



Odera ((Suing in her Capacity as the Legal Representative and Administrator of the Estate of Gladys Betty Odera - Deceased)) v Balozi Housing Co-operative Society Limited (Civil Application E302 of 2023) [2024] KECA 25 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KECA 25 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E302 OF 2023
DK MUSINGA, S OLE KANTAI & PM GACHOKA, JJA
JANUARY 25, 2024**

BETWEEN

**LAVENDER ACHIENG ODERA APPLICANT
(SUING IN HER CAPACITY AS THE LEGAL REPRESENTATIVE AND
ADMINISTRATOR OF THE ESTATE OF GLADYS BETTY ODERA -
DECEASED)**

AND

BALOZI HOUSING CO-OPERATIVE SOCIETY LIMITED RESPONDENT

(Being an application for stay of further proceedings of the High Court of Kenya at Nairobi (Visram, J.) dated 24th May, 2023 in H.C.C.C. No. 1075 of 2006)

RULING

1. In a plaint dated 9th October, 2006 filed at the High Court of Kenya at Nairobi being HCCC No. 1075 of 2006, the plaintiff (Gladys Betty Odera, hereafter referred to as - the deceased), prayed for an injunction to restrain the Defendant, Balozi Housing Co-operative Society Limited (the respondent) from dealing with a property known as Plot No. 119 on LR. No. 12422/16 situate at Balozi Estate, Nairobi. She also asked for an order of specific performance against the respondent. That plaint was amended many times to reflect various changes including substitution of the deceased by her daughter, Lavendar Achieng Odera, after the deceased died.
2. In 2010 the people of Kenya promulgated a new Constitution. The [Constitution of Kenya, 2010](#), ushered in many changes in Kenyan's way of life and administration. One of those changes created special courts where the system of courts changed. Article 162 of the [Constitution](#) recognizes superior courts which include a specialised court; the Environment and Land Court which under Article 162(2)



(b) shall deal with matters involving “... the environment and the use and occupation of, and title to, land ...”.

3. Visram, J. was asked in a motion by Lavendar Achieng Odera (the applicant) to order the transfer of the said HCCC No. 1075 of 2006 from the High Court of Kenya to the Environment and Land Court for hearing and determination. In a ruling dated 24th May 2023, the learned Judge dismissed the application.
4. We are asked in the Motion brought under section 3A of the *Appellate Jurisdiction Act*, rule 5(2) (b) of the *Court of Appeal Rules*, 2010 (since replaced by the 2022 Rules) and all enabling provisions of law in the main to order a stay of further proceedings of the said suit pending the hearing and determination of an intended appeal; that costs of the Motion abide the outcome of the appeal, and that we make such other orders as we may deem appropriate.
5. In grounds in support of the Motion and in a supporting affidavit by the applicant, it is said inter alia, that the ruling dated 24th May 2023, is tainted with legal and factual errors which warrant the invocation of this Court’s jurisdiction; that the High Court was wrong to hold that it had no jurisdiction to transfer the suit, which, according to the applicant, had been filed in the correct court; that the Judge was wrong to hold that the 2014 Practice Directions relating to transfer of suits was only transitional; and that the Judge ignored the spirit and intent of those practice directions. It is further stated that the ruling condemned the said suit to remain in a court without jurisdiction to hear it; that it exposed the suit to being dismissed or struck out; that it left the applicant and the estate of the deceased without any legal recourse where they were pursuing recovery of the suit property from the respondent.
6. Monica W. Ndungu, the respondent’s manager, in her replying affidavit says amongst other things that the applicant has not presented an arguable appeal or shown that the same would be rendered nugatory if stay was not granted. She says that the Judge had no jurisdiction in the matter and could therefore not order transfer of the suit; that the Judge exercised his discretion properly and:

“... the Applicant’s apprehensions in paragraph 26 of the Supporting Affidavit are, in any event, the natural consequences of the litigation process ”

For all that, the Motion should fail and be dismissed.

7. When the parties appeared before us on 31st October, 2023 on a virtual platform, the applicant was represented by learned counsel Mr. Vincent Oloo, while the respondent was represented by learned counsel Mr. J.M. Thiga. Both sides had filed written submissions and case digests in support of their respective positions. Mr. Oloo stressed that a substantive appeal against the impugned ruling, Civil Appeal No. E727 of 2023, had already been filed. He submitted that the suit at the High Court had been filed before the Environment and Land Court was established and that a party who meets the threshold in the 2014 Practice
8. Directions issued by the Chief Justice should have their suit transferred. He concluded by submitting that if stay was not granted the respondent would move the High Court to strike out the suit and the suit could even be struck out by the court on its own motion.
9. Mr. Thiga thought that there was no arguable appeal. He submitted that the High Court had considered and decided that it had no jurisdiction; that in those circumstances the suit should be struck out. According to him, an applicant must show that if a suit is struck out with costs the respondent would not be able to refund the costs.
10. We have considered the application and submissions made before us.



11. The principles that apply in an application of this nature are well known. For an applicant to succeed he must show, firstly, that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the appeal is not frivolous. Such an applicant must, in addition, show that the appeal, if successful, would be rendered nugatory absent stay – see *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR. The applicant intends to argue on appeal as per draft Memorandum of Appeal that the High Court distorted and misapprehended the import, tenor and purport of the ELC Practice Directions dated 25th July 2014. She also intends to argue that the High Court erred in law and fact in finding that it had no jurisdiction to transfer the suit from itself to ELC for hearing and determination. There are other grounds set out in the draft Memorandum of Appeal. We find the grounds arguable on appeal, and as has been held by this Court, a single arguable point will suffice as an applicant need not show a multiplicity of arguable grounds to succeed in an application for stay of further proceedings pending appeal.
12. On the nugatory aspect, the applicant says, and the respondent appears to agree, that there is imminent danger that the suit at the High Court may be struck out any time, either on application or by the Court itself. If the suit is struck out the applicant will be left without a remedy, which would mean that the appeal, if successful, would be rendered nugatory.
13. We are satisfied that the applicant is entitled to the orders sought and we allow the Motion. There shall be stay of proceedings in Nairobi HCCC No. 1075 of 2006 pending hearing and determination of Civil Appeal No. E727 of 2023. Costs of the Motion will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb.

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

