



Kaptoror Holdings Limited v Kibore & 3 others (Civil Application 073 of 2022) [2024] KECA 532 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KECA 532 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION 073 OF 2022
F SICHALE, LA ACHODE & WK KORIR, JJA
MAY 9, 2024**

BETWEEN

KAPTOROR HOLDINGS LIMITED APPLICANT

AND

KIPRONO KIBORE 1ST RESPONDENT

TOM ROTICH 2ND RESPONDENT

HOSEA KIPLAGAT CHUMA 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

(Being an application for stay of proceedings from the ruling and decree (E. Obaga J) dated 12th May 2022 at Eldoret) in ELC Case No. 553 of 2013)

RULING

1. The singular prayer in the application dated 23rd May 2022, filed by Kaptoror Holdings limited, the applicant, is that pending the hearing and determination of the intended appeal, this Court be pleased to stay the proceedings in ELC 553 of 2013. Tom Rotich, Kiprono Kibore, Hosea Kiplagat Chuma, Daniel Chebet and the Attorney General are the first to fifth respondents respectively.
2. The application is premised on the grounds to be found on its face and the supporting affidavit sworn on 25th May 2022, by Titus K. Barmazai, the applicant’s director.
3. The grounds of the application are that the applicant was declared as the rightful owner of the land known as LR No. 10394 (Suitland), in Judicial Review Case No. 1411 of 2001, *Republic v Chief Lands Registrar ex parte Kaptoror Holdings Limited*. As a result, the Chief Land Registrar was directed to register the applicant as the owner of the land. The said judgment was not challenged. That notwithstanding, the 4th respondent had adversely mentioned the suit land in a suit filed by the 1st and



- 2nd respondent, in Eldoret ELC Case No. 553 of 2013, with a view of extending an ownership claim over it.
4. The applicant approached the court seeking to expunge documents which adversely mentioned the suit land. The applicant asserted that the High Court in JR No. 1411 of 2001 had already pronounced itself and declared the applicant as the lawful owner of the suit land. The court considered the application and held that the applicant, being an interested person, could not seek to expunge the said documents. The court dismissed the application.
 5. Dissatisfied by the court's decision, the applicant filed an appeal to this Court faulting the judge for failing inter alia, to make determinations on its lack of jurisdiction to handle a question on ownership of LR No. 10394; to find that unless the decision of the High Court in JR Case No. 1411 of 2001 was reviewed and / or appealed, it lacked the jurisdiction to consider any question relating to the suit land; to find that under section 7 of the Civil Procedure Act, a court is barred from trying an issue which has been heard and finally decided by the court; to find that the judgment in JR case No. 1411 of 2001 was a judgment in rem rather than one in personam.
 6. In their affidavit, the applicant deposed that the court in ELC 553 of 2013 directed the parties to take a date in the registry for expeditious disposal of the main suit, hence the urgency of this application. Additionally, that the applicant stands to suffer great prejudice and irreparable harm should this application not be granted, as the 4th respondent shall lay an adverse claim on the parcel of land in utter defiance of the orders of the court issued in JR Case No. 1411 of 2001.
 7. That in the event the 4th respondent successfully defends the claim against the 1st and 2nd respondents in ELC 553 of 2013 and the court adopts its statement of defence, the instant application would be rendered nugatory. Its success would be mere pyrrhic victory as the proceedings in the main suit would have sanctioned the violation of the applicant's right to its property which it seeks to protect. The applicant further deposed that a prima facie case has been demonstrated and that the application was filed expeditiously.
 8. The applicant filed an application to be enjoined as an interested party in Eldoret ELC No. 553 of 2013, seeking to have the documents filed in court touching on LR. No. 10394, particularly a letter dated 13th June 2019, be expunged from the record. Its application was allowed to the extent that the applicant was joined in the proceedings, but the court dismissed the prayer to have the documents expunged from the record.
 9. The respondents did not file a replying affidavit in opposition to this application. The firm of M/S Rachier & Amollo LLP Advocates filed written submissions dated 4th July 2022 on behalf of the applicant, while the firm of Kibichiy & Company Advocates filed the 4th respondent's submissions dated 17th June 2023, in opposition to the application.
 10. The applicant reiterated what was in the supporting affidavit and cited the case of Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR, to urge that an arguable appeal is not one that must necessarily succeed, but one that ought to be argued fully before the Court. That the applicant's intended grounds of appeal can be granulated into the main arguable issue that the ELC lacks jurisdiction to entertain any claim of ownership over LR. No. 10394 as purported by the 4th respondent, since the claim over the suit land is *res judicata*. That the judgment issued in JR Case No. 1411 of 2001 in respect of the suit land was a judgment in rem and not judgment in personam.
 11. On the nugatory aspect, it was urged that in the event the 4th respondent successfully defends the claim against the 1st and 2nd respondents in ELC 553 of 2013, then the intended appeal would be rendered nugatory.



12. In rebuttal, the 4th respondent urged that on whether the application is arguable, the principle of *res judicata* was not established as the 4th respondent was not a party in JR No. 1411 of 2001. Further, that the case was not on ownership of the parcel of land but rather on whether the Lands Registrar should be compelled to transfer LR. No. 10394 to the applicant. Hence, no dispute as to ownership of LR. No. 10394 has ever been determined by any court or tribunal capable of rendering the proceedings barred by the doctrine of *res judicata*.
13. The 4th respondent relied on this Court's decision in [Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others](#) [2017] eKLR, to assert that the matter before the ELC court was not *res judicata*. It was argued that the applicant has filed the instant application as a delaying tactic and intends to use this Court to further ensure that the parties in Eldoret ELC No553 of 2013 do not have their day in court. It was urged that the applicant has not shown that it has an arguable appeal.
14. The 4th respondent further urged that the applicant has approached this Court with unclean hands having failed to supply a copy of the judgment in the Judicial Review case. That the power to grant stay of proceedings is a discretionary one and ought to be exercised sparingly, and only in exceptional cases. That the applicant has not presented a case which in the interest of justice deserves the orders sought. Lastly, that he provided evidence to the trial court, of his interest in both LR Nos. 11205 and 10394, a sale agreement between himself and the other parties to the suit, and the receipt of payment issued by the Ministry of Agriculture in the year 1989.
15. We have looked at the application, the grounds in support thereof and the rival arguments in the submissions on record. We have also looked at the applicable law. In exercise of the jurisdiction under Rule 5(2)(b) of this [Court's Rules](#), the Court must be satisfied on the twin principles that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory. We are guided by the decision of [Trust Bank Limited and Another v Investech Bank Limited and 3 Others](#) [2000] eKLR where this Court stated thus:

“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...”
16. In the decision of [Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others](#) [2013] eKLR, relied on by the applicant, this Court described an arguable appeal as follows:
 - “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.
 - 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.”
17. Upon considering the grounds in the memorandum of appeal together with the 4th respondent's rebuttal, we are of the view that the question as to whether the claim of ownership over LR. No. 10394 as advanced by the 4th respondent is *res judicata* is arguable. We are aware that even one arguable issue is sufficient to avail the applicant the orders sought. We shall say no more on this lest we hamstring the bench that will be seized of the appeal.



18. In respect to the nugatory aspect, this Court pronounced itself in *Stanley Kang'ethe Kinyanjui (supra)* as follows:

- “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”.

19. In the present application, the applicant posited that if the application is not allowed, the case before the superior court will proceed, and if the 4th respondent successfully defends the claim against the 1st and 2nd respondents in Eldoret ELC 553 of 2013, then the intended appeal would be rendered nugatory. The 4th respondent did not give his position on this. In our considered view, we agree with the applicant, that the intended appeal will be rendered nugatory should it succeed, if the proceedings before the superior court are not stayed and the 3rd and 4th respondent’s defence is successful.

19. The applicant having satisfied the two limbs as required under Rule 5 (2) (b) of this *Court’s Rules*, the application dated 23rd May 2022, is found to be meritorious and is hereby allowed. The costs shall abide the appeal.

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

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

