



Omuga & another v Ndung'u alias Lily Umazi Kadzo & 4 others (Environment and Land Appeal E027 of 2023) [2023] KEELC 20992 (KLR) (25 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20992 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E027 OF 2023
NA MATHEKA, J
OCTOBER 25, 2023**

BETWEEN

BONIFACE ODIRA OMUGA 1ST APPELLANT

LEONARD MUGUSA KATUGA 2ND APPELLANT

AND

IRENE MWIHAKI NDUNG'U ALIAS LILY UMAZI KADZO . 1ST RESPONDENT

LAND REGISTRAR MOMBASA 2ND RESPONDENT

IRENE MWIHAKI NDUNG'U 3RD RESPONDENT

ASHEEY JUMA MBARAK 4TH RESPONDENT

GLADYS MUENI SEVU 5TH RESPONDENT

RULING

1. The 1st application by the 1st appellant is dated May 16, 2023 and is brought under Order 42, Rule 6 (1) (2), Order 51 Rule 1 of the *Civil Procedure Rules*, section 3A of the *Civil Procedure Act* seeking the following orders;
 1. That service of this application be dispensed with in the first instance in view of its urgency.
 2. That an interim stay of execution of the judgment and decree of Hon M.L Nabibya (SPM) made on March 23, 2023 in Mombasa CMCC ELC No. 45 of 2018 consolidated with CMCC ELC No. 136 of 2020 be granted pending the hearing of this application.
 3. That this Honourable court be pleased to order a stay of execution of the Judgment and Decree of Hon. M.L. Nabibya (SPM) made on March 23, 2023 in Mombasa CMCC ELC No. 45 of 2018 consolidated with CMCC ELC No. 136 of 2020 pending the hearing and final determination of this appeal on its merits.



4. That this Honourable court do make such further or any other consequential order as it may deem fit or reasonable to issue in the interests of justice.
5. That the costs of this application be provided for.
2. It is based on the grounds that the Learned Magistrate erred in both fact and law by entering judgment against the 2nd appellant to refund the purchase price and interests thereof to the 5th respondent yet no conclusive evidence was adduced in court to demonstrate that the said sums were paid to the 2nd appellant. That the Learned Magistrate erred in both fact and law by entering judgment for the 4th and 5th respondents' counterclaim as against the 2nd appellant to refund the purchase price and interests thereof yet no conclusive evidence was adduced in court to demonstrate that the said sums were paid to the 2nd appellant. That the Learned Magistrate erred in both fact and law by levying costs of the 3rd, 4th and 5th respondents' suit to be borne by the 2nd appellant yet valid concerns still linger. That the Learned Magistrate erred in both fact and law by insinuating professional misconduct by the 2nd Appellant yet no conclusive proof was adduced to that effect, save for (the inadmissible) hearsay evidence by the 1st Respondent which, informed the basis of the Learned Magistrate's decision. That the Learned Magistrate erred in both fact and law by making her decision basing on unproved allegations and aspersions cast by the 1st and 5th respondents.
3. That the Learned Magistrate erred in both fact and law by failing to take judicial notice of the fact that if the 1st respondent was charged at Shanzu Law Courts, then the 2nd Appellant would also have been roped in. Since the 2nd appellant was neither charged nor even summoned to record a statement, it rests trite that the 1st respondent's assertions were mere falsehoods, couched to misdirect the court of first chance. That if stay of execution of the judgment is not granted and execution is effected against the 2nd appellant, he will suffer substantial loss as his business operations will be adversely affected particularly during this period when cash flow is limited due to the constrains on business caused by the on-going global economic recession. Moreover, his natural and legal right to be heard will be muffled out by the purport and import of such execution of the judgment and order, yet an appeal subsists. That the 1st appellant and the respondents will not suffer any prejudice nor harm should the prayers sought be granted. That unless the Application is granted, the 1st appellant and the respondent may levy execution against the 2nd appellant yet the 2nd appellant's appeal has not been heard and determined on its merits.
4. The appellant herein opposed the applicant's notice of motion application dated May 16, 2023 on the following grounds the Notice of Motion filed is seriously misconceived, is frivolous, bad in law and nothing other than an utter abuse of the process of the Court and must fail in its entirety. That the Notice of Motion as drawn is contrary to the express provisions of Order 42 of *Civil Procedure Rule* 6 cap 22 Laws of Kenya. The same renders the entire Application fatally defective and is therefore for striking out. That no cogent and sound reason and/or grounds have been set forth to warrant the court to exercise its discretion in favour of the applicant whereof the Application must be dismissed. That the grounds and issues raised in the Notice of Motion Application are misguided and predicated on a wrong premise and cannot be delved into at this juncture. That the Notice of Motion Application as drawn is fatally defective both in substance procedure and in form reasons wherefore the appellant prays for the striking out of the notice of motion and/or further orders this honourable court deems just and appropriate.
5. The appellant (Boniface Odira Omuga) stated that the 2nd respondent (Leonard Katuga) herein purported to file his own appeal out of time but used the same Appeal number being the one he has used herein. Annexed and marked as annexure Annexed herewith and marked as annexure "BO 3' is a copy of the receipt wherein the 2nd Respondent purported to file a Notice of Appeal whereas



the document they served upon his Advocate on record is a Memorandum of Appeal. That the 2nd respondent did not obtain leave of this court to file his appeal out of time and as such, there is no valid appeal before the court. That there is no appeal filed by the alleged 2nd respondent Leonard Katuga t/ a Katuga& Company Advocates.

6. The 3rd respondent submitted that the Memorandum of Appeal was filed on May 2, 2023 whereas the judgment appealed from was delivered on March 3, 2023. Clearly the Appeal is incompetent for having been instituted out of time without the leave of the court hence the same is a nullity and liable to be struck out. That the grounds set out in the 2nd appellant's Memorandum of Appeal do not raise an arguable appeal with chances of success- The appeal was only filed as a ploy to obstruct execution of the trial court's decree and to delay the matter.
7. The second application by the 2nd appellant is dated July 19, 2023 and is brought under Order 42 Rules 6(1) and 6(6), Order 57, Rule 1, of the Civil Procedure Rules 2010, sections 1A, 1B, 3, 3A and section 63(e) of the Civil Procedure Act cap 27, section 13(7),18(c) and 19(2) of the Environment and Land Court Act, cap12A Laws of Kenya and article 50 and 159 of the Constitution of Kenya seeking the following orders;
 1. That thishonourable court be pleased to certify this Application as extremely urgent and hear it on priority basis.
 2. That thishonourable court be pleased to issue an order of injunction restraining the 5th Respondenther servants, agents, proxies, beneficiaries or persons claiming through, for or from them from advertising, selling, subdividing, disposing, transferring, charging, leasing and/or sub-dividing, developing, wasting, damaging and/or alienating and/or registering any new entries in respect of title numbers Mombasa/Mwembelegeza/1167 pending the hearing and determination of this Application inter-partes.
 3. That this Honourable court be pleased to issue an order of injunction to restrain the 5th Respondent her servants, agents, proxies, beneficiaries or persons claiming through, for or from them from advertising, selling, subdividing, disposing, transferring, charging, leasing and/or sub-dividing, developing, wasting, damaging and/or alienating and/or registering any new entries in respect of title numbers Mombasa/Mwembelegeza/1167 pending the hearing and determination of appeal herein.
 4. That Costs of this Application be provided for.
7. It is based on the grounds that the Appellant purchased property known as Mombasa/ Mwembelegeza/1167 wherein the property was successfully transferred to the Appellant who is in custody of the original title deed to date. That vide a Judgment delivered on the March 23, 2023 by SPM Hon. M.L Nabibya in CMCC ELC No. 45 of 2018 as consolidated with CMCC ELC No. 136 of 2020, the trial Magistrate sanctioned the revocation and cancellation of Mombasa/ Mwembelegeza/1167 in total disregard of the doctrine of innocent purchaser for value without notice of any defects on the title. That despite the trial court correctly observing that the Appellant herein is an innocent purchaser, the court arrived at a wrong conclusion to wit that the Appellants' title over Mombasa/Mwembelegeza/1167 be cancelled and the same be reverted back to the name of the 5th Respondent. The Appellant is aggrieved by the Judgment of the trial court delivered on the March 23, 2023 and has filed an appeal which is still pending before this honorable court for hearing and determination. That in the strength of the impugned judgment/decree of Honourable Senior Principal Magistrate Hon. Nabibya, the 5th respondent herein seeks to have the title in the name of the Appellant cancelled and/or revoked and the same be reverted back to them before the Appeal herein



