



Basco Products (K) Ltd v Gichohi & another (Civil Application E680 of 2024) [2025] KECA 217 (KLR) (7 February 2025) (Ruling)

Neutral citation: [2025] KECA 217 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E680 OF 2024
DK MUSINGA, FA OCHIENG & WK KORIR, JJA
FEBRUARY 7, 2025**

BETWEEN

BASCO PRODUCTS (K) LTD APPLICANT

AND

DAVID N GICHOHI 1ST RESPONDENT

GORI INVESTMENTS LIMITED 2ND RESPONDENT

(An application for stay of execution of the judgment and decree of the Environment and Land Court of Kenya at Milimani (Mogeni, J.) dated 11th November 2024 in ELC Case No. 1528 of 2016)

RULING

1. At the trial court, the 1st respondent, Gori Investments Limited, had sued the applicant, Basco Products (K) Limited, as the 1st defendant and David N. Gichohi, the 2nd respondent herein as the 2nd defendant, asserting ownership over L.R. No. 209/9329 (“the suit property”), and seeking eviction of the defendants for trespass. The applicant opposed the claim, contending that it had bought the suit property from the previous owners and had in 2013 applied for amalgamation of the suit property with LR No. 209/9330 before obtaining permission to develop the amalgamated property. The applicant also filed a counterclaim seeking a declaration that it was the rightful owner of the suit property, cancellation of the 1st respondent’s title, and issuance of a permanent injunction against the 1st respondent. The 2nd respondent did not file a reply to the suit.
2. On 11th November 2024, Mogeni, J. entered judgment in favour of the 1st respondent, ordering the applicant and the 2nd respondent to vacate the suit property or be evicted. The learned Judge also issued a permanent injunction against the applicant and the 2nd respondent restraining them from continued occupation of the suit property. She finally awarded the 1st respondent Kshs. 2,000,000/00 as general damages for trespass. Conversely, the learned Judge dismissed the applicant’s counterclaim.



3. The applicant, being aggrieved by the decision of the trial court, has filed Nairobi Civil Appeal No. E938 of 2024, Basco Products (K) Limited vs. Gori Investments Limited and David N. Gichohi against it. In the interim, the applicant is through the notice of motion dated 4th December 2024, seeking to stay the execution of the judgment, and the decree arising therefrom, pending hearing and determination of its appeal.
4. Patel Gopal Dhanji Velji, a director/shareholder of the 1st respondent, swore a replying affidavit on 7th January 2025, in opposition to the application. The 2nd respondent did not reply to the application.
5. When the application came up for hearing on 15th January 2024, learned counsel, Mr. Ochieng Oduol, was present for the applicant, whereas learned counsel, Mr. Michuki, appeared for the 1st respondent.
6. In support of the motion, the applicant avers that it has an arguable appeal and refers to its 37-point memorandum of appeal through which it faults the learned trial Judge for, among other things, not adhering to settled principles established by the Supreme Court regarding the determination of the genuine title in conflicting claims over a single title; failing to determine whether the land was public land at the time of allocation or private land not available for allocation; failing to apply the well-established principle of indefeasibility of title as set out under Article 40 of *the Constitution*, section 26 of the *Land Registration Act*, 2012 and judicial precedents; and not giving proper weight to the evidence on record. Asserting that the appeal will be rendered nugatory should the Court decline to stay execution, the applicant avers that it holds the title to the suit property where it has developed 32 high-end apartment blocks presently valued at Kshs. 650,000,000/00 and will be prejudiced should the judgment be implemented.
7. On its part, the 1st respondent denounces the applicant's title, pointing out various contradictions in the grant before asserting that the document cannot convey title to any property. Conversely, the 1st respondent contends that the trial court upheld its title after taking cognizance of the errors in the applicant's purported title and the appeal, therefore, lacks real chances of success. Further, the 1st respondent argues that the applicant's property was constructed from 2017 while the matter was before the Environment and Land Court, and the applicant's decision to carry out the construction should not fetter the right of the 1st respondent to enjoy the fruits of the judgment, since the applicant was well aware that there was a possibility of losing the property should the suit be decided against it. According to the 1st respondent, the investment by itself, without a proper title, cannot be the basis for allowing the applicant to profit from the premises to its detriment as the actual owner. In conclusion, the 1st respondent avers that the applicant should not be allowed to continue profiting from a property it is occupying without any legal basis.
8. As to whether the appeal is arguable, the applicant's counsel through submissions dated 6th January 2025 relied on Kenya Hotel Properties Limited vs. *Attorney General & 5 others, SC Application No. 27 of 2020*, to submit that arguability of an appeal does not depend on whether it will succeed, but whether it raises legitimate arguable grounds that warrant full judicial consideration. Referring to the memorandum of appeal, counsel submitted that the appeal is not frivolous as it raises substantial, legal and factual issues that require full arguments before the Court.
9. Still pursuing the submission that the applicant's appeal is arguable, counsel relied on the holding by the Supreme Court in Freedom Limited vs. Omar Awadh Mbarak; SC Application No. E014 of 2024, in support of the proposition that in considering whether an appeal is arguable, the Court is not called upon to interrogate the merits of the appeal, but merely to see if at this stage there is a prima facie case to justify the grant of the order. Consequently, counsel urged that an arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the Court.



