



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, KIAGE & KANTAL, JJA.)**

**CIVIL APPLICATION NO. NAL E055 OF 2021**

**BETWEEN**

**SAMY GHANNAM.....APPLICANT**

**AND**

**SBM BANK KENYA LTD & ANOTHER.....1st RESPONDENT**

**PETER GACHOKI KATHANGA.....2ND RESPONDENT**

*(Being an Application for injunction pending the hearing and determination of an intended appeal against the Ruling of the High Court of Kenya at Nairobi (M. Odero, J.) dated 5th February, 2021 in H.C.C.C. No. E210 OF 2020*

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**RULING OF THE COURT**

We are asked in the main in the Motion brought under **Rule 5 (2) (b)** of the **Court of Appeal Rules** to issue a temporary injunction restraining the 1st respondent (**SBM Bank Kenya Limited**) or its agents from dealing with the property **L.R No. 195/228 unit No. 44, Karen Hills, Three Dee Lane, Karen** (“*the suit property*”) on the basis of an auction that was conducted on the 19th May, 2000 pending the hearing and determination of the application. We are also asked, pending the hearing and determination of the application to issue an order staying the execution and implementation of the ruling of the High Court made on 5th February, 2021 to the effect that High Court Civil Suit No. E210 of 2020 was *res judicata*. We are asked, pending the hearing and determination of the application and of an intended appeal to issue a temporary injunction and to stay execution and implementation of the said ruling to restrain the 1st respondent or any purchaser at a public auction from dealing or transferring the suit property pending the determination of the intended appeal. In grounds in support of the motion and in a supporting affidavit of the applicant **Sammy Ghannam** it is stated amongst other things that the applicant has an arguable appeal; that the High Court in a ruling delivered on 5th February, 2021 dismissed the applicant’s application to restrain the 1st respondent from transferring to the 2nd respondent the suit property sold at a public auction on 19th May, 2020; that it was the applicant’s case that the 1st respondent had breached a duty as chargee in exercising statutory power of sale; that the 1st respondent had acted contrary to section 97(2) of the Land Act 2012; that the public auction was conducted at a gross under-value; that with the dismissal of the application for injunction the applicant, a resident of the suit property, stood to be evicted from it; that with the finding of *res judicata* by the High Court ... “*Should that finding remain alive, it (sic) impossible that the applicant can ever get any redress in the High Court for any relief should it be found that only damages would be an adequate remedy...*”

**Egidia Mecha**, the 1st respondent's Debt Recovery Officer, in a replying affidavit, deposed that the ruling dismissing the application for injunction cannot be stayed. The deponent gives a history of the matter at the High Court; that the applicant was advanced a loan facility by the 1st respondent with the suit property offered as security for the loan; that the account was non-performing prompting an exercise of statutory power of sale; that the applicant filed a suit at the High Court for orders including of an injunction which suit was compromised through a consent order by the parties; that the applicant failed to abide by the terms of that consent order and this precipitated the sale by public auction on 19th May, 2020 where the suit property was sold to the 2nd respondent; that the applicant approached the High Court through another suit which was found to be *res judicata* and was dismissed. It is denied that the sale was an undervaluation it being contended that a regular sale occurred where the 2nd respondent was the purchaser and had acquired rights to the suit property. The respondent says that it is a person of means capable of paying damages should it be found that it had acted irregularly in the sale, amongst so many other things said which are not necessary in an application like this one.

The applicant and the 1st respondent filed written submissions and case digest which we have considered.

For an applicant to succeed in an application brought under rule 5 (2) (b) of the rules of this Court he must, firstly, demonstrate that the appeal, or intended appeal, is arguable, which is the same as saying that it is not frivolous. An applicant who succeeds on that first principle must, in addition, show that the appeal would be rendered nugatory absent stay – see a summary of these principles in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR*.

The facts of the case are not difficult to follow.

The applicant was granted a loan facility by the 1st respondent and he offered as a security for the loan the suit property. When the loan went into arrears there was a threat by the 1st respondent that it would exercise statutory power and sell the property. The applicant filed a suit at the High Court asking for an injunction to restrain the 1st respondent from exercising that statutory power of sale. The suit was compromised by a consent where the parties agreed that the applicant would meet his obligations on servicing the loan in default of which the 1st respondent be at liberty to exercise that power of sale. The applicant did not meet his part of the bargain and the suit property was sold by public auction to the 2nd respondent on 19th May, 2020. In those circumstances

we cannot discern any arguable point in the intended appeal. Being of that view we need not go to the second limb of the principles that apply in an application of this nature.

The Motion dated 24th February, 2021 has no merit and is dismissed with costs to the 1st respondent.

**Dated and delivered at Nairobi this 23rd day of July, 2021.**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**



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