is heard and determined. That the appellant has just learnt with ultimate shock that the property has already been reverted back to the 5th respondent and thus the 5th respondent is at liberty to dispose off the property which is the subject matter of the appeal herein in any manner they so wish during the pendency of this Appeal unless the substratum of this Appeal is reserved by an order of injunction from this court. That unless the orders sought herein are granted, the appellant/applicant is likely to suffer irreparable harm and/or loss. That the overriding objectives embodied in sections 1A and 1 B of the *Civil Procedure Act* (cap 21) and article 159 of the *Constitution* of Kenya will be furthered if orders sought herein are granted.

8. The 3rd respondent stated that the 1st appellant's Application is frivolous baseless mischievous and a grave abuse of the process of this Honourable Court as it is purely calculated to unduly, unjustly and improperly deprive (and delay the realization by) her as well as the beneficiaries of the estate of Juma Khamis Mbarak (deceased) the legitimate owner of the subject property of the fruits of the Judgment in the matter.
9. That the orders sought if granted are prejudicial to him as well as the beneficiaries of the estate of Juma Khamis Mbarak (deceased) because firstly she is the administrator of the estate and he is an elderly lady of 75 years of age and of ill health. Secondly the beneficiaries Of the estate have waited for more than 14 years for the settlement of the of their late father and any further delays would gravely prejudice the beneficiaries as they have been unable to find closure on their late father's estate for an inordinately long time which delay was partly occasioned by the actions of the appellant in participating in a fraudulent scheme which he knew about having been warned by the 6th respondent and it would therefore be in the interests of justice to allow the succession to be concluded and not delayed any further. Similarly, the 4th and 6th respondents also opposed the applications.
10. This court has considered the application and the submissions therein. The principles for granting stay of execution are provided for under Order 42 Rule 6 (1) of the *Civil Procedure Rules* as follows:

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

Order 42, rule 6 states:

“No order for stay of execution shall be made under sub-rule (1) unless:-

 - a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
11. The appellants need to satisfy the court on the following conditions before they can be granted the stay orders:
 1. Substantial loss may result to the applicant unless the order is made.



2. The application has been made without unreasonable delay, and
 3. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
12. The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal and second, this court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of *Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd* – Civil Appl. No. Nai. 93/02 (UR), thus;
- Hitherto, this court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-
1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”
13. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange v Richard Nyagaka Tongi & 2 others* eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus;
- The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”
14. In the case of *Mohamed Salim T/A Choice Butchery v Nasserpuria Memon Jamat* [2013] eKLR, the court stated that;
- “That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”
15. We are further guided by this court’s decision in *Carter & Sons Ltd v Deposit Protection Fund Board & 2 others* Civil Appeal No. 291 of 1997, at Page 4 as follows:
- “ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”
16. On perusal of the court record the trial court delivered judgement in this matter on March 23, 2023 granted orders to the effect that the subject property be reinstated in the name of Juma Khamis Mbarak (deceased) who at the time when the property was first fraudulently transferred had already passed away some 8 years back. The decree was for reversion of the title of the suit property to the original owner and for payment of the purchase price paid to the 3rd and 5th respondents. The title to the suit property



has already reverted to the original owner. In the circumstances the executed of the decree is a money decree for payment of the purchase price together with and costs to the 3rd, 4th and 5th respondents. The 2nd appellant filed their appeal out of time without leave of the court and hence the same is struck off. I find that the intended appeal is not arguable and is frivolous. Secondly, I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has not fulfilled the above grounds mentioned to enable me grant the stay. I find the applications dated May 16, 2023 and July 19, 2023 are unmerited and I dismiss them with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF OCTOBER 2023.

N.A. MATHEKA

JUDGE

