



Mwaura v Ethics and Anti-Corruption Commission & another (Civil Application E404 of 2023) [2024] KECA 307 (KLR) (15 March 2024) (Ruling)

Neutral citation: [2024] KECA 307 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E404 OF 2023
S OLE KANTAL, F TUIYOT'T & A ALI-ARONI, JJA
MARCH 15, 2024**

BETWEEN

IRENE MUTHONI MWAURA APPLICANT

AND

JOHN FAUSTIN KINYUA 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

(Being an application for stay of proceedings and stay of execution pending the lodging, hearing and determination of an intended appeal from the Judgment and orders of the Environment and Land Court of Kenya at Nairobi (Okong'o, J.) dated 12th June, 2023 in ELC No. 524 of 2008)

RULING

1. In a Judgment delivered at Kisumu on 12th June, 2023 Okongo, J. found and declared that transfer of a parcel of land known as L.R. No. 209/10611/173 I.R. No. 77586 situate at Villa Franca Estate, Nairobi (“the suit property”) on which stands a residential house No. 304 by Kenya Reinsurance Corporation Limited (“Kenya Re”) to the 1st defendant (the applicant Irene Muthoni Mwaura) was illegal, fraudulent, null and void. The Judge cancelled registration of the applicant as owner of the suit property; he ordered her to vacate the suit property within 60 days from the date of Judgment or she be evicted; he issued a permanent injunction restraining the applicant from dealing with the suit property; he ordered the applicant to pay a sum of Ksh.321,514.50 with interest at court rates from 19th September, 2002 until payment in full. The applicant was ordered to pay Ksh.5,000,000.00 together with interest at court rates until payment in full being mesne profits for the unlawful occupation of the suit property and she was also ordered to pay costs.
2. Those orders provoked this application where by Motion brought under Rules 1(2) and 5(2) (b) and 49 of the *Court of Appeal rules*, 2022 we are asked in the main to order stay of proceedings in Nairobi Environment and Land Court Civil Case No. 524 of 2008 pending the hearing and determination



of an intended appeal by the applicant against the Judgment and orders in that case pending appeal. We are also asked to issue an injunction restraining the 1st respondent (Ethics and Anti-Corruption Commission) from evicting the applicant from the suit property and costs of the application abide determination of the intended appeal.

3. In grounds in support of the Motion and in a supporting affidavit by the applicant it is said *inter alia* that the applicant lodged a notice of appeal against the Judgment delivered on 12th June, 2023; that the applicant applied for proceedings from the trial court to enable filing an appeal; that the applicant has an arguable appeal as per draft Memorandum of Appeal; that the appeal will be rendered nugatory as the 1st respondent would process warrants for eviction of the applicant from the suit property; it is stated at ground (x) of the Motion:
 - (x) The Applicant's case is that she was not proved to have been party to fraud as found by the superior court and the superior court ignored or failed to advert to or did not consider that the Kenya Re-Insurance Corporation through its employees including the Managing Director and the Corporation Secretary effected the sale and transfer of the suit property L.R. No. 209/10611/173 I.R. No. 77586 situated at Villa Franca Estate, Nairobi to the Applicant and the Corporation (through the 1st Respondent) was thus disentitled to the order of restitution under the *Anti-Corruption and Economic Crimes Act, 2003.*"
4. The applicant further says that she has resided in the suit property with her family for over a decade; that if the title is cancelled as ordered by the Judge an appeal will then be of no use; at paragraphs 14 and 21 of the affidavit:
 - "14. That I am informed by my advocates on record that I need to show that I have an arguable appeal and that one point for argument on appeal is sufficient. The Honourable Mr. Justice Okong'o has said that I had no defence to the claim by Kenya Anti- Corruption Commission. I put up a defence. He has rubbished the fact that I gave evidence that I was the one who blew the whistle on my employer, Trident, and gave information to the Kenya Reinsurance Corporation, a governmental agency. By the Honourable Judge's reckoning a whistleblower is one who gives information to a governmental agency and that is what I did. I was awarded the house at Villa Franca Estate by the Corporation. I did not know the in house workings of the Corporation. I am not the one who made the Managing Director and the Corporation Secretary sign the agreement for sale and the Transfer of the house to me. I am not the one who instructed the staff in the Housing Department of the Corporation to look for me and go through the motions of handling over the house to me. It was the Property and Investments Manager who gave those instructions.
 21. That I deny, as I denied in the witness stand, that I did not know of the fraud. I pointed out to the Corporation that they had cash credits outstanding at Trident for 11 years and more. The Corporation through Mr. Faustin Kinyua was glad to receive the news. Action was taken to see that the money got to the Corporation. As Mr. Kinyua said in his statements to Anti-Corruption, and as I said, I was offered the Villa Franca house in my capacity as a whistleblower."
5. The applicant depones that the Managing Director of Kenya Re gave his approval to the transfer of the suit property to her; that the Corporation Secretary, Kenya Re, gave evidence to the same effect and that the Land Registrar had testified that the transaction was valid.
6. John Lolkoloi, the 1st respondent's director says in a replying affidavit that he was a member of the team that investigated the matter that led to the suit at the Environment and Land Court; he gives the powers



