



Kitsao & another v ACN (Legal Administrator of the Estate of FK Deceased) & another (Civil Appeal 35 of 2022) [2023] KEHC 19902 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19902 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 35 OF 2022
DKN MAGARE, J
JUNE 22, 2023**

BETWEEN

DANIEL KENYA KONDE 1ST APPELLANT

KONDE KITSAO 2ND APPELLANT

AND

ACN (LEGAL ADMINISTRATOR OF THE ESTATE OF FK DECEASED) 1ST RESPONDENT

SNC, JMC & SMC (MINORS) SUING THROUGH THEIR FATHER/NEXT FRIEND ACN 2ND RESPONDENT

RULING

1. On February 24, 2023 the Applicant filed an application for stay pending the hearing of the Appeal herein. The Appeal is from the Ruling and order of Hon DO Mbeja issued on February 8, 2023. The Appeal against an order was made when the Appellants were absent.
2. The Appeal is not from the Judgment of the Court. The order was made pursuant to an order of permanent injunction which was issued on September 30, 2021. There is no stay of such an order. For some reason, the Appellant did not want to challenge or comply with the same.
3. My duty is circumscribed by Order 42 Rule 6 of the *Civil Procedure Rules*. It provides as doth: -

“ 6. Stay in case of appeal

- (1) 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.

- (2) No order for stay of execution shall be made under subrule (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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (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 a subordinate court or tribunal has been complied with.

4. In the circumstances, the items I need to look at are: -

- a. Whether there is an arguable Appeal.
- b. Whether there is an offer for security.

5. In this case, there is an order for injunction in the following terms.

“A permanent injunction restraining the defendant, their representatives, agents, servants, employees from evicting tenants, occupying the suit property demanded for monthly house rent for selling land or invading Swahili houses with a rooms one plot xxx/ Sec/ x./ xxNyali area.”



6. The said orders were said to be disobeyed. Therefore, till the orders are complied with, set aside or otherwise stayed, there is no reason for non-compliance.
7. I do not find that whether, the Appellant has a triable and arguable Appeal. An arguable appeal is one which does not necessarily have to succeed but one which, has chances.
8. In the absence of compliance with the prior order, there is nothing to go on trial. Without an arguable Appeal. It is not necessary to sort out other issues.
9. In *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR, the court, R.E. Aburili, held as follows; -

“The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides: “No order for stay of execution shall be made under subrule (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.
10. In this context, where there is an appeal to this court, it must as a corollary be an arguable appeal. This is a principle applicable in relation to an appeal from this court to the court of appeal. It equally applies for an application for stay from the subordinate court to this court.
 11. In the case of *NIC Bank Limited & 2 others v Mombasa Water Products Limited* [2021] eKLR, the court of Appeal, Asike-makhandia, Sichale, & J. Mohammed, JJ.A), stated as doth: -

“

“9. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court’s satisfaction.

10. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court. See *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR (Civil Application No Nai. 31 of 2012) where this Court describan arguable appeal in the following terms:

“vii). 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.

viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

12. In the case of *Francis K. Chabari & another v Mwarania Gaichura Kairubi* [2022] eKLR, the court, C. K. YANO, stated as doth: -

“



- “25. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
26. As for the applicants having to suffer substantial loss, in the case of *Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988) KAR 1018 the Court of Appeal pronounced itself to the effect that:
 “It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
13. The order given is an injunction.
14. Considering the circumstances of this case, I do not find any arguable appeal.
15. Though the Replying affidavit, has details of the Advocate who allegedly did not have a valid practicing certificate, such matters cannot be decided as a preliminary objection. There needs to be affidavit evidence to support the allegation.
16. In the case *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 the Court of Appeal stated as follows: -
 “A preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose off the suit. Examples are an objection to the jurisdiction of the court.”
17. The issues raised under order 2 Rule 15 of the *Civil Procedure Rules* can only be dealt with through a notice of Motion supported by an affidavit. Order 2, rule 15 states as follows: -
 “(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 a. It discloses no reasonable cause of action or defence in law; or
 b. it is scandalous, frivolous or vexatious; or
 c. it may prejudice, embarrass or delay the fair trial of the action; or
 d. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
 (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
18. The only issue is in relationship to a filing in the wrong registry. The subject matter is Swahili houses. These are houses without Land. The question that needed to be dealt with was the material jurisdiction. These kind of houses defy our common understanding of the principle of *cujus est solum ejus est usque ad coelum et ad inferos*. Those are floating assets that do not confer. Land rights on the owners. They are floating commercial Assets that do not form part of the land.



19. In *Famau Mwenye Ali & 19 Others V Mariam Binti Said* [2010] eKLR CCC No 34 of 2005 (Ouko, J) (as he then was) described the concept of house without land as follows:

“The dispute arises from land tenure unique ... to Mombasa which has baffled scholars, practitioners and even jurists. That land system is only referred to as ‘house without land’. That is, the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin maxim, *cujus est solum ejus est usque ad coelum* [meaning, ‘whose is the soil, his is also that which is above it’].”

20. My understanding is that the concept does not create a right over land as we understand them. Without evidence the court cannot decline jurisdiction. the law is settled. in the case, *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu* [2009] eKLR restated these principle thus:

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan JA (as he then was) in his judgment in the case of *DT Dobie and Company (Kenya) Ltd v Muchina* (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case *inter alia* as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts LJ in the case of *Cail Zeiss Stiftung v Ranjuer & Keeler Ltd and others* (No 3) (1970) Ch D 506, where the Lord Justice said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

We may add that like Madan JA, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly.”

21. I therefore do not find merit in the preliminary objection. The same is dismissed in limine.
22. This being a draw having dismissed both the preliminary objection and the Notice of motion, each party will bear their own costs.
23. Given however the allegation that, the appellants advocate does not have a valid practicing certificate. I direct that Aron Ondindiko Wandera had a practising certificate for the year 2022 and 2023. The said Advocate to appear in person before me on June 23, 2023.

Determination

24. I therefore make the following orders: -



- a. The Notice of Motion dated February 23, 2023 and the preliminary objection dated March 6, 2023 are dismissed in limine. Aaron Ondindiko Wandera do appear before me on June 23, 2023. Pursuant to Order 52 Rule of the *Civil Procedure Rules*.
- b. Others directions will be given on June 23, 2023.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 22ND DAY OF JUNE, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant - Brian

