Otiende & 5 others v District Land Surveyor & 4 others (Civil Application E099 of 2024) [2025] KECA 338 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 338 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E099 OF 2024

HA OMONDI, LK KIMARU & AO MUCHELULE, JJA

FEBRUARY 21, 2025

BETWEEN

LUKAS OTIENO OTIENDE ..... 1ST APPLICANT

DANKAN ODHIAMBO OKUMA ..... 2ND APPLICANT

OTIENO AKEYO ..... 3RD APPLICANT

JARED OTIENO AYOO ..... 4TH APPLICANT

MILDRED GUMBO ..... 5TH APPLICANT

JENIFFER ODHIAMBO GUMBO ..... 6TH APPLICANT

AND

DISTRICT LAND SURVEYOR ..... 1ST RESPONDENT

MICHAEL OGINGA DACHE ..... 2ND RESPONDENT

COMMISSIONER OF LANDS ..... 3RD RESPONDENT

KISUMU DISTRICT LAND REGISTRAR ..... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

(Being an Application for injunction pending appeal from the judgment of the Environment and Land Court of Kenya at Kisumu (E. Asati, J) dated 1st July, 2024 in ELC No. E032 of 2024)

RULING

1. The Applicants were aggrieved by the decision rendered by the Kisumu Environment and Land Court [ELC] (E. Asati, J) in Kisumu ELC Land Appeal No. E032 of 2024, which dismissed the application in the appeal that sought to set aside the orders that were made by the subordinate court granting the 1st respondent's suit that sought to block the road of access that previously existed on Land Reference

No. Kisumu/Kogony/5551(registered in the name of the 1st respondent). The said road gave access to the properties owned by the applicants. The subordinate court held that the said road of access was part of the 1st respondent's parcel of land and therefore ordered the same to be deleted from the Registry Index Map (RIM). The issuance of the said order by the subordinate court resulted in the applicants having no road of access to their respective parcels of land.

2. The applicants filed notice of their intention to appeal against the said decision. They further moved this Court in a notice of motion made pursuant to section 3A and 3B of the *Appellate Jurisdiction Act*, Rules 5(2)(b) and 42 of the Court of Appeal Rules seeking the following orders from the Court:

> " 1. Spent.
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> 2. This Honourable Court be pleased to grant an order of mandatory injunction compelling the respondents to re-open and restore the access road that previously existed on Kisumu/Kogony/5551 upon the hearing of this application;
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> 3. This Honourable Court be pleased to grant an order of mandatory injunction compelling the respondents to re-open and restore the access road that previously existed on Kisumu/Kogony/5551 pending the hearing and determination of the intended appeal; and

2. This Honourable Court be pleased to direct that Kisumu ELC Appeal No. E034 of 2024 Lucas Otieno Otiende & 5 others v. Michael Oginga Dache & 4 others be heard and determined expeditiously by another Judge in the division except Justice E. Asati."

3. The application is supported by the grounds stated on the face thereof and the annexed affidavit of the 1st applicant. In summary, the applicant states that he is the registered proprietor of LR. Nos Kisumu/Kogony/8994 and 8995 which neighbours LR. No. Kisumu/Kogony/5551 owned by the 1st respondent. The rest of the applicants' properties neighbour that of the 1st applicant. All the applicants' properties had an access road that passed next to (or through, according to the 1st respondent) the 1st respondent's property. The road of access had been in existence for a period of more than thirty (30) years.

4. The applicants aver that in the year 2018, the 1st respondent filed suit, being Kisumu CMCC ELC No. E266 of 2018 against the Land Registrar claiming that the road that gave access to the applicants' properties was part of his parcel of land. The 1st respondent called the Court to amend the RIM so that the road of access could be deleted and amalgamated with his parcel of land and thereby resulting blocking of the said road of access. The 1st respondent's claim in the suit was granted by the subordinate court. Curiously, although the 1st respondent knew or ought to have known that the applicants would be affected by the decision as owners of the neighbouring parcels of land, he did not enjoin them as necessary parties in the suit.

5. The applicants aver that they became aware of the decision of the subordinate court when the 1st respondent blocked off the road of access to their respective parcels of land. Their attempt to seek appropriate remedy from the said subordinate court was unsuccessful. Their application in the appeal to the ELC to have the said road of access opened was unsuccessful, hence their decision to file the present application. The applicants urged the Court to grant the reliefs sought in their application.

6. The application is opposed. The 1st respondent swore a replying affidavit in opposition to the application. The 1st respondent doubted whether this Court had jurisdiction to grant the order of

mandatory injunction craved for by the applicants. The 1st respondent explained that the road of access that the applicants claim existed was indeed part of his said parcel of land. He swore that the said road of access to the applicants' parcel of land was illegally created on his parcel of land hence his decision to seek appropriate remedy by having the said illegal road deleted from the RIM and closed.

7. The 1st respondent stated that the applicants have no case against him since the closing of the illegal road of access created on his parcel of land by the court was in exercise of his right to own property. The 1st respondent insisted that the prayers sought by the applicants in the application cannot be granted at an interlocutory stage of the appeal unless the applicants establish and demonstrate existence of special and exceptional circumstances, which was not the case here.

8. The 1st respondent pointed out that the access that the applicants had through his parcel of land was not a public access road within the meaning of sections 10 and 11 of the *Public Roads and Roads of Access Act* and therefore the applicants had no legal right to seek the enforcement of the re- opening of a non-existent road. The 1st respondent urged the Court to dismiss the application.

9. The 2nd, 3rd, 4th and 5th respondents did not participate in the proceedings.

10. Prior to the hearing of the application, applicants and the 1st respondent, through learned counsel, filed their respective written submissions which were briefly highlighted during the plenary hearing of the application. Mr. Kipkogei and Mr. Mwangi Kangu, learned counsel appeared for the applicants, while Ms. Anuro learned counsel, appeared for the 1st respondent. Learned counsel more or less argued their respective clients' case in accordance with the summary of facts summarized above by the court.

11. For the applicants to succeed in their application for mandatory orders under Rule5(2)(b) of the Court of Appeal Rules, they must satisfy the Court of the twin principles i.e that they have an arguable appeal and, secondly, that if the orders of mandatory injunction craved for is not granted, their intended appeal will be rendered nugatory. In Cabinet Secretary Ministry of Health v. Aura & 13 others (Civil Application No. E583 of 2023) [2024] KECA2(KLR) 19th January, 2014) (Ruling), this Court held thus regarding this Courts mandate under Rule 5(2)(b) of the Court of Appeal Rules:

> "The jurisdiction to grant stay lies at the discretion of this Court and is exercised on the basis of sound and settled principles, not arbitrarily or capriciously on a whim or in consideration of any extraneous matters. The main guiding principle consideration set out in a long line of authorities of this Court, is that the application must show, first, that he or she has an arguable appeal, and second, that the said appeal is likely to be rendered nugatory unless the orders sought are granted in the interim."

12. The above principles equally apply if applicant sought orders of injunction, prohibitory or mandatory.

13. Although the applicants did not annex a draft memorandum of appeal, in the affidavit in support of the application, they, however, set out some of the grounds of appeal they will place before this Court for consideration in paragraph 11 thereof. The applicants are aggrieved that they were condemned unheard contrary to their right to fair trial that is guaranteed under Article 50 of *the Constitution*. They were further aggrieved that the road which they had used to access their respective parcels of land had been deleted from the RIM at the instance of the 1st respondent who had obtained an order from the court without the applicants being given the requisite notice as the parties who will be directly affected by the said deletion.

14. Upon considering these two grounds of appeal, we are of the view that indeed the applicants have an arguable appeal. The said grounds raise weighty issues which directly affect the applicant's right to access justice and their right to own and enjoy property as guaranteed under Article 40 of *the*

Constitution. The said grounds of appeal are not idle, nor are they frivolous. The applicants have therefore satisfied the first limb of the twin principles under Rule 5(2)(b) of the Court of Appeal Rules.

15. As regards the second principle, whether the appeal will be rendered nugatory, this Court agrees with the 1st respondent that for this Court to grant mandatory injunction at an interlocutory stage of the proceedings, the applicants are required to establish the existence of a special or exceptional circumstances that will make the Court feel a high degree of assurance and confidence that at the hearing of the appeal, its decision will be vindicated. The standard and the quality of evidence required to be established the facts must be such that the Court will have no doubt that the grant of mandatory injunction is deserved in the circumstances (See Kenya Breweries Ltd v Washington Okeyo [2002] eKLR.

16. In the present application, it was clear to this Court that by the time the applicants approached the ELC, and subsequently thereafter this Court, the RIM had already been amended and the road of access closed. Such actions can only be undone if the Court hears the appeal on its merits and grant final orders after hearing the parties.

17. For this Court to grant the orders craved for by the applicants at this interlocutory stage of the proceedings, it would prejudice the hearing and determination of the appeal, as in effect, this Court would have partially determined the appeal without the benefit of considering the entire evidence that will be contained in the record of appeal and the submissions that will be made by the parties during the hearing of the substantive appeal.

18. The Court will, in effect, be committing the same sin of condemning the respondents unheard that the applicants are accusing the two courts below of transgressing. Much as this Court sympathizes with the situation the applicants find themselves in, the remedy they are seeking cannot be granted at this interlocutory stage of the proceedings but at the full hearing of the appeal.

19. It is clear from the forgoing that the applicants have failed to satisfy the second limb under Rule 5(2)(b) of the Court of Appeal Rules.

20. The application lacks merit and is hereby dismissed with costs.

21. In light of the issues raised in this application, we direct the Deputy Registrar of this Court to list the hearing of this appeal on priority basis once the applicants file and serve the record of appeal. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.

H.A OMONDI

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.