Leebarn Builders Limited v Kenya Bankers' Savings and Credit Cooperative Society Limited (Civil Application E425 of 2024) [2025] KECA 503 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KECA 503 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E425 OF 2024

J MOHAMMED, M NGUGI & FA OCHIENG, JJA

MARCH 21, 2025

BETWEEN

LEEBARN BUILDERS LIMITED ..... APPLICANT

AND

KENYA BANKERS' SAVINGS AND CREDIT COOPERATIVE SOCIETY LIMITED ..... RESPONDENT

(Being an application for temporary injunction pending the hearing and determination of an appeal from the judgment and Orders of the Environment and Land Court at Nairobi (Mbugua, J.) dated 12th March 2024 in ELC Case No. 371 of 2012)

RULING

1. In the application dated 14th August 2024, the applicant, Leebarn Builders Limited, seeks a temporary injunctive order prohibiting the sale, development of housing units, subdivision, issuance of subleases and sectional titles, transfer and alienation of L.R. No. 209/13294/1 pending hearing and determination of its appeal. The application is brought under rule 5(2)(b) of this Court's Rules, 2022 and sections 3A and 3B of the *Appellate Jurisdiction Act*.

2. The grounds forming the basis of the application are set out on its face and in the affidavit in support sworn by Mohamud H. Ali, the applicant's director. The applicant avers that it is dissatisfied with the decision of the Environment and Land Court (ELC) dated 12th March 2024 and intends to appeal against it. At the core of the applicant's dissatisfaction with the decision is the ELC's finding that the Memorandum of Agreement (MOA) dated 26th July 2007 entered into between the applicant and the respondent was 'futuristic' and unenforceable.

3. The applicant asserts that the trial court's decision was erroneous, both in fact and in law, and that its intended appeal raises arguable issues with high chances of success. The applicant contends that unless

the temporary injunction is granted, the respondent may proceed to execute the judgment, which would render its appeal nugatory and cause irreparable harm to the applicant.

4. Briefly, the background to the application and the dispute between the parties as it emerges from the pleadings before us is that the parties hereto had entered into an MOA dated 26th July 2007. The terms of the MOA, according to the applicant, were that the applicant would develop a total of 145 units on L.R. No. 209/13294/2, which was registered in the name of the applicant, for purchase by members of the respondent.

5. The MOA further contemplated that the applicant would develop a further 139 units for the respondent's members. It transpired, however, according tot the respondent, that the applicant had not fully paid for L.R. No. 209/13294/2, and it requested the respondent to pay Kshs. 23 million to the vendor of the property as the applicant had not completed paying for it. The respondent further had to pay some of the contractors of the first phase units under the MOA as the applicant was unable to find financial resources to undertake the project.

6. It accordingly determined not to enter into agreement for the second phase relating to construction on L.R. 209/13294/1, which led the applicant to file suit in the ELC seeking enforcement of the MOA in respect of the second phase, which the trial court dismissed in the judgment dated 12th March 2024.

7. In the affidavit in support of the application, it is averred for the applicant that the MOA between the parties expressly provided that the applicant would build 139 housing units on L.R 209/13294/1, provided that the applicant procured and transferred the said property to the respondent. The respondent, however, reneged on completion of the second phase of the MOA, although it awarded the applicant the tender for its construction in the sum of Kshs.1,286,986.454 in 2012.

8. It is the applicant's averment that the execution of the impugned judgment would expose it to substantial loss, which an award of damages cannot adequately compensate; that its application meets the legal threshold for granting injunctive orders, including the existence of an appeal raising arguable points of law, the likelihood of suffering irreparable harm, and the balance of convenience tilting in favour of granting the orders sought. The applicant avers that it is necessary that the Court issues the injunctive orders to protect the substratum of its appeal, safeguard its right of appeal, and protect the respondent's members and third parties from financial loss should its appeal succeed.

9. The appellant filed a Supplementary Affidavit and a Further Supplementary Affidavit sworn by Mr. Ali on 28th and 31st October 2024 respectively. In these affidavits, it reiterates and expands its earlier averments, and it annexes additional documents in support of its case.

10. The respondent opposes the application by an affidavit sworn on 27th August 2024 by Lucas Otieno Odong, its Chief Executive Officer. The respondent avers that the suit property is registered in its name; that it was the one that exclusively purchased and paid for it; and that at the time of signing the MOA, none of the parties owned it.

11. It is its case that the applicant has no right in law, equity or contract over the property and stands to lose nothing by the respondent exercising its rights, including the right of alienation, and that the respondent's property cannot constitute the substratum of the intended appeal. The respondent further states that the applicant's claim is one in which the respondent constructs an estate with its own funds, and the applicant holds itself out as an investor playing the role of a broker cum project coordinator, a situation that the respondent's members do not wish to tie themselves to.

12. The respondent asserts that the application lacks merit; that the applicant has not demonstrated anything special about the respondent's land to justify the injunction sought, and it is unlikely to

suffer irreparable harm. In any event, in the respondent's view, any loss the applicant may suffer can be adequately compensated in damages.

13. The respondent has filed a further affidavit sworn by Mr. Odong on 5th November 2024 in response to the applicant's Supplementary Affidavit sworn on 31st October 2024. It reiterates its position on the matter and urges the Court to dismiss the application.

14. The applicant filed submissions dated 31st October 2024 while the respondent filed submissions dated 6th November 2024. The submissions were highlighted by the parties' respective counsel, Ms. Koki Mbulu for the applicant and Mr. Onyango for the respondent.

15. We have considered the application, the affidavit in support and opposition thereto, and the submissions of the parties. We note that the applicant has filed a Supplementary and Further Supplementary affidavit, while the respondent has filed a Further affidavit. None of these affidavits appears to have been filed in compliance with rule 45(2) of this Court's Rules. We have, nonetheless, read and noted that they are either responses to opposing averments, or amplifications of the respective cases of the parties. However, nothing turns on these prolix averments and documentation, especially on the part of the applicant, in light of the fairly straightforward demands on a party who seeks injunctive relief under rule 5(2)(b) of this Court's Rules.

16. In an application under rule 5(2)(b), an applicant is required to satisfy the Court on two principles: first, that it has an arguable appeal and secondly, that the appeal will be rendered nugatory if the orders sought are not granted. These principles were well articulated in the case of Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR in which this Court stated:

    i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See Ruben & 9 Others v Nderitu & Another (1989) KLR 459.

    ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.

    iii. ...

    iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.

    v. An applicant must satisfy the court on both of the twin principles.

    vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.

    vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.

    viii. ...

    ix) ...

    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..." (Emphasis added).

17. The applicant's case against the respondents has its basis in an MOA entered into on 26th July 2007. The first phase of the agreement related to construction of 145 housing units on a property then registered in the applicant's name. There is no dispute that this phase was successfully completed, but there is also no dispute that the respondent had to pay Kshs. 23 million to complete the applicant's purchase of the said property. As a result, the respondent appears to have lost faith in the applicant, and it did not therefore proceed with the second phase of the MOA.

18. In its decision, the ELC found that the second phase of the MOA was 'futuristic' as it appeared to contemplate construction of the second phase on the suit property or any other property. In its draft memorandum of appeal annexed to its application, the applicant has raised several issues that it is aggrieved by in the findings of the ELC.

19. One of these is its contention that the trial court misdirected itself on the law, thereby arriving at an erroneous finding that the MOA dated 26th July 2007 was not a binding agreement between the parties despite it encompassing all the requirements of a binding contract in relation to the construction of phases one and two under the MOA. Given the jurisprudence that even one arguable ground is sufficient, we have no difficulty in finding that the applicant has satisfied the first principle.

20. The applicant is also required, in an application under rule 5(2)(b), to satisfy the Court that his appeal will be rendered nugatory should the orders sought not be granted and the appeal succeeds. In this matter, the applicant seeks to appeal the dismissal of its suit by the ELC. What it sought before the ELC was enforcement of an MOA between it and the respondent. Its case was that it had constructed the units required under phase one of the MOA, but the respondent had reneged on the second phase.

21. In its plaint before the ELC, the applicant sought two substantive orders at prayer b) and d): an order directing the respondent to honour the terms of the MOA dated 26th July 2007; and as an alternative to its prayer for an order restraining the respondent from developing or constructing any structures on L. R. No. 209/13294/1, general damages for breach of contract.

22. The applicant does not dispute that the suit property is registered in the name of the respondent. It does not claim ownership or any kind of interest in the suit property. Its claim is for enforcement of the MOA. If no injunctive orders are granted and its appeal succeeds, it can be compensated in damages, which it had sought before the ELC. Its appeal, therefore, cannot be rendered nugatory, so it has not satisfied us on the second limb under rule 5(2)(b).

23. It is our finding, therefore, that the application dated 14th August 2024 is devoid of merit, and it is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

JAMILA MOHAMMED

.....

JUDGE OF APPEAL MUMBI NGUGI

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR