



Wereh & another v County Government of Bungoma & 4 others (Civil Application E196 of 2023) [2024] KECA 133 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KECA 133 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E196 OF 2023
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 9, 2024**

BETWEEN

ABDALLA ALI WEREH 1ST APPLICANT

MWANAIIDI NABWIRE MOHAMMED 2ND APPLICANT

AND

COUNTY GOVERNMENT OF BUNGOMA 1ST RESPONDENT

COUNTY LAND REGISTRAR BUNGOMA 2ND RESPONDENT

CABINET SECRETARY MINISTRY OF LANDS 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

(Being an application for stay of any further proceedings in the Environment and Land Court of Kenya at Bungoma (Cherono, J) Dated 12th May, 2023 in ELC Petition No. E004 of 2021)

RULING

1. The Application before us is the Notice of Motion dated 14th August 2023 brought pursuant to Rules 5 (2) (b) of the *Court of Appeal Rules* 2010, seeking an order of stay of any further proceedings in Bungoma ELC Petition E004 of 2021 (“Petition”) pending the hearing and determination of the intended appeal; and that costs be provided for.
2. The Application is supported by an affidavit of even date, jointly sworn by Abdallah Ali Wereh, the 1st applicant and Mwanaidi Nabwire Mohammed. Procedurally, each ought to have sworn a separate affidavit, but deferring to substantive justice over procedural justice and form, we will not make a fuss out of this, bearing in mind that the applicants are lay persons.



3. The genesis of this application stems from the ruling delivered on the 12th of May, 2023 where Cheron, J, set aside the ex- parte Judgment of Olao, J which had been delivered on the 21st of February, 2022; and granted the 1st Respondent more time to file responses to the Petition. The Applicants were dissatisfied with the aforesaid ruling on grounds inter alia that the orders of the court amounted to it sitting on appeal over its own decision as Olao, J had already on the 12th of January, 2022 declined to grant the 1st respondent more time to file its responses. The Applicants point out that they have already filed their appeal against the said ruling; and are apprehensive that if the proceedings in the trial court continue their appeal will be rendered nugatory as the core of the appeal challenges the legality of the proceedings in the superior court.
4. To place this matter in perspective, it is necessary to give a brief background of the applicant's claim, and how the orders issued by Olao, J were eventually set aside by Cheron, J. The applicants, who are the Co Administrators to the Estate of the late Abdallah Wambwere, claimed that prior to his demise, the deceased was the proprietor of the land parcel No. Kimilili/Kimilili/2097 on which he operated a private slaughter house facility. Sometimes in the year 1990, the then Town Council of Kimilili compulsorily acquired the slaughter house together with a portion of land measuring 960 feet by 66 feet by 16 feet, which it placed under the management of the defunct Bungoma County Council, having paid only Kshs.151,226.85/= out of the calculated figure of Kshs. 371,230/= being the cost incurred by the deceased in constructing the slaughter house and for which no compensation was paid. Following the advent of devolution, the 1st Respondent took over the management of the slaughter house, and levied charges for every animal slaughtered therein.

Subsequent to the demise of the deceased, the land parcel No. Kimilili/Kimilili/2097 was sub divided by his estate into several parcels of land and, eventually, the slaughter house fell into parcel No. Kimilili/Kimilili/7397, registered in the name of the 1st applicant. Meanwhile, the 1st respondent continued to operate the slaughterhouse and generate income, therefrom yet the estate is yet to be compensated.
5. This is what led to the applicants filing a petition against the respondents in Bungoma ELC Petition No.E004 of 2021 *Abdalla Ali Wereh and Mwanaidi Nabwire Mohammed versus The County Government of Bungoma & 4 others*, seeking:
 - a) A declaration that the proprietary interest in the land parcel No. Kimilili/Kimilili/7397 on which the slaughter house stands together with the buildings and structures constituting the slaughter house popularly known as Machinjoni absolutely vests in the 1st Respondent;
 - (b) A declaration that the compulsory acquisition of the land parcel No. Kimilili/Kimilili/7397 (formerly comprised in Kimilili/Kimilili/2593 and Kimilili/Kimilili/2097) without consent or compensation violated Section 75 of the retired Constitution and article 40 of the 2010 Constitution;
 - (c) An order of mandamus to compel the 1st to 4th Respondents to jointly and/or severally pay the Estate of Mohamed Wambwere Ali mesne profit for the loss of user for the slaughterhouse and the entire parcel of land Kimilili/Kimilili/7397;
 - (d) A mandatory injunction directing the 1st respondent to immediately vacate from the land parcel No. Kimilili/Kimilili/7397; plus costs of the Petition.
6. Incidentally, none of the respondents had filed any reactions to the petition. Subsequently, the ELC sitting at Bungoma, and presided over by Olao, J., directed that the matter be canvassed by way of written submissions; and 12th January 2022 was set as the date for mention to confirm compliance and take a date for judgment. At the mention, counsel for the applicants, and a counsel who held brief for



- the 1st respondent's counsel appeared in court. The 1st respondent's counsel request for more time to file the 1st Respondent's response was declined; and Judgment was set for 21st February 2022.
7. The petition was treated as uncontested, and ultimately judgment was entered in favour of the applicants by Olao, J on 21st February 2022. Subsequently, the 1st respondent filed an application dated 27th February 2023 seeking inter alia orders to set aside and or vary or review the judgment delivered on 21st February 2022 and all consequential orders obtained thereto; and that the 1st Respondent be granted leave to oppose the Petition. These prayers were granted in an order dated 17th March 2021.
 8. There is no response filed in reaction to the instant application.
 9. The issue to be determined in this matter is whether the Applicants have satisfied the requirements necessary for granting an order for stay of proceedings. This Court has stated that whether it be an application for injunction, stay of execution or stay of proceedings the applicable principles are the same. To succeed in an application in 5 (2) (b) the Applicant has to establish that: -
 - i. The Appeal is arguable.
 - ii. The Appeal is likely to be rendered nugatory if the stay is not granted and Appeal succeeds.”
 10. As to whether the applicant has an arguable appeal, we consider the case of *Wasike v Swala* [1984] KLR 59, where this Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court. See also *David Morton Silverstein v Atsango Chesoni* [2002] e KLR, *Nation Newspapers Limited v Peter Baraza Rabando* CA No. 1 [2007] e KLR.
 11. Also, an arguable Appeal is one that is not idle and/or frivolous. This Court in *Transouth Conveyors Limited v KRA & Another* [2007] e KLR, CA No. 37 of 2007 observed that a single issue will suffice and that an applicant need not establish a multiplicity of arguable issues, nor that the point would succeed. The arguable issue only needs to be an issue that raises a serious issue of law worthy of consideration. See *Retreat Villas Limited v Equatorial Commercial Bank limited & 2 others* CA No. 40 of 2006
 12. The applicants' grievance, as set out in the grounds in support of this application, is that the orders of Cheron, J. amounted to the court sitting on appeal over its own decision as Olao J (a judge of equal status) had already, on the 12th of January, 2022 declined to grant the 1st Respondent more time to file its responses. They have annexed a memorandum of appeal raising only one issue, that the trial court erred in failing to find that there was inordinate delay by the 1st respondent in bringing the application for setting aside the ex parte judgment of the superior court.
 13. This Court has held in *KCB Limited v Nicholas Ombija* [2009] e KLR that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court. Whether or not the intended appeal will succeed, that is to be determined at the hearing thereof. It is our view that the question as to whether it was proper to set aside a judgment entered following failure by the opposing party to file written submissions, is an arguable point.
 14. As regards the second principle, whether the appeal, if successful, would be rendered nugatory in the event we decline to grant the orders sought. In determining whether or not an appeal will be rendered nugatory, a lot 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. We recognize that in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (2013) eKLR, this Court stated that:
 - “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.”

15. In *African Safari Club Limited vs Safe Rentals Limited*, Nai Civ App 53 of 2010 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.”

16. Thus bearing in mind that the nugatory aspect is pegged on whether or not what is sought to be stayed or halted by an order of injunction, if allowed to happen is reversible; or if not whether damages will reasonably compensate the parties aggrieved, we hold that in the present instance, should the proceedings in the trial court be allowed to go on; the appeal will be rendered an academic exercise as the core of the said appeal challenges the legality of the proceedings in the superior court in the first instance. In the circumstances, a stay of further proceedings is necessary pending hearing and determination of the appeal.

17. Consequently, the applicants have satisfied the twin principles for grant of an order for stay of proceedings under rule 5(2)(b). Accordingly, the application is allowed cost shall abide the main appeal.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

