



**Yinda (Suing as administrator of the Late Linus Yinda Opondo) v
Okumu & 3 others (Environment and Land Appeal E012 of 2023)
[2024] KEELC 663 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 663 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E012 OF 2023
AY KOROSS, J
FEBRUARY 15, 2024**

BETWEEN

**SELINE AUWOR YINDA (SUING AS ADMINISTRATOR OF THE LATE LINUS
YINDA OPONDO) APPELLANT**

AND

JOICE ACHIENG OKUMU 1ST RESPONDENT

EMILY APONDI MURENDE 2ND RESPONDENT

JOHN OTIENO MUDEDE 3RD RESPONDENT

**DISTRICT LANDS REGISTRAR UGENYA/UGUNJA DISTRICT 4TH
RESPONDENT**

RULING

Appellants's Case

1. This ruling seeks to determine the notice of motion dated 29/08/2023 filed by the appellant in which she prays for several reliefs some of which are spent and the substantive prayer for determination is: -
 - a. That pending hearing and determination of the appeal, an order of temporary injunction do issue restraining the 2nd and 3rd respondents, their agents, servants, employees and/or anyone acting on their behalf or under their instructions from selling, transferring and or dealing with suit properties being LR. Nos. North Ugenya/Doho/1073 and 1071.
2. The Motion is supported by grounds particularised on its face together with averments contained in the appellant's affidavit sworn on even date. In summary, the appellant asserts she is aggrieved by the decision of the trial magistrate that was rendered on 16/03/2023 and has since lodged an appeal to this Court.



3. Further, she asserts since delivery of the judgment, all efforts to trace the lower court file has been fruitless despite several correspondence by her counsel. Accordingly, she is apprehensive the appeal may be rendered nugatory and she will suffer damages if the orders sought are not granted. Further, she contends her appeal raises a prima facie case and the balance of convenience tilts in her favour.

The 1st, 2nd and 3rd respondents' case

4. In opposing the motion, the 1st to 3rd respondents filed grounds of opposition dated 5/09/2023 which raised 4 grounds which are thus:-
 - a. That the supporting affidavit is fatally defective since it had been deposed by a stranger who has no locus standi or authority to swear documents.
 - b. That the ingredients to warrant the grant of the orders sought had not been met.
 - c. That the motion is premature since there is no extracted decree.
 - d. That the motion is a waste of court's time and intended to deny the respondents justice.
5. In making these grounds, the 1st to 3rd respondents urged this court to dismiss the motion with costs to them.

4th respondent's case

6. Despite service upon the office of the attorney general who ordinarily represents the 4th respondent, it did not file any documents in opposition to the motion.

Appellant's submissions

7. As directed by the court 30/08/2023, the motion was canvassed by written submissions. The firm of M/s. Bitala & Kakainga Advocates who are on record for the appellant filed written submissions dated 7/09/2023. Counsel identifies the issue for resolution as whether the appellant has satisfied the requirements to warrant the grant of injunctive relief.
8. To support his argument that the appellant has met the ingredients of injunction pending appeal, counsel relies on the averments made in the motion and argues the legal framework to warrant the grant of this relief is found in Order 40 Rule 1 of the *Civil Procedure Rules*. To augment his position, counsel relies on the well cited case of *Giella v Cassman Brown* [1973] EA 358 and the Court of Appeal decision of *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR which stated: -

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The 1st, 2nd and 3rd respondent's case

9. The firm of M/s. Sala & Mudany Advocates which is on record for them filed written submissions dated 11/09/2023. Counsel recognises three issues as falling for determination;
 - (a) whether the affidavit in support of the motion is fatally defective for want of locus standi
 - (b) the elements to be met before stay pending appeal is granted and,
 - (c) whether the motion is frivolous, vexatious and an abuse of court process.



10. On the 1st issue, counsel submits, the affidavit in question is sworn by a stranger by the name of Angelica Mueni Mbaabu and not by the appellant. To support his argument, counsel relies on the case of [Moijo Mataiya Ole Keiwua v Chief Justice of Kenya & 6 others](#) [2008] eKLR which cited with approval the decision of Bosire, J.A. in [Jasbir Singh Rai & Others V. Tarlochan Singh Rai & Others](#) in Civil Application No. Nai. 307 of 2003 (Unreported) which stated: -

“...while the [Constitution](#) and public policy demanded that a person should not be condemned unheard, there is another equally important issue of public policy that there be an orderly dispensation of justice. It is the duty of the Court to balance the conflicting issues. We think that it was highly irregular and improper for the Ntutu brothers to have filed these affidavits.”

11. On the 2nd and 3rd issues, counsel submits Order 42 Rule 6 (2) (b) of the [Civil Procedure Rules](#) donates power to this court to grant orders of stay of execution. However, according to counsel, the appellant needed to meet the ingredients set out in the case of [Butt v Rent Restriction Tribunal](#) [1982] KLR 417. In addition, counsel submits the appellant is not willing to abide with the orders of this court on stay of execution pending appeal.

Issues for determination and preliminary issues

12. I have carefully considered the motion, affidavit, grounds of opposition, parties’ rival submissions, provisions of law and well cited case law and consequently, the sole issue that warrants determination is whether the appellant has satisfied the ingredients of injunction pending appeal.
13. Before I delve into the issue, I must first deal with preliminary issues that emanated from the motion and parties’ submissions. Firstly, on injunctions pending Appeal, this Court derives its jurisdiction from Order 42 Rule 6 (6) of the [Civil Procedure Rules](#) and not Order 40 Rule 1 of the [Civil Procedure Rules](#) which deals with injunctions pending hearing of a main suit. Nonetheless, this error is curable by Article 159 (2)(d) of the [Constitution](#).
14. Secondly, the ground of opposition on locus standi of the deponent is overtaken by events because the record was rectified on 30/10/2023 to reflect the appellant as the deponent. Lastly, the substantive prayer for determination is injunction pending appeal and not stay of execution. Therefore, it follows the 1st to 3rd respondents’ submissions and some of their grounds of opposition are misplaced. I will now proceed to deal with the issue for determination.

Analysis and Determination

15. Utmost, this court derives its jurisdiction to grant injunctions pending appeal from the provisions of Order 42 Rule 6 (6) of the [Civil Procedure Rules](#) which provides thus:

“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.”

16. The principles for grant of injunction pending appeal have been explicated in various court decisions and this court has to exercise judicious discretion based on evidence and law and if justice so demands and upon confirmation that the appeal is properly before it, it will grant such a relief.



17. In the case of *Cosmas Stephen Nabungolo v African Banking Corporation Ltd* [2018] eKLR, the Court of Appeal summarised the principles of injunctions pending appeal as follows: -

“...the applicant must satisfy the Court that the appeal is not only arguable but that should it succeed it would be rendered nugatory if the orders sought are not granted. This principle has been well summarized in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.”

18. From the record, the impugned decision the appellant is aggrieved against was rendered on 16/03/2023 and the appeal was filed on 14/04/2023. It suffices the appeal is competently before me since it was filed within the requisite statutory period of 30 days.

19. However, it must be noted from correspondence between the appellant’s counsel and Ukwala Law Courts whose decision the appellant is appealing against, the lower court file appears to be ‘missing’ and communication from this court for remittance of the lower court file has similarly not elicited any response.

20. On the 1st principle of whether the appeal is arguable, this court has to bear in mind that an arguable appeal is not one which must ordinarily succeed but one which is not frivolous. Even a sole arguable ground of appeal would suffice to meet the required threshold.

21. Hence, this court has to interrogate the memorandum of appeal to establish the appeal’s arguability. In the memorandum of appeal dated 13/04/2023, the appellant asserts amongst others that the trial magistrate erred in holding the 1st respondent had locus to transfer the suit property despite absence of title or sale documents and further, erred in finding the 2nd and 3rd respondents were bonafide purchasers for value. Without delving into whether the grounds have merits, I am contented these grounds are arguable.

22. The 2nd and last principle of the appeal being rendered nugatory was expounded by the Court of Appeal decision of *Stanley Kangethe Kinyanjui V Tony Ketter & 5 others* [2013] eKLR as follows: -

ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.

x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecuniosity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”

23. In the instant case, the respondents have not rebutted the appellant’s contest that the appeal will be rendered nugatory. However, understandingly, the appellant did not tender a copy of the judgment and decree to enable this court to comprehend the decision of the trial court. It must be noted the absence of these documents are not fatal. See the Court of Appeal decision of *Peter Kirika Githaiga & another v Betty Rashid* [2016] eKLR.

24. Likewise, the affidavit in support of the motion provides scanty information and merely asserts the appeal will be rendered nugatory. For this reason, I am not satisfied this principle has been met.



Consequently, having failed to meet the 2nd limb of the principles, this court declines to grant the order of temporary injunction pending appeal.

25. However, I have considered the peculiar circumstances of this case whereby the lower court file is 'missing'. From numerous correspondence by the appellant's counsel to the lower court, the appellant is flustered and apprehensive and all efforts to trace the file have been fruitless. This court is uncertain if there is mischief or otherwise. It appears indefinite as to when the lower court proceedings or file will ever be available.
26. Bearing this situation in mind, this court invokes Section 3A of the *Civil Procedure Act* which empowers this court to make such orders as may be necessary for the ends of justice to be met and hereby finds and holds that the order that commends itself to be issued is that of status quo. Costs shall abide the outcome of the appeal.
27. Ultimately, for the foregoing reasons and findings, I hereby issue the following disposal orders: -
 - a. That an order of status quo now obtaining on LR. Nos. North Ugenya/Doho/1073 and 1071 do remain in force pending the hearing and determination of the appeal.
 - b. That the costs of this Motion will be costs in the appeal.
 - c. That this matter shall be mentioned for directions on 12/03/2024.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 15TH DAY OF FEBRUARY 2024.

HON. A. Y. KOROSS

JUDGE

15/2/2024

Ruling delivered virtually through Microsoft Teams Video

Conferencing platform in the Presence Of:

Miss. Murugi h/b for Mr. Kakinga for the appellant

Mr. Sala for the respondents

Court assistant: Ishmael Orwa

