



Mramba & 3 others v Cannon Assurance (K) Limited (Civil Application E110 of 2023) [2024] KECA 569 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KECA 569 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E110 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
MAY 24, 2024**

BETWEEN

**MWENDA KAHINDI MRAMBA 1ST APPLICANT
CHRISTOPHER CHANGAWA KAHINDI (SUING ON BEHALF OF THE
ESTATE OF KAHINDI MRAMBA - DECEASED) 2ND APPLICANT
KAI MRIHIE KAI 3RD APPLICANT
HARO MRIHIE KAI (SUING ON BEHALF OF THE ESTATE OF CHIHUNGA
MRIHE KAI (DECEASED) 4TH APPLICANT**

AND

CANNON ASSURANCE (K) LIMITED RESPONDENT

(Being an application under rules 5(2) (b) and 47 of the Court of Appeal Rules for orders of injunction and stay of execution pending hearing and determination of an appeal from the judgement of the Environment & Land Court at Mombasa (N. A. Matheka, J.) delivered on 29th November 2023 in Mombasa ELC No 207 of 2017)

RULING

1. Before us is an application brought by way of Notice of Motion dated 5th December 2023 pursuant to rules 5(2) (b) and 47 of the Court of Appeal Rules. The applicants seek an order restraining the respondent from selling, trespassing on, alienating, evicting or interfering with the applicants’ quiet possession, occupation, peaceful enjoyment and/or use of the portions of land measuring 2.5 and 4 acres or thereabouts of Plot No. MN.SEC.111/13, CR 5692 (the suit property) pending hearing and determination of the intended appeal; that this Court stays the execution of the decree issued in the Environment and Land Court at Mombasa pending hearing and final determination of the intended appeal; and that this Court stays the execution of the judgement entered and delivered against the applicants on 29th November 2023 pending hearing and final determination of the intended appeal.



2. According to the applicants, the 1st and 2nd applicants, who are the widow and son of Kahindi Mramba Mweni (deceased), share a boundary with, and are neighbours to, the 3rd and 4th applicants; that they have been in peaceful occupation of the 2.5 and 4 acres respectively of the suit property; that they filed an Originating Summons at the Environment and Land Court (ELC) at Mombasa seeking to be registered as proprietors of the respective portions occupied by them by way of adverse possession; that, in its judgment delivered on 29th November 2023, the ELC dismissed their case in its entirety on the grounds that they had failed to prove the acquisition of the said portions through adverse possession; that, dissatisfied with that decision, they filed and served a Notice of Appeal; that, from the draft memorandum of appeal attached to their supporting affidavit and the proceedings, their appeal is arguable and has overwhelming chances of success; that absent stay or injunction, the respondent may evict them any time from the suit land thus rendering them homeless and landless while they have been in occupation thereof for over 30 years; and that the respondent is unlikely to suffer any prejudice.
3. It was averred that, on 10th December 2023, unknown people invaded the suit property where the applicants are in occupation and proceeded to vandalise properties erected thereon, including the applicants' farming facilities and submersive water pump installed in the well dug by the applicants; and that the matter was reported at Kijipwa Police Station.
4. Opposing the application, the respondent filed grounds of opposition in which it stated that the application was misconceived and incapable of being granted since it seeks to stay execution of negative orders which merely dismissed the suit; that no substantial loss or irreparable injury has been demonstrated by the applicants, and nor is there evidence of the appeal being rendered nugatory; and that the application is defective, premature, improperly before the Court, and that it ought to be struck out.
5. When the matter was called out for virtual hearing before us on 30th January 2024, learned counsel, Ms Ruth Rotich appeared for the applicants while Ms Nzisa appeared from the respondent. Both counsel informed the Court that they had filed their submissions which they relied on with minimal highlighting.
6. In their submissions, the applicants rehashed their case as set out above and relied on the case of Stanley Kang'ethe v Tony Keter & 5 others [2013] eKLR, highlighting the principle that an arguable appeal is not one that must necessarily succeed. They also cited the case of William Nto Makuta M'ethenga v Baikimbia Kirimania [2017] KLR, submitting that the aim of a court of law is to do justice. It was urged that it is in the interest of justice that the application be allowed so as not to expose the applicants, who have occupied the suit property for over 30 years, to the risk of an eviction, an occurrence which is likely to render the intended arguable appeal nugatory.
7. On behalf of the respondent, it was submitted that there is no evidence of any threat of an eviction; that the respondents ought not to be denied the fruits of their judgement, and that their rights as the registered proprietor of the suit land should not be curtailed; that the applicants have no arguable appeal since no surveys maps were produced before the trial court to identify the exact portions of the subject property they alleged to have been occupying; that there is no demonstration that, unless the order of stay is granted, the intended appeal will be rendered nugatory; and that the judgement did not give rise to any positive order capable of being stayed and, therefore, as held in the case of Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 Others [2021] eKLR, stay cannot be granted.
8. During the hearing, Ms Nzisa disclosed that the respondent allocated ¼ acre to the applicants which it believes is the portion occupied by them, and that the respondent has no intention of removing the applicants from that portion. Hence, there is no danger of eviction



