Mutua v County Government of Narok; National Land Commission (Interested Party) (Civil Appeal (Application) E018 of 2024) [2025] KECA 116 (KLR) (31 January 2025) (Ruling)

Neutral citation: [2025] KECA 116 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL (APPLICATION) E018 OF 2024

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

JANUARY 31, 2025

BETWEEN

GODFREY MUTUA ..... APPLICANT

AND

THE COUNTY GOVERNMENT OF NAROK ..... RESPONDENT

AND

THE NATIONAL LAND COMMISSION ..... INTERESTED PARTY

(Being an application for stay of execution of the decree in the Environment and Land Court of Kenya at Narok (C. G. Mbogo, J.) dated 26th October 2023 in ELC No. E007 of 2021)

RULING

1. A brief history of the litigation before the Environment and Land Court (the ELC) at Narok is necessary in order to properly contextualize the issues urged in the application dated 5th November 2024, the subject of this ruling. By a plaint dated 8th April 2012 filed at the ELC at Narok, Godfrey Mutua, (the applicant) sued the respondent and named the National Land Commission as an interested party in the said case. The applicant averred that he bought Plot no. 212, block 5 in Narok town from its previous proprietor one Patricia Sangriaki vide sale agreement dated 15th July 2010, that he paid the outstanding rates and applied for a letter of allotment. He also claimed that he continued paying the rates and that the said plot did not form part of the land owned by the Narok County Referral Hospital, nor did the respondent object to his application for a lease for the said plot. His grievance was that on 31st October 20212 the respondent demanded that he vacate the plot in default his premises would be demolished.

2. The applicant prayed for inter alia a permanent injunction restraining the respondent from evicting, trespassing, demolishing his structures and or interfering with his quiet possession of the suit property. The applicant never sought any orders against the interested party.

3. The respondent filed a statement of defence dated 24th May 2023 in which he vehemently denied the claim and averred that the gazette notice relied upon by the applicant did not mention the said plot. At paragraph 11 of its defence, the respondent pleaded "the defendant prays for a permanent injunction to restrain the plaintiff by himself, his agents, servants or those who may claim under him from entering upon, remaining upon, or in any other way interfering with the defendant's use and occupation of the hospital land." The respondent prayed for the suit to be dismissed.

4. By a judgment dated 26th October 2023, Mbogo, J. framed three issues, namely; (a) whether the plaintiff was the owner of the suit property; (b) whether the plaintiff should be evicted from the suit property; and, (c), who is entitled to costs. After considering the evidence, the learned concluded that the applicant had failed to satisfy the court on a balance of probabilities that he was the owner of the suit property and instead issued an order of permanent injunction against him barring him from entering, remaining on, or in any way dealing or interfering with the respondent's use and occupation of the hospital land.

5. Aggrieved by the above verdict, by his application dated 5th November 2024 brought under Article 48 of the Constitution and Rule 5 (2) (b) of the Court of Appeal Rules, 2022, the applicant prays for stay of execution of the said judgment.

6. On whether his intended appeal is arguable, the applicant averred that his appeal is merited and raises arguable points as demonstrated in his draft memorandum of appeal annexed to the affidavit in support of the application. His main ground is that the respondent's defence did not contain a counter-claim, yet the learned judge issued injunction orders against him.

7. On the nugatory aspect, the applicant averred that the suit property comprises a warehouse where he stores his items of trade which is his only source of livelihood. Therefore, if he is injuncted from accessing the suit property, he will be thrown out of business and his appeal will be rendered nugatory. He also pleads that the order of permanent injunction is a positive order capable of being execute and therefore, this court has the jurisdiction to entertain his application.

8. The respondent and the interested party, though served with a hearing notice did not attend court nor did they file a reply to the application. Therefore, this application proceeded unopposed.

9. Learned counsel Mr. Githui appeared for the applicant and relied on his written submissions dated 9th January 2025 which we have carefully considered.

10. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled. In the case of Republic vs. Kenya Anti-Corruption Commission & 2 Others [2009] eKLR, this Court stated:

> " The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory."

11. On the first principle, as to whether or not the applicant's intended appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant

in order to warrant ventilation before this Court on appeal. An arguable ground as was stated by this Court in Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR "is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. 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 satisfaction of the first prerequisite, the applicant has raised 7 grounds in his draft memorandum of appeal. One of the grounds is that the learned Judge erred in law in framing and determining an issue that did not flow from the pleadings and the evidence, which is whether the appellant should be evicted from the suit property, and proceeded to issue an injunction against the respondent which had not been counter-claimed in the respondent's defence. In his oral arguments, the applicant's counsel deployed a lot of energy arguing that the respondent's defence did not contain a counter-claim, therefore, the intended appeal is arguable. However, as we alluded earlier, the correct position is that, in its defence at paragraph 11, the respondent prayed for an injunction. However, this averment is in the body of the defence as opposed to a counter-claim as the rules require. Also, at the end of the defence, the respondent only prayed for dismissal of the suit and did not pray for an injunction.

13. At stage, we are precluded from making definitive findings of law or facts because that will be a preserve of the court that will hear and determine the intended appeal. It will suffice for us to state that whether the respondent's pleading at paragraph 11 of its defence was a competent counter-claim is an arguable issue to be resolved by the trial court, and to that extent, the applicant has satisfied the first limb under Rule 5 (2)(b). Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.

14. Turning to the second prerequisite, that is, whether the appeal, if successful, will be rendered nugatory in the event we decline to grant the stay sought and the intended appeal succeeds, the applicant in his submissions has reiterated the contents of his affidavit in support of the application and contended that since the trial court has already declared that the parcel of land is the property of the respondent, the respondent may move in and demolish his structures erected on the land, and, such an eventuality will not only have a negative impact on his livelihood but will render the entire appeal a mere academic exercise.

15. We note that the applicant is apprehensive that the structures on the land will be demolished by the respondent in execution of the decree by the ELC. However, we are of the view that if the appeal succeeds, the land will still be available for his occupation. This is because the respondent before the ELC maintained that the suit property is public property allocated to the Referral Hospital and the Town Council for housing and it remains government land reserved for public use. Consequently, we find that the applicant's appeal will not be rendered nugatory since the suit property which is public land will not be sold to third parties nor has it been demonstrated that there is a risk of alienation to third parties.

16. As for the structures or any incidental loss that may arise in the event of the demolition and eviction, such a loss, in our view is quantifiable and recoverable as damages. In fact, the applicant said nothing to demonstrate that the respondent will not be able to afford paying such compensation. Conversely, the respondent is a public body and, in our view, it will be in a position to pay for the loss.

17. The upshot of the above is that applicant has failed to satisfy the second prerequisite to merit the stay sought under Rule 5 (2) (b) and since it is a requirement for an applicant to satisfy the twin principles, inevitably, this application is for dismissal. Accordingly, we dismiss the applicant's notice of motion

dated 5th November 2024 with no orders as to costs because the respondent and the interested party did not participate in the application.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF JANUARY, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.