



Ibau & 73 others v Langata Development Company Limited & another (Civil Appeal (Application) E453 of 2023) [2024] KECA 240 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KECA 240 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E453 OF 2023
MSA MAKHANDIA, M NGUGI & PM GACHOKA, JJA
MARCH 8, 2024**

BETWEEN

JOSEPH GITHU IBAU & 73 OTHERS APPLICANT

AND

LANGATA DEVELOPMENT COMPANY LIMITED 1ST RESPONDENT

MARGARET ESTHER DAMES & IOHN ANDREW DAMES (ESTATE OF MARY WAIRIMU DAMES) 2ND RESPONDENT

(An application for injunction and stay of execution of the Judgment and decree of the Environment and Land Court at Nairobi (Mbugua, J.) dated 6th July 2023 in ELC No. 129 of 2019)

RULING

1. Before us is a Notice of Motion dated 27th September 2023, in which Joseph Githu Ibau & 73 Others (“the applicants”) seek in the main orders that:

“1. That pending the lodging, hearing and determination of the applicants’ intended appeal, there be issued an injunction restraining the 2nd respondents from evicting the applicants from properties known as Plot Nos. Block B.63/64, A.44, A58, A64, A55, A53, 457, 462, A72, A75, A78, A97, A112, A113, AI14, A107, AI24, 125, A126, N127, B64, B514, B733. B521. B15, B485, B7B4, B806, B868, B141, B88, B47, B372, B 1, B66, B67, B164, A60, A8139, A59, B72/811, A115, B570, B9.5, 57. B1, B15/16, B17, A10/t1, 12, A25, A36, B65, A38, B581/9223, B854, B57L. B732, BG30, B890, B66/67, B3, B772, C384, B88/89, 3 382, A60, B047/N48, B824 and B890 respectively of Langata Development Company-Thika within ILRN7240/23



2. That pending the lodging, hearing and determination of the Applicants intended appeal there be a stay execution of the Judgment and decree by Mbugua, J. in Milimani Environment and Land Court Suit No.129 of 2019, delivered on 6th July 2023.....”

2. The grounds upon which the motion is based are that the applicants had filed ELC Case No. 129 of 2019 seeking injunctive orders against the respondents to restrain them from demolishing, evicting, bringing down or in any way interfering with the applicants' possession and use of the houses and structures; or in any way interfering with plot numbers cited in the prayers above. That after considering the application, the trial court dismissed it and the main suit for being res judicata which decision the applicants being dissatisfied have filed a notice of appeal evincing their intention to appeal. Pursuant to the said notice, the applicants have lodged the instant application. On arguability of the intended appeal, the applicants reiterate the grounds in the draft memorandum of appeal annexed to the affidavit in support of the application. The grounds raised are that the trial court erred in law and in fact and misdirected itself by holding that the suit was res judicata; failing to decipher the doctrine of privity of contracts as in ELC Case No. 1413 of 200 and ELC Case No. 129 of 2019, the claims arose from different contractual relationships whereas in the current suit the claim by the applicants is that they were rightful owners of the stated plots having acquired them for value.
3. On the nugatory aspect, the applicants state that if the orders are not granted, the 2nd respondents will proceed with their eviction in execution of the impugned judgment and decree.
4. The application is further supported by the affidavit of Joseph Ibau, the 1st applicant which merely reiterates the grounds in support of the motion set out above, hence the need not to rehash the same.
5. The application is supported by the 1st respondent through the replying affidavit of one Eliud A. Kariuki dated 1st December 2023. It is the 1st respondent's position that the applicants were the rightful owners of the stated parcels of land having purchased them for value. On arguability, he states that the question of whether the 2nd respondents in asserting their claim to a portion of land measuring 85.3 acres from all that land parcel known as IR 57550LR 7240/23, entitles them to a particular parcel of land comprising the suit properties has never been determined by any court and hence the suit was not res judicata. That based on the case of *IEBC vs. Maina Kiai & 5 Others* [2017] eKLR, where it was held that five conjunctive tests have to be met for a bar of the doctrine of res judicata to apply, the trial court's decision was thus made in error as the threshold was not met.
6. On the nugatory aspect, the 1st respondent states that the 2nd respondents have threatened to and have in fact commenced eviction of the applicants, yet the main legal issue has not been addressed. As such, failure to grant the order sought will expose the applicants to greater risk and hardship and further, render the intended appeal futile, worthless and trifling.
7. On their part, the 2nd respondents filed grounds of opposition dated 28th November, 2023 and stated that the ruling intended to be appealed against resulted in a negative order dismissing the applicants' suit. The order was therefore not a positive order capable of being executed by the 2nd respondents. That from the said ruling and order, the court held that the decision of the Court of Appeal delivered on 28th September 2018 in Civil Appeal No. 283 of 2016 was final as regards the ownership of the parcels of land. Similarly, having not stayed the order of eviction in the Supreme Court in Application No. 24 of 2019 - *Langata Development Co. Ltd vs. Margaret Esther Dames & John Andrew Dames*, that order remains in force, and as such the application before this Court was incompetent and defective as the applicants were trying to re-litigate a matter that has been determined with finality by this Court.



That the interests of the applicants were addressed by this Court and which was cited by the High Court in dismissing the application and the applicants' suit.

8. Further, the 2nd respondents stated that the original title LR No. 7240/23 was cancelled pursuant to this Court's order dated 28th September 2018 and lodged on 15th March 2019 with the Nairobi Central Land Registry. Subsequently, two new title deeds were issued by the Senior Land Registrar as directed by this Court's order of 14th February 2022 and as such, there was no existing land parcel known as LR No. 7240/23. That the applicants' intended appeal has no overwhelming chance of success in view of the final determination by this Court which dismissed the applicants' appeal and issued an order of eviction. That the suit, the subject of the intended appeal was just choreographed to appear as if it raised fresh issues that had never been determined by this Court. That in the premises there was no doubt that the suit was res judicata as properly held by the trial court. They thus prayed that the application be dismissed with costs.
9. The application was heard by way of written submissions. The applicants through Mr. Kirwa, learned counsel submitted that they had an arguable intended appeal and relied on the draft grounds of appeal already set out elsewhere in this ruling. He also relied on the cases of *Stanley Kangethe Kinyanjui vs. Tony Keter & 5 Others* [2013] eKLR, *Timoi Farms & Estates & Another vs. Florence Chelangat Langat* [2023] eKLR and *Al Gburair Printing and Publishing Company LLC vs. Coalition for Reforms and Democracy & 2 Others* [2017] eKLR, to demonstrate arguability of the intended appeal. On the nugatory aspect, the applicants reiterated what they had stated in their grounds in support of the motion as well as the supporting affidavit.
10. On its part, the 1st respondent through Mr. Lusi, learned counsel, equally reiterated the depositions in its affidavit and relied on the cases of *Kibos Sugar & Allied Industries & 3 Others vs. Benson Atega & Others* C.A 137 of 2018 and *Thika Min Hydrp Co. Limited vs. Josephat Ndwiga* [2013] eKLR to buttress the point that it had made out a case for the appeal being arguable. On the nugatory aspect, it relied on the cases of *Reliance Bank Ltd (in liquidation) vs. Norlake Investment Ltd - C.A 93 of 2002* to urge this Court to allow the application.
11. The 2nd respondents through their submissions also reiterated word for word their grounds of objection which we have already alluded to elsewhere in this ruling.
12. We have considered the application, the grounds in support thereof, the supporting and replying affidavits, the submissions, the authorities cited and the law. The jurisdiction under rule 5(2) (b) of this *Court's Rules* is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles, which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.
13. This Court in the case of *Trust Bank Limited and Another vs. Investech Bank Limited & 3 Others* [2000] eKLR, delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
14. In considering the twin principles set out above, we are cognizant that both limbs must be demonstrated to the Court's satisfaction.



However, it may not be necessary to consider the aforesaid principles in disposing of this application.

15. It is common ground that the trial court dismissed the applicants' application as well as the main suit with costs to the 2nd respondents for being res judicata. The parties were therefore not ordered to do anything or to refrain from doing anything capable of being stayed. The ruling and order of the trial court was in the nature of a negative as opposed to a positive order. It is only a positive order that is capable of enforcement and or execution. In *William W. Wabome & The Registrar of Trade Unions vs. Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers*, [2006] eKLR, this Court stated:

“The order of 19.9.2005 did not grant the respondents any relief other than costs which can be enforced through execution. On the contrary, the order in fact denied the applicant a relief in the sense that it struck out the application for leave and of order of stay and set aside the leave and stay granted earlier. There is no judgment in favour of the respondents which is capable of enforcement by execution save for costs.”

Given the foregoing, the prayer for stay of execution of the judgment and decree sought is not available to the applicants.

16. With regard to the prayer for an injunction, this too is not available to the applicants in view of the observations by this Court in its judgment in Civil Appeal No. 283 of 2016 at pages 16 and 17 whilst pitying the 2nd respondents when it stated that:

“Even if there was no proper basis laid for the conclusion of subdivision of the 85.3 acres, the subject of the dispute or that there was occupation of the same. But, even if there was, the land was clearly the respondents and the Appellant had no basis for getting third parties onto it. If it at all did so, that was in violation of the injunction given in the suit and contrary to Lis Pendens Principle or Doctrine that is meant to maintain the status quo thereby preserving the property, that is the subject matter of the suit until its determination.”

17. That observation, which equally applies to the applicants, has not been appealed, reviewed or set aside and therefore still holds. The applicants cannot in the premises be entitled to the order of injunction craved for having been brought to the property in violation of an order for an injunction in place and Doctrine of Lis Pendens. To grant such an order in the circumstances will be tantamount to giving a seal of approval of their mischief. On the whole, therefore, the application fails and is dismissed with costs to the 2nd respondents.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

ASIKE-MAKHANDIA

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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

