



Sagal Investment Limited & another v Hassan (Civil Application E428 of 2023) [2024] KECA 26 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KECA 26 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E428 OF 2023
S OLE KANTAI, M NGUGI & PM GACHOKA, JJA
JANUARY 25, 2024**

BETWEEN

SAGAL INVESTMENT LIMITED 1ST APPLICANT

ABDI HASSAN ABDI 2ND APPLICANT

AND

AHMED ALI HASSAN RESPONDENT

(An application for stay of execution and injunction pending hearing and determination of an intended appeal against the ruling of the Environment and Land Court of Kenya at Nairobi, (E.K. Wabwoto, J.) delivered on the 21st August 2023 in Nairobi ELC Case No. E061 of 2023))

RULING

1. Coming before us is the applicants' notice of motion dated 31st August 2023 brought under sections 3, 3A & 3B of the *Appellate Jurisdiction Act* and rules 5(2) (b) and 47 of the *Court of Appeal Rules*. The application seeks, *inter alia*; stay of execution of the ruling of the Environment and Land Court (ELC) dated August 21, 2023 and an order of injunction to restrain the respondent or his agents from interfering or accessing a property known as L.R No. 209/18158 (I. R. No. 127286) Diamond Park II Estate, South B pending appeal.
2. The applicants' motion is supported by the affidavit of Abdi Hassan Abdi, a director of the 1st applicant, sworn on August 31, 2023, essentially deposing to the grounds on which the motion is premised, namely: that the intended appeal is arguable with high chances of success, that the applicants face the risk of eviction from the suit property which will render the appeal nugatory; that the orders that were issued in the ELC were obtained through misrepresentation and withholding of material facts; and that it is in the interest of justice that stay of execution be granted.
3. In support of the applicants' motion, Mr. Hassan N. Lakicha & Co. Advocates filed written submissions and a case digest dated September 12, 2023. The submissions and the authorities highlight



the principles required to be satisfied in applications under rule 5 (2) (b) of this [Court's Rules](#), all of which we have considered. Counsel urged us to grant the application.

4. The respondent opposed the applicants' motion vide his replying affidavit sworn on August 8, 2023, stating, *inter alia*; that he is the registered owner of the property having purchased it at a public auction held on 13th July 2020; that the applicants are misleading the Court by filing an incomplete title since they omitted the page showing the correct registered owner; that the applicants were evicted after the Rent Restriction Tribunal issued orders compelling the applicants to vacate the suit property; that the applicants had invaded the property with goons and the matter was reported to the police; that the orders issued by the ELC were meritorious; and that there are no good grounds to give the orders for stay as the applicants' grievances should be directed to the bank that sold the property.
5. Learned counsel for the respondent, M/s Mbalu & Associates Advocates LLP, filed written submissions and a list of authorities dated September 15, 2023, which we have considered. They urged us that since the applicants have not satisfied the principles under rule 5 (2) (b) of this [Court's Rules](#), we should dismiss the motion with costs.
6. Briefly, the background to the applicants' motion is as follows; It is common ground that before the public auction that was held on July 13, 2020, the 1st applicant was the registered proprietor of the suit property and the 2nd applicant was in occupation. The applicants had charged the property to Gulf Bank Ltd. The applicants defaulted in paying the loan and the bank advertised the property for sale by way of public auction. The applicants allege that the public auction was not conducted properly, but those grievances are not relevant to this application.
7. It is common ground that the respondent purchased the suit property at the public auction and there is a copy of the title annexed to the replying affidavit showing that he is now the registered owner.
8. Upon registration, the respondent obtained eviction orders from the Rent Restriction Tribunal and after successfully evicting the applicants, he quickly withdrew the proceedings from the Rent Restriction Tribunal. There is an apparent abuse of the court process on the jurisdiction of the Rent Restriction Tribunal, but that is not an issue for us to deal with at this stage. What is significant is that upon evicting the applicants, the respondent filed the suit in the ELC and obtained orders to restrain the applicants from trespassing or interfering with the suit property. The Officer Commanding Station, Industrial Area Police Station was to enforce those orders.
9. Deriving out of the short background, it is apparent from the documents that were filed by the parties that the suit property was sold at a public auction on July 13, 2020. The respondent, the registered proprietor, is now in occupation, notwithstanding the manner in which the occupation was achieved.
10. We now turn to the question whether the applicants have satisfied the conditions for grant of stay of execution or an injunction. The principles that apply in applications under rule 5(2) (b) of this [Court's Rules](#) for stay of execution pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal, or appeal (if any) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings arising from a judgment, decree or order are not stayed. These principles have been enunciated in various judicial pronouncements of this Court including those cited by the parties. [See *Anne Wanjiku Kibe v Clement Kungu Waibara & IEBC* [2020] eKLR.
11. We have looked at the grounds set out in the memorandum of appeal. We agree that the question whether the Judge exercised his discretion properly in holding that the case before him was *res judicata* and whether the evidence placed before the court was ignored can be deemed to be arguable. We say



so in view of the fact that, as this Court has stated in several decisions, an arguable appeal need not be one that must necessarily succeed. See *Kenya Commercial Bank v Nicholas Ombija* [2009] eKLR. However, we leave the question as to whether the appeal will succeed to the bench that will hear and determine the appeal.

12. On the nugatory aspect, we note that the suit property has already been transferred in the name of the respondent. Further, the eviction of the applicants has already been effected. In our view, the manner of eviction and the apparent abuse of the court process, through the use of orders issued by the Rent Restriction Tribunal, is an issue that is capable of compensation by way of damages. Accordingly, the intended appeal cannot be rendered nugatory as the horse has already bolted.
13. In the circumstances, the applicants have failed to satisfy the second principle on the grant of stay of execution. Accordingly, we find that this application has no merit and we dismiss it. As regards the costs, we order that in the circumstances of this application, each party shall bear their costs.

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

S. OLE KANTAI

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JUDGE OF APPEAL

MUMBI NGUGI

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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

