



Kibera v Kamata & 2 others; Mutinda (Interested Party) (Environment and Land Appeal E030 of 2022) [2023] KEELC 21088 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21088 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E030 OF 2022
OA ANGOTE, J
OCTOBER 26, 2023**

BETWEEN

JOSEPH KIGURU KIBERA APPELLANT

AND

GEORGE GICHUHI KAMATA 1ST RESPONDENT

HANNAH WATHITHI KAMATA 2ND RESPONDENT

NANCY KAMAU 3RD RESPONDENT

AND

MICHAEL MUTINDA INTERESTED PARTY

RULING

1. This Ruling is in respect of two applications dated 6th April, 2022 and 4th September, 2022 respectively. The Appellant/Applicant filed a Notice of Motion Application dated 6th April, 2022 (the Motion is dated 6th February, 2022 whereas the Certificate of Urgency and Supporting Affidavit are dated 6th April, 2022).
2. The Motion is brought pursuant to the provisions of Sections 3, 3A and 63 of the *Civil Procedure Act*, Order 40 of the *Civil Procedure Rules* and Article 50(1) of the *Constitution* and seeks the following reliefs;
 - a. That the Honourable Court be and is hereby pleased to restrain the 1st and 2nd Respondents either by themselves, agents or servants from evicting the estate of the deceased John Kibera Njoroge and his beneficiaries from the leased suit properties known as Dagoretti/Riruta/518 and Dagoretti/Riruta/519, and further, the 1st, 2nd and 3rd Respondents do cease and desist from erecting any structures in the leased suit properties pending the hearing and determination of the Appeal.



- b. That pending the hearing and determination of this Appeal, the Honourable Court be and is hereby pleased to stay the entire proceedings of the suit known as MCELC/E160/2021 Milimani Commercial Chief Magistrate Court.
 - c. That the Honourable Court be and is hereby pleased to order the district surveyor to measure the actual dimensions of the leased suit properties known as Dagoretti/Riruta/ 5818 and Dagoretti/Riruta/5819 and file the Report with Court.
 - d. That the Costs of the Application be borne by the Plaintiffs.
3. The application is premised on the grounds on its face and supported by the Affidavit of Joseph Kiguru Kibera, who deponed that he is the son of the deceased, John Kibera Njoroge and an Administrator of the Estate thereof and that the 1st and 2nd Respondents are son and mother.
 4. It was deponed that the 1st and 2nd Respondents each leased to the deceased half an acre of property but after the Government reclaimed a road reserve from the property, the deceased realized that he had been paying for less than a quarter of an acre each to the 1st and 2nd Respondents and that attempts to address the issue with the 1st and 2nd Respondents bore no fruit.
 5. According to the Applicant, the 1st and 2nd Respondents destroyed the Interested Party's property; that in a bid to avoid responsibility, they instituted MCELC/E160/2021 against several parties including the Interested Party, a tenant of the deceased and that they deliberately did not institute a suit as against the Applicant as the person duly representing the Estate.
 6. It was the deposition of the Applicant that as the matter proceeded, he sought for Letters of Administration to enable him defend the interests of the suit property; that after receiving the same, he sought to be enjoined in the lower Court proceedings but the Magistrate declined and that the 1st, 2nd and 3rd Respondents have invaded the suit property and began constructing thereon with a view to defeating the rights of the deceased estate.
 7. In response to the application, the Respondents filed a notice of Preliminary Objection dated 26th April, 2022. The objection was premised on the grounds that the application is fatally defective for the reasons that the Applicant lacks the locus standi to institute the same and that the application is devoid of merit and malafides because the orders sought do not lie before the Court.
 8. Contemporaneously with the Objection, the Respondents filed a Replying Affidavit sworn by the 1st Respondent on his own behalf and on behalf of the 2nd Respondent, who deponed that the application is an abuse of the court process meant to mislead the Court and delay the trial of the matter in the lower Court and that the application is similar to applications filed by the Interested Party in the lower Court and rightfully dismissed by the Magistrate.
 9. It was deposed that the Applicant has not demonstrated any interest in the suit property; that the matter before the lower court does not involve the Estate of the late John Kibera Njoroge nor is there any issue of law or fact involving the Estate justifying the present application or Appeal and that the application herein is by the Interested Party in the Magistrates Court disguising himself as the Applicant herein to advance his interests in the land.
 10. Vide a Further Affidavit, the Applicant deponed that the 1st, 2nd and 3rd Respondents orchestrated the destruction of the 1st Interested Party's property and the damage was quantified by a Quantity Surveyor at Kshs 1, 180,000 and that the Respondents are working hard to evade the responsibility of the damages occasioned to the Estate of the deceased and the Interested Party.



11. It was averred that vide his Ruling of 1st April, 2022, the Magistrate indicated that he had not expressed interest, made any application to be enjoined to the suit nor provided letters of administration and that the same was a misnomer because the application, the subject of the ruling, was for joinder. The Applicant filed submissions which I have considered.
12. In the application of 4th September, 2022, the Applicant sought for the following reliefs;
 - i. That the Honourable Court be and is hereby pleased to order the Kenya Power and Lighting Company to reconnect the power supply to the Applicant/Appellant and Interested Party to the state it was at before 3rd August, 2022, pending the hearing and determination of this Application and the Applicants Application dated the 6th April, 2022 and the Appeal.
 - ii. That the Costs of this Application be borne by the Respondent.
13. However, by way of a Notice of Withdrawal dated 28th September, 2022, the Applicant withdrew the entire Appeal against the eight (8) Interested Parties rendering the application otiose.

Analysis and Determination

14. The Applicant seeks, inter-alia, for an injunction pending Appeal, an order for the stay of the proceedings pending Appeal and an order that the district surveyor measures the actual dimensions of the suit properties and file the Report with Court.
15. It is the Applicant's case that he is the Administrator of the estate of the late John Kibera Njoroge who leased ½ acre each of the suit properties from the 1st and 2nd Respondent but upon reclamation of the land by the Government, realized that he had been given less a ¼ each and not ½ an acre and that the efforts to address the same were futile.
16. The Applicant stated that the 1st and 2nd Respondents entered on the property leased by the deceased, and in which the Interested Party is a tenant, and destroyed the same; that they later turned around and sued the Interested Party at the Magistrates Courts instead of suing him and that in a bid to try and protect the suit property, he sought and was granted Letters of Administration and thereafter filed an application seeking to be enjoined in the suit in the lower court but the same was declined.
17. The Respondents on their part assert that the application is unmerited and constitutes an abuse of Court process and that the same is a ploy by the Interested Party through the Applicant to re-litigate issues decided on by the trial court.
18. The Respondents' objection is to the effect that the Applicant has no locus standi to institute this Appeal. Locus standi denotes the right to bring an action or to be heard in a given forum. It is trite that lack of the requisite capacity to bring a suit goes to the root of the matter. This was expressed in the case of *Priscilla Jesang Koech vs Rebecca Koech & 3 Others* [2018] eKLR, where the Court stated thus;

“Locus standi is the cornerstone of any case. Before a party files a case, he or she must be certain that they are clothed with the requisite capacity to sue and be sued. In the case of *BV Law society of Kenya vs Commissioner of Lands & Others*, Nakuru High Court, Civil Case No. 464 of 2000. It was held that:

If a party has no locus standi, then the said party cannot bring a suit to court. The issue of locus standi goes to the root of any suit and the said issue of locus standi is a point of law which is capable of disposing of a matter preliminarily.”



19. It is apparent that the Applicant is appealing against the decision of the lower Court in refusing to enjoin him in the proceedings. This, the Court opines, constitutes sufficient locus.

20. The Court's jurisdiction to stay proceedings pending appeal is derived from both Order 42 rule 6 of the *Civil Procedure Rules* as well the inherent jurisdiction of the court reserved in section 3A of the *Civil Procedure Act*. Order 42 Rule 6 provides as follows;

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

21. The general principles which guide the courts whenever they are invited to exercise jurisdiction to stay proceedings are best summarized in *Halsbury's Law of England*, 4th Edition, Vol 37 at pages 330 and 332 thus;

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue”

22. *In Re Global Tours & Travel limited* (Nairobi) H.C. Winding up Cause No. 43 of 2000 quoted with approval in Meru Civil Appeal 40 of 2018 *Kenya Wildlife service vs Mutembei* (2019) eKLR the Court, while discussing the question of stay of proceedings pending Appeal stated as follows:

“As I understand the law whether or not I grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of Judicial Discretion to be exercised in the interest of justice. The sole question is whether it is in the interest to order a stay of proceedings, and if it is on what terms it should be granted.

In deciding whether to order a stay, a court should essentially weigh the pros and cons of granting or not granting the order, and in considering those matters it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not or whether it is an arguable one. The scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.... “...Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent...”

23. The Court is alive to the fact that an Appeal that is arguable is not necessarily one that will be successful. Indeed, the Court should at this juncture steer clear of making merited determinations of the Appeal. The raising of a single bonafide point worthy of consideration renders an Appeal arguable.



24. The Applicant seeks to impugn the Ruling of the Magistrate on several grounds, all of which revolve around the failure by the learned Magistrate to make a merited determination of his application for joinder. This, the Court opines, is an issue that this Court will need to consider and determine at the hearing of the Appeal by considering the trial court's decision and whether or not the Magistrate made relevant considerations.
25. As to whether the Appeal will be rendered nugatory, the Court is also persuaded that it will. As aforesaid, the Appeal is against a Ruling in which the Applicant's prayer to be joined in the proceedings was dismissed. The suit in the Magistrate's Court is set to proceed for hearing and if it does, the question before this Court, being whether or not the Magistrate fully determined the application for joinder and/or reached a just determination thereof will be rendered an academic exercise.
26. In the end, the Court is convinced that the prayer for stay of proceedings is warranted.
27. The remedy of an injunction pending Appeal is provided for under Order 42 Rule 6 (6) of the [Civil Procedure Rules](#) which provides as follows:
- “(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate Court or tribunal has been complied with.”
28. The principles underpinning the grant of a temporary injunction pending appeal were discussed by the Court of Appeal in the case of [Patricia Njeri & 3 Others vs National Museum of Kenya](#) [2004] eKLR, where it was stated;
- “a. An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
- b. The discretion should be refused where it would inflict great hardship than it would avoid.
- c. The applicant must show that to refuse the injunction would render the appeal nugatory.
- d. The court should also be guided by the principles in *Giella vs. Cassman Brown* [1973] EA 358.”
29. In [Bilba Mideva Buluku vs Everlyne Kanyere](#) [2016] eKLR, the court, when considering an application under Order 42 Rule 6(6) stated that;
- “Even though the court is dealing with an application for injunction at appeal stage, the court would have to be satisfied that the applicant has made a case in terms of *Giella v Casman Brown* 1973 EA 358, that he has a prima facie case with a probability of success, that he will suffer irreparable damage which cannot be compensated by an award of damages or that if in doubt the court should decide the case on a balance of convenience. The court should at the same time bear in mind that there is an appeal pending and therefore consider the prospects of that appeal succeeding in order to determine whether an applicant has a prima facie case, the ultimate objective of course being to safe guard rights of the appellant in the appeal.



As was held in the case of *Butt v The Rent Restriction Tribunal*, Civil Appeal No.6 of 1979, in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard. The same position was taken by the Court of Appeal in the case of *Mukuma v Abuoga* [1988] KLR 645, where the court held that where a party is exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard.”

30. From the foregoing, it is clear that the grant of an order of temporary injunction pending appeal is discretionary in nature. It is common ground that where a court is called upon to exercise discretion, the same must be exercised judiciously and in the interest of justice. This was as aptly expressed by the Court of Appeal in *Patriotic Guards Ltd vs James Kipchirchir Sambu*, Nairobi CA No. 20 of 2016, (2018)eKLR as follows:-

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

31. It is crucial to note that at this stage, the court is not required to venture into a re-consideration of the case as presented to the lower court. This is a matter for the substantive appeal. All that the court ought to consider is whether the appeal is arguable. What constitutes an arguable appeal was considered by the Court of Appeal in *Stanley Kang’ethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR as follows:

“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. In law, an arguable appeal/intended appeal is one that need not succeed but one that warrants the court’s interrogation on the one hand and the courts invitation to the opposite party to respond thereto.”

32. As aforesaid, the Applicant asserts, inter alia, that the Magistrate erred in summarily dismissing his application for joinder, and that the suit property was leased to the deceased. In the Court’s opinion, this is an issue that cannot in any way be said to be frivolous. The Court in this respect finds that the Applicant has established a case for an injunction pending appeal to issue.

33. In the circumstances, the Appellant’s application is allowed as follows:

- a. An order of stay of proceedings in MCELC/E160/2021 Milimani Commercial Chief Magistrate Court pending the hearing and determination of the Appeal be and is hereby issued.
- b. The 1st and 2nd Respondents either by themselves, agents or servants are hereby restrained from evicting the estate of the deceased-John Kibera Njoroge and his beneficiaries from the suit properties known as Dagoretti/Riruta/518 and Dagoretti/ Riruta/519, and further, the 1st, 2nd and 3rd Respondents do cease and desist from erecting any structures on the suit properties pending the hearing and determination of the Appeal.
- c. The costs of the application shall be in the Appeal.



DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 26TH DAY OF OCTOBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Nyangoro for Respondents

No appearance for Appellant

Court Assistant - Tracy

