



REPUBLIC OF KENYA



**Apungu v Justinice Limited (Civil Application E218 of 2023)
[2024] KECA 99 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 99 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E218 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
FEBRUARY 9, 2024**

BETWEEN

ARTHUR K. APUNGU APPLICANT

AND

JUSTINICE LIMITED RESPONDENT

(Being an application for stay of execution of the Judgement and Decree of the Environment and Land Court at Nairobi (M. D. Mwangi, J.) dated and delivered on 23rd February 2023 in ELC Civil Suit No. 103 of 2019)

RULING

1. Aggrieved by the judgement of the Environment and Land Court at Nairobi (M. D. Mwangi, J.) in Nairobi ELC Civil Suit No. 103 of 2019, Arthur K. Apungu (the applicant) moved this Court by a Notice of Motion dated 23rd May 2023 brought under the provisions of sections 3, 3A & 3B of the *Appellate Jurisdiction Act* and rules 5(2) (b) & 49 of the Court of Appeal Rules. The applicant in the main, sought orders that, pending the lodgment, hearing and determination of the intended appeal, this Court be pleased to stay execution of the Judgement and Decree of the Environment and Land Court at Nairobi (Mwangi, J.) dated and delivered on 23rd February 2023, and that costs of the application be in the appeal.
2. The application is founded on the grounds listed on its face and a supporting affidavit sworn by the applicant on 22nd May 2023, together with the annexures thereto. In further support of his application, the applicant filed written submissions dated 2nd June 2023, a digest of authorities of even date and a supplementary digest of authorities dated 6th June 2023.
3. The applicant deposed that on 30th September 1999, he signed a sale agreement for the purchase of Land Parcel No. Soy/Soy/Block 10 (Navillus 1), comprising of 40.47 hectares (the suit property) for a consideration of Kshs.3, 700,385/= out of which a deposit of Kshs.1,500,000/= was paid, leaving a



- balance of Kshs.2,200,385/=. The applicant stated that he took possession of the suit property, and that he has been living with his family thereon for a period of over 23 years.
4. In addition to the foregoing, the applicant deposed that, between 1st October 1999 and 20th December 2001, he undertook development of the suit property in addition to an adjacent 202 acres of land belonging to the respondent, thereby incurring expenses of about Kshs.18,900,000/=; and that on 12th March 2003, he learnt that the respondent had entered into an alternative sale agreement with third parties for the sale of the suit property and transferred it in the names of the third parties.
 5. In order to protect his interest, the applicant filed suit in HCCC No. 738 of 2003, which was later transferred to the Environment and Land Court at Nairobi in 2019 under ELC Civil Suit No. 103 of 2019. The High Court had issued a restraining order against the respondent from interfering with the suit property pending the hearing and determination of the suit. Pursuant to the interim orders aforesaid, the applicant has remained on the suit property to date.
 6. The applicant deposed that the suit was heard and determined and that the respondent's counterclaim seeking his eviction was allowed. He urged that, if the orders of eviction are executed, he stands to suffer loss account of the investments made on the suit property since the year 1999, among others; 60 acres of maize crop; 6,600 fencing posts; over 100kms barbed wires; 5 metal gates; a permanent house built on 3,000 square foot; 5 workers' houses; 3 livestock buildings; 2 grain storage facilities; 1 machinery garage; diverse farm animals; and other developments made in the adjacent parcel of land in accordance with the terms of the sale agreement.
 7. The applicant contended that the appeal is meritorious and has high chances of success; that among the main grounds in the appeal are: that the trial court erred in finding that the sale agreement was void for want of consent from the Land Control Board; and that the learned Judge erred in failing to find that a constructive trust had been created, more so in the absence of consent from the Land Control Board.
 8. The application was opposed vide the replying affidavit of the respondent's Managing Director, Dr. Justry Patrick Nyaberi sworn on 29th May 2023. The respondent also relied on its counsel's written submissions dated 16th June 2023.
 9. According to the respondent, judgement was entered in its favour and against the applicant, and eviction orders were subsequently issued, requiring the applicant to vacate the suit property within 180 days.
 10. According to the respondent, the applicant has failed to demonstrate that the appeal is arguable and that it would be rendered nugatory if stay of execution is not granted. It states that the applicant failed to disclose to this Court that he added extraneous terms to the sale agreement which were not agreed upon by both parties. The respondent further faulted the applicant for failing to disclose that the sale agreement was revoked vide a letter dated 17th March 2003, and that the deposit of Kshs.1, 500,000/= was refunded; and that the applicant issued it with a rescission notice on 8th September 2003, which was received by its counsel on 15th September 2003.
 11. The respondent further outlined the alleged illegal activities that were being carried out by the applicant, including destruction of indigenous trees, chasing away wildlife and cultivating on three parcels of land without its consent. It stated that, since the sale agreement was null and void for want of compliance with the law, and was rescinded, it offered the suit property to other interested buyers; that contrary to the various allegations in paragraphs 4 - 32 of the applicant's supporting affidavit, the applicant is guilty of non- material disclosure of material facts, and that he does not deserve equitable