9. We have considered the application, the written and oral submissions and the law.
10. The principles that guide consideration of an application of this nature are now well settled. For an applicant to succeed, he or she must have expressed an intention to appeal against the decision in question by filing a Notice of Appeal in order to properly invoke this Court's jurisdiction. It should then be demonstrated that the appeal or intended appeal, as the case may be, is arguable, or as is often said, not frivolous. The applicant must in addition show that the appeal would be rendered nugatory absent stay. The conditions apply both to a party seeking stay or injunction pending an appeal or intended appeal. The applicant must satisfy the two conjunctive conditions so that, even if only one of them is satisfied, the application would still fail. The rationale for these twin principles was explained by this Court in *Peter Gathecha Gachiri v Attorney General and 4 Others Civil Application Nai 24 of 2014* (unreported) where it was held that:

“Rule 5(2)(b) of the Rules of this Court on which the application is premised confers on us independent discretionary jurisdiction exercisable in accordance with the twin principles, namely, that the appeal must be shown to be arguable and, in addition, that the appeal, if successful, shall be rendered nugatory if stay is not granted. These principles have been developed by the court as a guide in the exercise of its discretionary power in determining an application premised on Rule 5(2)(b). The rationale in these principles is intended to balance two parallel propositions; first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and; secondly that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it in the next higher court (see *Butt v Rent Restriction Tribunal [1982] KLR 417*. See also *Kenya Shell Ltd v. Kibiru & Another [1986] KLR 410*...It is imperative for an applicant seeking an order under Rule 5(2)(b) to satisfy the Court on both principles. An applicant must show that the appeal is not frivolous and is arguable. It is now settled that an applicant need not demonstrate a plethora of arguable points. It is sufficient even if there be a solitary arguable point. An applicant must further show that the appeal, if successful, will be rendered futile if stay is not granted.”

11. In *Stanley Kang'ethe v Tony Keter & 5 others (supra)*, the Court emphasised that it is sufficient if a single bonafide arguable ground of appeal is raised. See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004*. Further, 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. See *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd & 2 others, Civil Application No. 124 of 2008*.
12. With regard to the nugatory aspect, which an applicant must also demonstrate, it has been held by this Court that the term 'nugatory' has to be given its full meaning since it does not only mean worthless, futile or invalid, but also means trifling. Further, whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen, will be reversible or, if not reversible, whether damages will reasonably compensate the aggrieved party. See *Stanley Kangethe Kinyanjui v Tony Ketter and 5 others (supra)*.
13. In this case, the applicants intend to argue in their intended appeal that, based on the evidence presented before the trial court, the court erred in finding that they had not proved acquisition of the suit property by adverse possession. The appeal, when filed, will be a first appeal before this Court, and hence this Court will be enjoined to re-evaluate the evidence presented before the trial court, subject it to fresh scrutiny and arrive at its own decision on the issue as to whether the trial court's finding that the applicants did not prove their case was correct. Whether or not the Court will be persuaded



by the applicants is another matter altogether. As held in *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008, in this application, we are not concerned with determining whether or not that appeal will succeed. We are satisfied that the applicants have successfully crossed the first hurdle.

