Wakarima v Mutea (Civil Application E072 of 2024)
[2025] KECA 399 (KLR) (28 February 2025) (Ruling)

Neutral citation: [2025] KECA 399 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E072 OF 2024

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

FEBRUARY 28, 2025

BETWEEN

MARY WAKARIMA ..... APPLICANT

AND

RAEL GATABIRA MUTEA ..... RESPONDENT

(An application for stay of execution from the ruling of the Environment and Land Court at Meru (Nzili, J.) delivered on 31st July 2024 in ELC Appeal No. E003 of 2024)

RULING

1. Before this Court is a Notice of Motion dated 6th August 2024 brought by Mary Wakarima, the applicant, under inter alia rule 5 (2)(b) of the Court of Appeal Rules. The respondent is Rael Gatabira Mutea. The application arises from the ruling of Nzili, J. delivered on 31st July 2024 dismissing the applicant's notice of motion in which she sought a stay of the judgment and order of the Meru Chief Magistrate's Court (Hon. Nyambo, CM) delivered on 30th January 2024 in ELC No. 19 of 2019 (Formerly Meru HC ELC No. 37 of 2013). The learned trial magistrate declared the respondent the proprietor of Plot No. 9 (formerly plot and/or stall no. 4A) situated within Meru Municipality at the main bus park, and further declared that the premises which were formerly occupied by Meru Nissan Sacco Limited was part of Plot No. 9 and therefore the same belonged to the respondent. Orders of injunction and eviction were also issued against the applicant.

2. In the instant application, the applicant seeks an order of status quo to the effect that the applicant remains in occupation and use of Plot No. 10b within Meru Municipality pending the hearing and determination of the appeal. Alternatively, the applicant seeks an order of injunction restraining the respondent, her servants, agents, family members, and assignees from taking over the suit area or in any way interfering with it until the appeal is heard and determined.

3. Aggrieved by the ruling of Nzili, J. dismissing her application for a stay of execution of the Magistrate's Court's judgment, the applicant preferred an appeal to this Court and, in the same appeal, filed the instant application.

4. We have considered the application and the rival submissions of counsel to the parties. First and foremost, this Court's jurisdiction to stay the impugned judgment and decree is contingent on a notice of appeal having been filed against the said ruling pursuant to rule 77 of the Court of Appeal Rules. This requirement is prescribed by Rule 5 (2)(b) of the Rules and was confirmed by this Court in the case of Halai & Another vs. Thornton & Turpin [1963] Ltd. (1990) KLR 365. We are satisfied that the application is competent as the applicant has demonstrated that she filed a notice of appeal dated 1st August 2024.

5. What the applicant needs to demonstrate in order to obtain the orders sought is the fulfilment of the twin principles: one, that the appeal is arguable and, two, that it is likely to be rendered nugatory if the application is declined and the appeal were to subsequently succeed. What is arguable was explained in the case of *Somak Travels Ltd vs. Gladys Aganyo* [2016] eKLR, where this Court held:

> "It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this Court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application."

6. On arguability of the intended appeal, we have considered the applicant's grounds in support of the application on the face of the motion and the supporting affidavit, as well as the memorandum of appeal annexed and the submissions by learned counsel for the applicant Mrs. Kauma dated 15th August 2024. The applicant avers that the learned Judge of the ELC erred by failing to grant stay or status quo to preserve the suit area, by failing to consider previous cases that had dealt with the subject suit area; and by failing to consider the orders of 31st July 2024 which had the effect of giving the suit area to the respondent unfairly through an application instead of a full hearing, and that the entire ruling was against the weight of evidence. The submissions of counsel were to the effect that the applicant deserved the status quo order and that the learned Judge erred not to grant the order. Nothing more is stated.

7. The respondent has vehemently opposed the application in her replying affidavit sworn on 16th August 2024. She avers that the application has been brought in bad faith, and is intended to deny the respondent the enjoyment of the fruits of the judgment. The respondent averred that the applicant does not have an arguable appeal. She urged that the seller of the suit premises, Mr. Samuel Kiome Rimbere testified at the trial and stated clearly that he sold plot no. 9 to the respondent and plot no. 10, the suit property to the applicant. She averred that upon the delivery of the judgment at the lower court, the applicant filed an application for a stay, and the trial court by its ruling dated 11th June 2024 dismissed it. The applicant further filed a similar application before the Environment and Land Court, and the same was dismissed through the ruling of the court dated 31st July 2024 the subject of the instant application.

8. As to whether the appeal will be rendered nugatory if a stay is not granted and the appeal succeeds, the applicant contends that she runs a hotel business in the suit area with her family and, therefore, was apprehensive that the respondent would undoubtedly enforce the impugned judgment and evict her.

In addition, she was worried that the health officers would close the hotel business as one could not run a hotel within the town bus park with many people without a toilet facility. The respondent, in reply, avers that there was clear evidence that the suit property was not a toilet at the time Mr. Rimbere sold the suit property to the respondent, therefore the applicant's argument that she stands to lose business as the toilet facility she needs to run her hotel will be taken away from her is not true. The respondent stated that she stands to suffer irreparably since the applicant has leased the suit property and collects rent from them since 2013 when the suit was filed.

9. What is arguable was explained in the case of *Somak Travels Ltd vs. Gladys Aganyo* (supra).

10. A perusal of the record clearly shows that the learned Judge merely declined to exercise his discretion in favour of the applicant and grant orders of stay of execution of the judgment of the lower court delivered on 30th January 2024 in ELC No. 19 of 2019 (Formerly Meru HC ELC No. 37 of 2013). Being an order which did not order any performance on the parties or restrain any party from doing anything is thus incapable of being executed. The said principle is pronounced in a plethora of this Court's decisions. This Court in *Kanwal Sarjit Dhiman vs. Keshavji Jivraj Shah* [2008] eKLR while dealing with a similar application, held as follows:

> "The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see. Western College of Arts & Applied Science v Oranga & Others [1976] KLR 63."

11. Similarly, in *Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya)* [2015] eKLR, this Court made similar pronouncement. See also *Lake Victoria South Water Service Board vs. Seline Akoth Oyiengo* [2020] eKLR.

12. There is nothing to stay as the order made by the learned Judge was a negative order. It is also our view that even if the appeal may be arguable, which we do not think that it is, it will not be rendered nugatory if the order sought is not granted. We are satisfied that the applicant will not be prejudiced and stands to suffer nothing that cannot be compensated by an award of damages.

13. In the circumstances therefore we find the Notice of Motion dated 6th August 2024 devoid of merit and accordingly dismiss it with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF FEBRUARY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI – ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR