Kassam v Njoroge (Civil Appeal (Application) E761 of 2024) [2025] KECA 881 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KECA 881 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E761 OF 2024

M NGUGI, F TUIYOTT & GV ODUNGA, JJA

MAY 23, 2025

BETWEEN

KARIM KASSAM & 13 OTHERS ..... APPLICANT

AND

GRACE NJERI NJOROGE & 23 OTHERS ..... RESPONDENT

(Being an application for a conservatory order and stay of proceedings in ELC Petition No. E021 of 2024)

RULING

1. The application dated 7th October 2024 has been filed before this Court following dismissal by the Environment and Land Court (ELC) of a similar application seeking injunctive orders against the respondents. In the application, the applicants ask this Court for a conservatory order stopping and discontinuing the development and construction activities on Nairobi/Block 37/66, 37/66/1, 37/66/2, 37/66/3, 37/66/4, 37/66/5/ 37/66/6, 37/66/7 and 37,66/8– City Park Drive, Parklands, Nairobi by the 1st- 12th respondents or any other person pending hearing of their appeal from the ruling of the ELC dated 19th September 2024. They also seek an order for stay of proceedings in ELC Petition No. E021 of 2024- Karim Sherali Kassam & 13 others vs Grace Njeri Njoroge & 23 others pending hearing of the

   appeal.

2. The application is brought under rule 5(2)(b) of this Court's Rules, Article 70(1) and (2) of *the Constitution*, section 3(3) and (4) of the Environmental Management and Co- ordination *Act, No.8 of 1999*, as well as section 3A and 3B of the *Appellate Jurisdiction Act*.

3. The application is supported by an affidavit sworn by the 1st applicant, Karim Sherali Kassam, on 7th October 2024 and is based on the grounds set out on its face. The applicants' case is that they are owners and /or occupiers or residents of residential units erected on the properties known as L.R. No.

209/871/13, 209/20730 and 209/161816, City Park Drive in Parklands within Nairobi City County, while the 1st to 11th respondents are the owners of properties known as Nairobi /Block 37/66 37/66/1, 37/66/2, 37/66/3, 37/66/4, 37/66/5/ 37/66/6, 37/66/7 and 37,66/8– City Park Drive Parklands (the subject properties). They aver that the subject properties resulted from sub-division in 1999 of land previously known as L.R. No. 209/9316, measuring 0.2282Ha into two equal portions measuring 0.1141 Ha.

4. The applicants aver that the 1st to 12th respondents are undertaking development and construction activities on the subject properties while relying on documents showing that approvals and permits were issued for L.R. No. 209/9316 by the 15th to 24th respondents, yet no such approvals and permits were issued.

5. It is the applicants' averment further that they filed an application for conservatory orders of a temporary injunction preventing construction and development on the subject property pending determination of their petition, but their application was dismissed by the trial court in its ruling dated 19th September 2024.

6. The applicants state that following the dismissal of their application, the 1st to 12th respondents have accelerated development and construction activities on the suit property. They aver that the 15th respondent has once again confirmed that it has given no development permission for the development, and they contend that in the absence of the orders sought, their appeal, which has already been filed, will be rendered nugatory as the construction will long have been completed and the residential apartment units, now on level 4, will have been occupied.

7. It is the applicants' case that the development and construction is deleterious to the environment, is in breach and violation of the provisions of the *Physical and Land Use Planning Act* (PLUPA) and the Development and Control (General) Regulations, *Environmental Management and Co-ordination Act* (EMCA) and National Construction Authority (NCA) Act, and have, and will continue subjecting them and the general public to denial, violation and infringement of their rights to life and to a clean and healthy environment.

8. With regard to their application for an order staying proceedings, the applicants aver that unless hearing and determination of their petition is stayed pending determination of their appeal, the prayers sought in the petition will be rendered nugatory, more so the prayers on declarations that development on the subject property is illegal and irregular, and that the 1st to 24th respondents have, jointly and severally, breached or threatened the applicants' rights to life, to access information and to a clean and healthy environment. They assert that the environmental loss and damage caused by the ongoing development and construction is, and will be immeasurable and irrecoverable. They contend that their appeal is arguable and raises fundamental issues of both law and fact, and has a high chance of success.

9. In submissions dated 24th October 2024, the applicants argue that the learned trial judge erred in fact and law by failing to recognize that L.R. No. 209/9316 is not the same as Nairobi/Block 37/66/1-8; and that the trial court erred in finding that there was discrepancy in the land reference number of the suit properties that are being developed by the 1st- 12th respondents. The applicants further contend that the 12th rrespondent obtained approvals and development licences based on L.R. No. 209/9316, yet the properties under dispute are registered under different land reference numbers. Further, that the 12th rrespondent failed to apply for a change of user as required under the *Sectional Properties Act* and the *Physical and Land Use Planning Act* making the approvals obtained irregular and unlawful.

10. The 1st to 11th respondents filed a replying affidavit sworn on their behalf by the 5th respondent, Elijah Malekya Matibo, on 28th October 2024. Mr. Matibo avers that the respondents are the rightful

property owners of the suit property and have obtained all the necessary approvals for the project. They assert that the applicants' objections are motivated by racial and community-based bias rather than legitimate environmental or legal concerns. Mr. Matibo sets out in his affidavit a series of what he avers are shifting claims by the applicants and avers that the applicants have engaged in a pattern of obstruction and abuse of court processes to delay or stop the project.

11. The respondents aver that the trial court rightly denied interim orders as the applicants have not demonstrated an arguable appeal or any actual harm that they are likely to suffer. They assert that their project is legal and should proceed, and they ask the Court to dismiss the application.

12. In their submissions dated 13th November 2024, the 1st - 12th respondents submit that the applicants are inviting this Court, in their intended appeal, to consider issues still pending trial before the ELC; and that they are inviting this Court, on appeal, to consider and determine substantive matters requiring oral evidence. They ask this Court to reject the invitation as to do otherwise would embarrass the outcome of the case before the trial court.

13. To the question whether the applicants' appeal would be rendered nugatory, the 1st -11th respondents submit that the applicants have not shown that they would suffer any irreversible harm that could not be addressed through existing legal remedies. They submit that the applicants' contentions that there would be environmental strain and infrastructure damage were mere conjecture and untested fears. Further, that the PLUPA and the EMCA, on which the applicants' petition before the ELC is premised, provide for orders of restoration which the applicants would be at liberty to apply for.

14. In opposing the application, the 12th respondent filed an affidavit sworn on 12th October 2024 by Abdiwahab Mohamed Hussein. Mr. Hussein avers that the applicants have not met the legal threshold for grant of the order sought, noting that they are indirectly asking this Court, at this interlocutory stage, to grant them orders that they failed to secure before the trial court. The 12th respondent avers further that the applicants have failed to disclose that upon delivery of the ruling of 19th September 2024, the trial court issued elaborate directions regarding the hearing and disposal of the main petition, including the filing of responses to the petition. It is the 12th respondent's case that the applicants are forum shopping through this application and the appeal; that development of the subject property is in line with the Nairobi County Development Policy dated December 2021, which allows mixed developments within City Park estate, and he prays that the application be dismissed.

15. The 12th respondent has also filed submissions dated 5th November 2024. He submits that the applicants have not demonstrated how their appeal would be rendered nugatory if the orders sought are not granted; and that the balance of convenience favours allowing the development to continue, as halting construction would cause significant financial losses and disrupt ongoing investments.

16. At the hearing of the application on 19th February 2025, learned counsel, Mr. Alfred Ndambiri, Mr. Masila and Mr. Muchoki appeared for the applicants, the 1st -11th and the 12th respondent respectively. There was no appearance for the other respondents. Learned counsel highlighted the respective parties' cases and submissions, which we have briefly set out above.

17. We have considered the application, the affidavits in support and opposition thereto, as well as the submissions and authorities placed before us. The applicants seek exercise of the Court's discretion under rule 5(2)(b) of this Court's Rules. The principles to be satisfied on such an application are well

settled. In its decision in Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR this Court summarized the applicable principles as follows:

> " 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.
>
> 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. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
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> 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.
>
> 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.
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> 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.
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> viii. 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.
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> ix. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
>
> 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. ..."

18. The applicants before us seek an injunction pending an interlocutory appeal from a decision of the ELC declining to grant them an injunction to restrain the 1st -12th respondents from continuing with development on the suit property. They also seek an order staying the hearing of their petition before the ELC pending their appeal. For the Court to issue these orders, the applicants must satisfy the Court that they have an arguable appeal, as defined in Stanley Kang'ethe Kinyanjui v Tony Ketter (supra).

19. In the undated memorandum of appeal in the applicants' record of appeal, the applicants set out some 31 grounds of appeal challenging the ruling of the ELC dated 19th September 2024. The intended appeal is from a decision of the trial court declining to grant an interim injunction in favour of the applicants. Whether or not to grant injunctive orders requires the exercise of discretion. A perusal of the applicants' prolix grounds shows that they include arguments that the trial court erred in failing to grant conservatory orders to stop the ongoing construction despite evidence of potential constitutional violations; erred in its finding on the identity of the subject property, particularly by overlooking the alleged misdescription of the property, and failed to properly evaluate the violation of constitutional rights, including the right to a clean and healthy environment under Article 70; and misapplied the legal threshold for establishing a prima facie case. Given that the applicants are dissatisfied with the

exercise of the trial court's discretion and the grounds they raise appear to be directed at matters that were not determined on merit, we have reservations on the arguability of their appeal. They do raise one ground however, relating to the legal threshold for establishing a prima facie case, which may satisfy the first limb in a 5(2)(b) application. We are, in the circumstances, satisfied that the intended appeal is arguable.

20. Will the appeal be rendered nugatory if the orders sought are not granted? The applicants submitted that should the orders not be granted, their appeal will be rendered nugatory as the construction by the 1st -12th respondents will long have been completed, the residential apartment units, now on level 4, will have been occupied, and the applicants would suffer a violation of their right to a clean and healthy environment, right to life, and the right to access information as guaranteed under *the Constitution*. On their part, the respondents submit that the applicants have not demonstrated how their appeal will be rendered nugatory. They submit that the applicants have not shown how road, water, and sewerage services will be affected, thereby rendering their appeal nugatory. Further, that they obtained all the necessary approvals for the project and have invested heavily, and they stand to suffer immense financial loss should the orders sought be granted.

21. In Reliance Bank Limited v Norlake Investment Limited [2002] I EA 227, it was held that the factors which render an appeal nugatory should be considered within the circumstances of each case. In considering these circumstances, the Court should consider the competing claims of the parties, and in order to do justice, weigh the hardship that would result to the parties- see African Safari Club Limited v Safe Rentals Limited [20IO] eKLR.

22. Taking the facts and circumstances of the matter before us into consideration, we are not satisfied that the applicants have established that their appeal will be rendered nugatory should the orders that they seek not be granted, or that in weighing the competing claims, theirs should prevail. In leaning in favour of the 1st - 12th respondents, we note that there are development approvals in their favour, and the controversy may be whether the approvals actually relate to the land on which the development is ongoing. In addition, the applicants have not clearly demonstrated how the road, water, and sewerage services will be affected.

23. Regarding the prayer for stay of proceedings, we have considered the applicants' affidavit and submissions and find that the applicants have not placed before us anything to demonstrate that there is an exceptional basis for staying the proceedings before the ELC. We note, in particular, that some of the issues that they seek to raise on appeal before us are yet to be heard and determined on merit.

24. Accordingly, we find the application dated 7th October 2024 to be without merit. It is hereby dismissed with costs to the 1st -12th respondents.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2025.

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR