



**Karwenju v Ngenye & another (Civil Application
E410 of 2023) [2024] KECA 492 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KECA 492 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E410 OF 2023
A ALI-ARONI, LA ACHODE & PM GACHOKA, JJA**

MAY 9, 2024

BETWEEN

JANE WAMBUI KARWENJU APPLICANT

AND

JOSEPH MAINA NGENYE 1ST RESPONDENT

JOSEPH WANYOIKE THUO 2ND RESPONDENT

(An application for an injunction and stay of execution of the Judgment pending hearing and determination of an intended appeal arising from the Judgment of the Environment and Land Court at Nairobi (Angote, J.) delivered on the 19th of July, 2023) in ELC Case No. 413 of 2017)

RULING

1. The application before the court is brought under sections 3A and 3B of the [Appellate Jurisdiction Act](#), rules 5 (2)(b) and 47 of the *Court of Appeal Rules*, 2022. It seeks an order of injunction to restrain the respondents, their agents, successors, or assigns from subdividing, annexing, alienating, and any interference with the ownership and possession of Plot No. 38B Kayole Shopping Centre and in the alternative, a stay of the Judgment of the Land and Environment Court (ELC) in Case No. 413 of 2017, pending hearing and determination of an intended appeal.
2. The application is supported by grounds set out in the application and the supporting affidavit of Jane Wambui Karwenju, the applicant sworn on 18th of August 2023. It is the applicant's disposition that the trial court's judgment was arrived at erroneously as it has glaring omissions in that: the judge failed to consider the entire pleadings before him, thus arriving at a wrong decision; that the applicant had purchased the property from the 1st respondent on the 5th February 2010 and was subsequently issued with an allotment letter; that she thereafter took possession of the suit property and has since been paying land rent and rates to the Nairobi City County; that unknown to her the 1st respondent purported to have sold the property to the 2nd respondent in 2008 in fraudulent documents that



were generated in 2017; that in 2016 the 2nd respondent purportedly sold the said property to one John Ngatho Kamau; that the applicant had sought approvals to develop the said property before the respondents interrupted her; that the trial court delivered a judgment on the 19th of July, 2023 without any notice, though the judgment was scheduled for the next day; that the suit property is exposed and likely to be alienated to third parties; that John Kamau Ngatho may proceed to register the property in his name; and that unless the orders are issued the applicant is likely to ultimately lose her property and the appeal will be rendered nugatory.

3. In her draft memorandum of appeal, the applicant inter alia, claims that the trial court erred in fact and law: in making a finding that she had not proved her case against the respondents, yet on the other hand, the court found that the respondents had proved on a balance of probabilities the allegations of fraud against the applicant; in either deliberately or inadvertently failing to determine the main issue as to whether the respondents had trespassed on the applicant's property; in granting the respondents reliefs they had not sought; and in relying heavily on the forensic examination report that was not produced in court by the maker and which was not conclusive.
4. The application was vehemently opposed by the respondents vide a notice of preliminary objection dated 24th August 2023 and a replying affidavit of the 1st respondent Joseph Maina Ngenye of even date. The respondents' case is that the suit property in the ELC Case and the subject of this application are different, in that the property subject of the ELC Case was B38, Kayole Shopping Centre, whereas the property referred to herein is 38B, Kayole Shopping Centre; that the suit property is currently owned by a third party one John Kamau Ngatho since 2016; that the applicant has not shown that she will suffer irreparable loss; that the applicant has never been in possession or occupation of the suit property; that there is nothing to stay as the trial court simply dismissed the case; that the orders were negative and not capable of being stayed; and that the respondents are not capable of alienating the property as they are not the owners.
5. The matter was heard on the GoTo virtual platform on the 27th of November 2023. The applicant's counsel, Mr. Chumo was present and had filed his submissions which he highlighted orally, whereas the respondents' counsel though duly served was absent and had not filed any submissions.
6. In his submissions counsel for the applicant reiterated the averments in the grounds on the face of the application and in the supporting affidavit, which we need not rehash. Further counsel argued that the applicant has an arguable appeal with a chance of success in that the trial court denied the applicant a fair hearing; she was not allowed representation by counsel; and that the grounds of appeal are not frivolous.
7. On the nugatory aspect counsel submitted that if the injunction is not granted the appeal will be rendered nugatory; in that the 1st respondent may hurriedly transfer the suit property to the third party named; and may facilitate its disposal, or cause it to be charged as a security.
8. Before we consider the application, two things have come to our attention. One, which is positive is that in his submissions learned counsel for the applicant wisely dropped the prayer for a stay of execution and confined himself to the prayer for an injunction. We say so because the trial court issued a negative order of dismissal, which is incapable of being stayed. On the negative side, in the submissions learned counsel cunningly introduced a new ground alleging that the applicant was not represented by counsel, thus she was not accorded a fair hearing. This ground is neither in the application nor in the draft memorandum of appeal. We do not have the benefit of the proceedings at this stage and thus we are unable to verify the allegation. In any event, a ground ought to be pleaded and not alluded to at the level of submissions.



9. Turning to the merits of the application, rule 5(2)(b) of this [Court's Rules](#) provides that:

“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:

a. ...

b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

10. Under the rule, for a party to succeed, the court ought to be satisfied that the twin principles have been met. Firstly, the court must be satisfied that the intended appeal is not frivolous.

Even one arguable ground will suffice. At this point, we are not concerned with the merit or demerit of the intended appeal, as it is not for us at this stage to interrogate and be convinced that the appeal is likely to succeed, this will be the concern of the bench that will hear and determine the appeal.

In the case of [Stanley Kangethe Kinyanjui vs. Tony Ketter & Others](#) [2103] eKLR, this Court had this to say on the first principle:

“That in dealing with Rule 5(2)(b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court. The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

11. In our view the applicant has sufficiently demonstrated by the grounds on the face of the application, the affidavit in support of the same, and the grounds on the draft memorandum of appeal, that she may have an arguable appeal that may not be said to be frivolous. We are therefore satisfied that the applicant has met the threshold of an arguable appeal.

12. Secondly, the court has to be satisfied that should the order of stay or injunction be declined the appeal will be rendered nugatory.

In the case of [Multimedia University & Another vs. Professor Gitile N. Naituli](#) [2014] eKLR this Court stated as follows;

“In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.’

“The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

13. We note that other than mere allegations on the ownership of the parcel of land, the applicant has not demonstrated that she is in actual occupation of the suit property; whether any action to transfer has commenced or is likely to be done; and whether indeed the property is not already registered in the name of a third party. The applicant has therefore failed to demonstrate how the intended appeal will be rendered nugatory and how compensation by way of award of damages is not adequate.



14. Consequently, the second principle having failed, we decline to grant the application. It is thus dismissed with no orders as to cost as the respondents did not participate or file submissions.

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

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

L. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