- reliefs; and that during the period the applicant was in occupation of the suit property, he was there on the basis of a court order, but not on the legality of the sale agreement in issue.
12. Lastly, the respondent urged that any loss or expenses incurred by the applicant can be quantified and remedied by an award of damages. It asked us to find that the application is incompetent and dismiss it with costs.
 13. The application came up for hearing before us on 8th August 2023. Present was learned counsel Mr. Muiruri who appeared for the applicant while learned counsel Mr. Rotich appeared for the respondent. Both counsel relied on their written submissions with brief oral highlights.
 14. In brief, the applicant submitted that the appeal is arguable. On the issue as to whether the requisite consent of the Land Control Board was obtained, the applicant submitted that, under the special condition No. 2 of the sale agreement, it was the respondent's responsibility to obtain the consent; and that whether failure to obtain the consent voided the sale agreement, is a matter for consideration by this Court. To buttress the submission, reliance was placed on this Court's case of *Duncan Nduracha vs. Faud Mohammed & 2 Others* [2011] eKLR for the proposition that even one bona fide arguable ground merits consideration on appeal.
 15. The applicant submitted further that the trial court ought to have construed the existence of a constructive trust in the absence of consent from the Land Control Board. Judgment of this Court in the case of *Aliaza vs. Saul* (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) was relied upon for the proposition that where consent from the Land Control Board is not obtained, a constructive trust ought to be construed. For this reason, the applicant argued that the learned Judge erred in failing to so hold.
 16. On the nugatory aspect, the applicant submitted that he has been resident on the suit property since 1999, and that he has carried out massive investments thereon; that if the eviction is carried out, he will be unable to return to the suit property to its current form, as rebuilding it will be extremely expensive. The applicant urged us to be persuaded by the decision in *Gulf Timber & Hardware Supplies Limited vs. Ngaruiya & 5* February 2022) (Ruling) (with dissent - S ole Kantai, JA) where this Court held that whether or not an appeal will be rendered nugatory will depend on what is sought to be stayed or restrained if allowed to happen is reversible. Further reliance was placed on the case of *Wensley Barasa vs. Immaculate Awino Abongo* (2016) eKLR where this Court, after considering the facts before it, found that if stay is not granted and the eviction proceeds, the appeal would be rendered nugatory.
 17. The applicant further relied on the case of *Duncan Nduracha* (supra) where the Court ordered that a sum of Kshs.60,000/= as mesne profits be deposited into an interest earning account so that the intended appeal is not rendered nugatory. The applicant conceded that he is willing to abide by the conditions the Court may impose for grant of stay of execution.
 18. The respondent submitted that the appeal does not raise any bona fide arguable grounds. This was hinged on the argument that the learned Judge correctly found that, in the absence of the Land Control Board consent, the agreement of 30th September 1999 was invalid. It was conceded that consent from the Land Control Board was not obtained since the respondent disputed the terms of the agreement which were inserted in the sale agreement; that those terms were not agreed upon by the parties, and that evidence to that effect has been produced; that, having disputed the terms thereof, the respondent rescinded the sale agreement on 17th March 2003 and refunded the deposit of Kshs.1, 500,000/=; that, on this basis, the trial court was correct in finding that the absence of consent from the Land Control Board voided the whole sale agreement. In this regard, reliance was placed on the case of *Willy Kimutai Kitilit vs. Michael Kibet* [2018] eKLR.



19. The respondent further submitted that the applicant, having deliberately concealed material facts, was not deserving of equitable reliefs of temporary injunction in the form of stay of execution pending appeal as it was held in *Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others* [1998] eKLR. It submitted that it proved its counterclaim against the applicant, and was accordingly declared as the owner of the suit property and awarded eviction orders. Therefore, the grounds of appeal proffered by the applicant are not arguable, and the appeal has no chances of success.
20. On the aspect of constructive trust, it was submitted that the issue was never pleaded, and that was only introduced in the submissions. It was submitted that the trial court rightly held that parties are bound by their pleadings, and that they cannot be allowed to traverse and introduce new issues at the submission stage. Further, the trial court held that, even if the issue of constructive trust had been pleaded, it did not arise in this scenario since the full purchase price had not been paid. Furthermore, the conduct of the applicant in introducing new terms in the sale agreement in order to steal a march did not warrant invoking the principle of constructive trust since it is an equitable remedy.
21. On the nugatory limb, whilst relying on the *Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others* [2013] eKLR as cited in *Kenya Revenue Authority vs. Evelyne Onyango Obondo* [2021] eKLR, it was submitted that any damages that the applicant may incur can be compensated by way of damages, and that the suit property can be transferred to the applicant if the appeal succeeds.
22. We have considered the application, the affidavits both in support of, and in opposition to, the application as well as the written and oral submissions and the law.
23. It is a long-standing principle that for an applicant to succeed in a rule 5 (2) (b) application, he or she must meet two requirements. Firstly, the applicant has to demonstrate that he has an arguable appeal and, secondly, that the appeal will be rendered nugatory if the order sought is not granted.
24. The two principles were well enunciated by this Court in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* (supra), 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. 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. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
 - 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 bonafide 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. 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. *Damji Pragji (supra)*.
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227* at page 232.
 - 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.
 - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.*”
25. We are cognizant of the fact that an arguable appeal is not one that must necessarily succeed, but simply one that is deserving of the Court’s consideration. See *Dennis Mogambi Mang’are vs. Attorney General & 3 others [2012] eKLR* where the Court held that:
- “An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”
26. We also take the liberty to restate the principle that a single arguable ground of appeal would suffice to meet the threshold of an intended appeal.
27. We have gleaned through the grounds of appeal and the facts set out in the application. Both parties conceded that, indeed, there was no consent obtained from the Land Control Board. In addition, both parties took diametrical views on the issue of the applicability of the doctrine of constructive trust in their transaction. The other aspect which came out from the parties is that the issue of constructive trust was never pleaded by the applicant and, therefore, whether an unpleaded issue can be raised at any stage of the proceedings or a court can raise and determine an issue suo moto, are all issues deserving this Court’s consideration. Accordingly, we arrive at the conclusion that the applicant has satisfied us and demonstrated that he has an arguable appeal, and that it is not frivolous. To this extent we find that the appeal is arguable.
28. On the nugatory aspect, the applicant averred that in the event that the appeal is successful, he would suffer tremendous loss of the developments already undertaken on the suit property since the year 1999 from when he was in occupation. The respondent took the position that the applicant can well be compensated by damages after valuation of the developments on the property.
29. We have considered annexures 160-215 in the applicant’s supporting affidavit. The annexures are a reflection of the developments done on the suit property. We cannot overlook the fact that massive developments have taken place on it, and that it is a fact which has not been denied by the respondent. The respondent has simply proposed that it would be willing to compensate the applicant by way of damages after valuation.
30. In our view, we think that it is not enough to state that the loss can be compensated by way of damages. The resultant inconvenience which will be occasioned to the applicant is massive. Again, we observe that the respondent is not forthright on its financial status and how it will compensate the applicant



if the appeal is to succeed. In Re: Estate of Harish Chandra Hindocha (Deceased) [2021] eKLR, this Court stated, inter alia, that:

“Turning to the second prerequisite, the position in law is that, an appeal would be rendered nugatory if the consequential effects for the failure to grant the relief sought would be either irreversible or highly prejudicial so as to render of no consequence the intended appeal or appeal if ultimately successful.”

31. In the case of African Safari Club Limited vs. Safe Rentals Limited [2010] eKLR, this Court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

32. From the facts before it, a court is expected to balance the interests of both parties, and especially considering which party’s hardship will be greater. The court has to balance and consider the conflicting claims of each side.

33. Having considered all the facts, we are of the view that the circumstances militate towards preserving the substratum of the appeal. The consequential effect of stay not being granted, is that in the event the appeal is successful, the applicant will be prejudiced and suffer massive loss. We are satisfied that no amount of damages will be able to atone the loss which will be suffered by the applicant. If the suit property is not preserved, the appeal is likely to be rendered nugatory and the economic prejudice to be suffered by the applicant will be almost irreversible.

34. The foregoing observation brings us to the inescapable conclusion that the applicant has satisfied both limbs on the test of granting stay of execution under rule 5(2)(b) of the Court of Appeal Rules, 2022. Accordingly, we hereby grant prayer No. 3 on the Notice of Motion dated 23rd May 2023, which is that a stay of execution of the trial court judgment is hereby granted pending hearing and determination of the intended appeal. The costs of the Motion shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G.W. NGENYE- MACHARIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