14. Regarding the second issue, the applicants have deposed that attempts have already been made, albeit by unknown people, to have them evicted. The respondent contends that it does not intend to evict the applicants from the $\frac{1}{4}$ acre portion which it believes the applicants occupy. It is however silent as to whether it does not intend to evict the applicants from the rest of the land. In *Raol Investment Ltd. v Lake Credit Finance Ltd.* Civil Application No. Nai. 303 of 1997, this Court opined that in cases where the dispute revolves around land, should the property pass to a third party, the appeal or intended appeal would be rendered nugatory.
15. As regards the propriety of granting the orders sought, the applicants are not only seeking stay of execution but also injunctive orders pending the intended appeal. While a stay may be inappropriate to grant in circumstances where no positive order is issued, nothing bars the Court from issuing injunctive reliefs in appropriate cases. This Court distinguished applications for stay pending appeal from those seeking injunctions pending appeal in *Martin Nyaga Wambora v. The County Assembly of Embu and 6 Others* (Civil Application Nai 46 of 2015 (unreported) in which this Court stated, with regard to the exercise of its discretion under rule 5(2) (b) as opposed to the principles that govern the grant of interlocutory injunctions in the High Court under Order 40 of the Civil Procedure Rules, as follows:

“The motion before us is one for injunctive orders under Rule 5(2)(b) of the Court of Appeal Rules. The guiding principles in invoking this Court’s jurisdiction under that rule, is as restated in *Kenya Hotel Properties Limited v Willsden Investment Limited & 6 Others*, (supra) as follows–

‘first, the intended appeal should not be frivolous or as otherwise put, the applicant must show that it has an arguable appeal, and secondly, this Court should ensure that an appeal if successful should not be rendered nugatory.’

The principles that govern an application for injunction under rule 5(2)(b) of the Court Rules, are not the same as the principles that govern an application for interlocutory injunction under Order 40 of the Civil Procedure Rules 2010 (formally Order 39 of the repealed Civil Procedure Rules). In the latter, the principles were well settled in the celebrated case of *Giella vs Cassman Brown & Co. Ltd.* [1973] EA 358, that:

‘First, an applicant must show a prima facie case with a probability of success. Secondly, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience.

...A careful examination of these principles reveals that unlike Rule 5(2)(b), where the establishment of an arguable appeal that is not frivolous is sufficient, (an arguable appeal not necessarily meaning one which must succeed), an application under Order 40 requires that a prima facie case with a probability of success must be established and as stated in *Mrao Ltd. v. First American Bank of Kenya Ltd. & 2 Others*, [2003] KLR 125 –

‘... A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case



Thus, the principles for granting an interlocutory injunction under Order 40 of the Civil Procedure Rules provides a bar which is a notch higher than that required for granting an injunction under Rule 5(2)(b) of this Court’s Rules.”

16. Where an applicant applies for both stay and injunction pending appeal, and yet the circumstances do not permit the grant of stay, the Court is perfectly entitled to consider the application for injunction. That was the position adopted by this Court in *Joyce Mutethya Kimanhi v Timothy Kimanzi Kiiva and others*, NAI Civil Application No. E321 of 2021 where it held that:

“Applying the above principles to the rival positions herein, it is our position that considering the nature of the circumstances surrounding the litigation giving rise to the intended appeal, it is not only fair and just that the applicant be accorded an opportunity to be heard on her intended appeal but also that the suit properties be preserved pending hearing of the intended appeal. The above conclusion now leads us to determine which of the two substantive prayers that is stay and injunction is the appropriate relief for us to grant herein. As correctly contended by the respondents, what the High Court issued as the final order is a negative order. It is now trite that a negative order is incapable of being stayed. See *Nairobi Metropolitan PSV Saccos Union Limited and Twenty Five others vs. County of Nairobi Government and three others* [2014] eKLR for the proposition that there is no jurisdiction to grant a relief under Rule 5(2) (b) of this Courts Rules where the High Court’s order either resulted in a dismissal or a striking out order; or alternatively where the court did not order either party to do or refrain from doing something capable of being restrained. The above being the correct position in law, it is our position that it is only the injunction relief that can issue herein as an appropriate relief.”

17. Accordingly, nothing bars this Court from considering the limb of the application seeking injunction pending the intended appeal.
18. In our considered view, the applicants have met the twin conditions for the grant of an order of injunction pending the intended appeal. In the premises, the order that commends itself to us, and which we hereby grant, is that the respondent be restrained from selling, trespassing on, alienating, evicting or interfering with the applicants’ quiet possession, occupation, peaceful enjoyment and/ or use of the portions of land measuring 2.5 acres or thereabouts and 4 acres or thereabouts of Plot No. MN.SEC.111/13, CR 5692 (the suit property) occupied by the applicants pending hearing and determination of the intended appeal.
19. The costs of this application will be in the appeal.
20. It is so ordered

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

A. K. MURGOR

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COURT OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.

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COURT OF APPEAL

G. V. ODUNGA



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COURT OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