10. On the nugatory aspect, counsel cited *Haki Na Sheria Initiative vs. Inspector General of Police & 2 others; Kenya National Human Rights and Equality Commission (Interested Party)* [2021] KESC 22 (KLR), and submitted that in considering whether an appeal would be rendered nugatory should the application for stay of execution be declined, the concern is whether 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. According to counsel, the appeal would be rendered nugatory if the orders sought are not granted as it would suffer not only financial loss of Kshs. 650,000,000/00 but the project would also suffer reputational loss. Further, that no amount of damages can compensate for the destruction of such a unique property, and the appeal, if successful, would be purely academic.
11. On his part, learned counsel for the 1st respondent through submissions dated 8th January 2023, urged that the applicant's appeal is not arguable. Counsel pointed to purported errors on the face of the applicant's title document and submitted that the appeal has no chance of success because the applicant's alleged interest in the property is based on a grant that cannot confer, hold or convey any interest in land. Reliance was placed on *Weru vs. Ngororo & 4 Others; Chege & 4 Others (Interested Parties)* [2023] KECA 1598 (KLR), where an intended appeal by parties who had purchased property from a party who could not hold or convey the property was deemed frivolous.
12. As to whether the intended appeal would be rendered nugatory if the execution of the judgment is not stayed, counsel submitted that it would not. According to counsel, the Court should note that the investments on the suit property were undertaken after the 1st respondent had filed its suit before the trial court. It is counsel's position that the construction was therefore carried out at the applicant's own risk and the action cannot now be used to urge the Court into staying execution of the judgment. Counsel further argued that granting stay would amount to enabling a land grabber to continue in occupation of the premises without any colour of right. This, counsel contends, is inimical to the interests of justice and would greatly prejudice his client who has waited for more than eight years to recover the property. We were therefore urged to dismiss the application for being frivolous.
13. The only issue for determination by the Court is whether the applicant has met the conditions for grant of an order staying execution of the judgment of the trial court. In order to persuade the Court to stay execution, issue injunction or stay any further proceedings pursuant to the discretionary power granted under rule 5 (2) (b) of this Court's Rules, 2022, an applicant must establish that there is an arguable appeal, which, were it to eventually succeed, would be rendered nugatory owing to the failure to issue any of the stated orders. The aforesaid principles were succinctly expressed by the Supreme Court in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR thus:

“The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- i. the appeal or intended appeal is arguable and not frivolous; and that
- ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:



iii. that it is in the public interest that the order of stay be granted.

14. As to whether the applicant has demonstrated an arguable appeal, a perusal of the motion and the supporting affidavit of Kamlesh Shah shows that the applicant, will, in the appeal, be contesting the validity of the 1st respondent's title and asserting the genuineness of its title. The 1st respondent's replying affidavit goes into great detail to demonstrate that the applicant's title is not genuine. In our view, the dispute regarding the true owner of the suit property ought to be settled through the appeal. The applicant's appeal, being a first appeal, the parties will be entitled to agitate both issues of law and fact. In the circumstances, it is not difficult to conclude that the applicant has an arguable appeal, bearing in mind that an arguable appeal is not one that would necessarily succeed, but one which ought to be argued fully before the Court – see *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR.
15. Is the appeal likely to be rendered nugatory should the execution not be stayed? On this issue, the applicant avers, and its counsel submits, that it is in possession and has developments valued at Kshs.650,000,000/00 on the suit property. According to the applicant, were eviction to occur and the property demolished, a successful appeal would amount to nothing. The 1st respondent's reply is that the applicant cannot be allowed to continue enriching itself by collecting rent and denying it (the 1st respondent), the right to enjoy the fruits of the judgment. The 1st respondent also contends that the developments were made during the pendency of the case before the trial court and the applicant should accept the risk it took by undertaking construction on the disputed land. Further, that the 1st respondent has waited to recover the property for more than eight years and staying execution would be prejudicial to it.
16. In resolving the issue as to whether the appeal is likely to be rendered nugatory should the application be declined, we refer to the holding in *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* (supra), that in determining if an appeal is likely to be rendered nugatory, the Court is called upon to determine “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.” The applicant before us has averred and there is no rebuttal to that statement, that the development on the disputed property is valued at Kshs. 650,000,000/00. Demolition of the development would be irreversible as we do not see how the apartments can be restored to their current state should the applicant's appeal succeed. As regards the possibility of compensation, we have not come across any averment by the 1st respondent that it is liquid enough to compensate the applicant if the appeal succeeded. In the circumstances of this case, it cannot then be said that the applicant can be compensated by damages should the appeal succeed.
17. There is the argument by the 1st respondent that the construction was carried out at the applicant's risk as it was done despite the pendency of the 1st respondent's case challenging the applicant's ownership of the suit property. The applicant's decision to carry out developments during the subsistence of the 1st respondent's case may have indeed been unwise, but its actions were not illegal, considering that the 1st respondent's attempt to stop the developments by way of an injunction had been rejected by the trial court. In the circumstances, the applicant cannot be penalized by being denied an order staying the execution of the judgment because the construction took place as the dispute over the title was proceeding in court. After all, there was no order stopping the applicant from continuing with the developments. As was held in *Ahmed Musa Ismael vs. Kumba Ole Ntamorua, Saroni Ole Ntamorua, Parsaaya Ole Kutu, County Council of Narok & Commissioner of Lands* [2014] KECA 689 (KLR), the purpose of a stay order or an injunction is “to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succour by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual.” It is in



the appeal that the dispute of the parties will be determined once and for all. A party who has met the threshold for the grant of protective orders should only be denied the orders for good reason. Legitimate activities that take place during the pendency of proceedings cannot pass muster.

18. In the application before us, we are persuaded that the applicant has demonstrated that it has an arguable appeal that will likely be rendered nugatory should the execution of the judgment of the trial court be allowed to proceed. As such, the notice of motion dated December 14, 2024 succeeds in terms of prayer number 3, so that there shall be stay of the judgment, and the decree arising therefrom, in Nairobi ELC Case No. 1528 of 2016; Gori Investments Limited vs. Basco Products (K) Limited and David N. Gichohi pending the hearing and determination of Civil Appeal No. CoACA/E938/2024: Basco Products (K) Limited vs. Gori Investments Limited and David N. Gichohi. The costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