donated in law to the 1st respondent; that investigations revealed that the 2nd respondent (John Faustin Kinyua) was at the material time Financial Controller, Kenya Re while the applicant was an employee of Trident Insurance Company Limited (Trident); that there was a claim by Kenya Re against Trident for Ksh.12,690,396, Trident released Ksh.3,422,586.50 to the 2nd respondent by cheque; that Kenya Re entered into agreement with the applicant in respect of the suit property and eventually transferred the same to the applicant but that the applicant did not give any consideration for the transfer. Further, that the 2nd respondent had admitted that transfer of the suit property was made by Kenya Re to the applicant in consideration of her role in unearthing sums of money held by Trident on account of Kenya Re. The 1st respondent had therefore recommended that the suit property and mesne profits be recovered from the applicant. He says that the applicant can be restored to the suit property if the intended appeal succeeds and we should therefore refuse the application.

7. The applicant says in a further affidavit that she would like this Court to review and reassess the evidence that the 1st respondent's director has given in the replying affidavit.
8. When the Motion came up for hearing before us on 11th October, 2023 on a virtual platform the applicant was represented by learned counsel Mr. Mwenesi; learned counsel Mrs. Litoro appeared for the 1st respondent while learned counsel Mrs. Githae appeared for the 2nd respondent. Counsel for the 2nd respondent confirmed that the 2nd respondent was not taking any position in the matter.
9. The applicant and the 1st respondent had filed written submissions and case digests and in a highlight of the same Mr. Mwenesi submitted that the applicant who had been charged in a criminal court had been acquitted of the charges she faced. He submitted that the applicant had not engaged in any fraud but was rewarded by Kenya Re for being a whistleblower where Kenya Re recovered money owed to it by Trident. He invited us to find that there were arguable points in the intended appeal and that the applicant would be evicted and forced to pay the sums ordered in the Judgment of the ELC.
10. Mrs. Litoro submitted that the applicant duped Kenya Re to transfer the suit property to her. According to counsel if the applicant is evicted from the suit property she can be put back through court order.
11. We have considered the Motion and the submissions made before us.
12. The principles that apply in an application for stay pending appeal are well known. For an applicant to succeed he must, firstly show that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay – See a summary of those principles in *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR.
13. We have seen a draft Memorandum of Appeal where the applicant sets out 15 grounds of appeal. It is intended to be argued on appeal, for instance, that the Judge erred in law and fact by finding that the applicant had done something that constituted corruption or economic crime and thus that ELC had jurisdiction to hear and determine the suit against her. Further, that the Judge erred in law and fact by finding the applicant liable when there was no conviction against her by a criminal court. These we find to be arguable points 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 points.
14. The 1st respondent has submitted on the nugatory aspect that the applicant can be restored back to the suit property should the appeal succeed. The applicant on the other hand says that she has occupied the suit property with her family for over 10 years and she considers it her family home; she has no other home.



15. There was evidence before the Judge that Kenya Re transferred the suit property to the applicant. She moved into the same with her family and they have resided there for over 10 years. Based on the above, we think that it would be wrong to have the applicant evicted, to be restored back if the appeal succeeds. It is better to let the status quo be maintained pending hearing and determination of the intended appeal.
16. We find that the applicant has satisfied the principles that apply in an application of this nature. We allow the Motion dated 18th August, 2023. Costs of the Motion will be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH, 2024.

S. ole KANTAI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR

