantee of Kshs 113,848,864.00. According to the applicant, the guarantees are only payable upon termination of the contract between the applicant and 2nd respondent, which contract is still ongoing. The applicant contends that the appeal raises arguable grounds and has high chance of success, and should the orders sought are not granted the applicant will suffer irreparable loss as the properties will be auctioned; and the appeal will be rendered nugatory.
7. In opposing the application, the respondent submits that the intended appeal does not raise any arguable issues as it is res judicata as the grounds relied on and orders sought have been heard and determined before the High Court on two separate occasions; that the impugned ruling dismissing the application for injunction had the effect of allowing the bank to exercise its statutory power of sale which arose in the year 2019; that the, bank has already sold many of the properties; that the applicant has had ample time to settle the debt owing and claims the contract is still in place, and that the fact that the 2nd respondent has not paid them for work done should not be an excuse to continue prejudicing the 1st respondent who is not privy to the contract.
8. The respondent further points out that the intended appeal will not be rendered nugatory as the applicant has enjoyed the benefit of an injunction granted in February 2020 until September 2021 during which time no effort was made to repay the outstanding sums which continue to accrue interest; that no fraud was proved in the High Court to warrant setting aside of the consent order; that the application is overtaken by events as many of the properties have been sold; that prior to the exercise of the statutory power of sale the bank conducted a valuation of all the suit properties and to that extent the value is known and the applicant can be compensated for loss if any, by the 1st respondent which is a financial institution of repute.
9. Has the applicant satisfied the requirements necessary for granting an order for injunction under rule 5(2) (b)?

In the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 Others*, [2015] eKLR this Court held that:

- “(23) It is clear to us that rule 5(2) (b) is essentially a tool for preservation. It safeguards the substratum of the Appeal in consonance with principles developed over the years...



(27) Rule 5(2) (b) of the *Court of Appeal Rules* is derived from article 164(3) of the *Constitution*. It illuminated the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of the appeal/intended appeal.”

10. This court has set out the parameters to be met for an order for injunction to be granted in an application under rule 5(2) (b). In the case of *Alfred Mincha Ndubi v Standard Limited* [2020] eKLR, this court held, that to succeed in an application under rule 5(2) (b), the applicant has to establish the twin principles that: the appeal is arguable; and is likely to be rendered nugatory if the injunction is not granted and appeal succeeds.
11. These principles were restated in *Multi Media University & Another v Prof Gitile N Naituli* [2014] eKLR. From the long line of decided cases, the jurisprudence is underlined in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others* (2013) eKLR that in dealing with rule 5(2) (b) the court exercises original and discretionary jurisdiction; and the discretion is wide and unfettered if it is just to do so.
12. 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; for an appeal to be deemed arguable, it is sufficient if a single bona fide arguable ground of appeal is raised; and that it is not one that will necessarily succeed but one which ought to be argued fully before court. Whether or not an appeal will be rendered nugatory depends on whether 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 aggrieved party.
13. It is our considered view that the applicant’s central issue is the contention that the 1st respondent’s statutory power of sale has not risen as the contract between the applicant and 2nd respondent is still in force and that there is no proof that the auction has taken place. We note that the applicant is not making any repayments and the debt is not denied. Further, after careful consideration of the application and the memorandum of appeal we are doubtful whether it raises any arguable ground, as the statutory power of sale accrued as a result of the failure by the applicant to settle the debts due and owing to the respondent bank, which debt are not denied. In a stream of decisions, this court has held on several occasions that a relief under rule 5(2) (b) will not be granted if there is a loan amount that is outstanding. In the case of *Joseph Okoth Waudi v National Bank of Kenya* [2006] eKLR the court held:

“...it is trite law that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arrange.”
14. As to whether the appeal will be rendered nugatory should the injunction no be granted, we refer to the observations made in *Reliance Bank Limited v Norlake Investment Limited* [2002] 1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides. This was echoed in the case of *African Safari Club Limited v Safe Rentals Limited*, [2010] eKLR that:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”



15. The applicant has stated that it will suffer irreparable loss and harm owing to the fact that the suit properties will be sold. The question we must consider is whether the loss is irreparable to the extent that damages would not be available as compensation, as was stated in *Eso Kenya Limited v Mark Makwata Okiya* [1992] eKLR that:

“...as it is settled law that where the remedy sought can be compensated by an award if damages then the equitable relief of injunction is not available.”

16. We draw from the case of *John Nduati Kariuki T/A Jobester Merchants v National Bank of Kenya Ltd* [2006] 1EA 96 where the court stated:

“The applicant having obtained the funds and having full benefit of it and having offered securities knowing full well that they would be sold if there was default cannot be heard to say that the securities are unique and special to him as the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capacity has not been challenged.”

17. We take note that the 1st respondent is a reputable bank and will be able to compensate the applicant should their appeal succeed, and it is our finding that the applicant has failed to show that the loss cannot be adequately remedied by an order of damages.

18. Accordingly, we find that the applicant has failed to show that it has an arguable appeal; and that the appeal would be rendered nugatory should the order for injunction be denied and has therefore not satisfied the twin principles under rule 5(2) (b). The application therefore, fails and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

