



Ndambuki & another (Suing as administrators to the Late Gregory Ndambuki) v National Land Commission & 2 others (Civil Application E092 of 2024) [2024] KECA 534 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KECA 534 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E092 OF 2024
P NYAMWEYA, LA ACHODE & JM MATIVO, JJA
MAY 9, 2024**

BETWEEN

**MARIA NDUMBA NDAMBUKI 1ST APPLICANT
KIENDI NDAMBUKI 2ND APPLICANT
SUING AS ADMINISTRATORS TO THE LATE GREGORY NDAMBUKI**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
ABEY ABDINOOR OSMAN 2ND RESPONDENT
THE CHIEF LAND REGISTRAR 3RD RESPONDENT**

(An application for orders of injunction restraining the 3rd respondent, his servants or agents from demolishing the structures on LR No. Nairobi/Block 42/118 (formerly L.R. No. 209/3271/71) or transferring or alienating the property pending hearing of intended appeal in the Environment and Land Court at Nairobi (L. Mbugua) dated 22nd February 2024 in ELC Petition No. E022 of 2023)

RULING

1. By an application dated 28th February, 2024, the applicants seek an injunction to restrain the 3rd respondent, his agents or servants from demolishing the structures erected on LR No. Nairobi/Block/42/118 (formerly LR No. 209/3271/71), or transferring or alienating the said property pending the hearing and determination of their intended appeal to this Court against the judgment delivered on 22nd February 2024 in ELC. No. E022 of 2023, (Mbugua J). The applicants also pray for costs of the application. The application is brought under Articles 159 of the Constitution and Rule 5 (2) (b) of the Court of Appeal Rules, 2022.



2. Briefly, the grounds in support of the application are that:
 - (a) the impugned judgment affirms the validity of the 3rd respondent's title to the said property and the applicants are apprehensive that if stay is refused, the 3rd respondent will repossess the said property and demolish the structures erected thereon.
 - (b) the intended appeal raises triable issues and it has reasonable chances of success.
 - (c) the intended appeal will be rendered nugatory if the injunction is refused should the appeal succeed.
 - (d) the value of the structures on the suit property cannot be ascertained at the moment and should the demolition proceed, monetary compensation will be inadequate in the event the appeal succeeds.
3. The 1st respondent did not file any response to the application or submissions nor was it represented during the hearing of the application. The 2nd respondent only filed submissions.
4. The third respondent filed a replying affidavit dated 1st March 2024 sworn on 1st March 2014. The substance of the affidavit is that he is the registered proprietor of LR. No. Nairobi/Block 42/118 and that the applicants have no arguable appeal and in the event this Court allows the application, then it should order the applicants to deposit Kshs.10,000,000/= as security.
5. Also, on record is a further affidavit dated 11th March 2024 sworn by the 1st applicant the substance of which is that the 3rd respondent attempted to demolish their structures on the said property whose value is unknown.
6. The applicants and the 2nd and 3rd respondents filed written submissions dated 22nd April 2024, 11th March 2024 and 4th April 2024 respectively which they highlighted in court orally on 22nd April 2024.
7. Learned Counsel for the applicants Mr. Munene cited *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR in support of the proposition that 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. Buttressed by the said decision, Mr. Munene maintained that the applicants have an arguable appeal because the learned judge erred in law in failing to consider the validity of the 3rd respondent's title and also failed to consider the totality of the pleadings.
8. On the nugatory aspect, Mr. Munene relied on *Reliance Bank Ltd. v Nortake Investments Ltd* [2002] 1 EA 227 at page 232 which defined the term nugatory as follows: "The term nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling." Counsel urged the Court to find that if the injunction sought is declined, the appeal if successful will be rendered nugatory and an award of damages will be inadequate remedy.
9. On behalf of the 2nd respondent, Mr. Motari submitted that the applicants' appeal is not arguable. To buttress this position, counsel cited *Nairobi City Council v Tom Ojienda & Associates* [2022] KECA 1326 in support of the proposition that the issues raised must involve serious questions of law worthy of consideration by the court or one in respect of which a reasonable argument can be put forward. It was Mr. Motari's position despite the applicants' lease expired in 2004, and they never applied its extension for a period of 19 years.
10. Regarding the nugatory aspect, Mr. Motari cited *Kenya Tea Growers Association & Another v Kenya Plantation & Agricultural Workers Union* [2012] eKLR, and *Joseph Mwangi Kamau v Jacob Ngigi Kanini & 3 Others* [2019] eKLR, in support of the holding an applicant must satisfy the court that



- the intended appeal would be rendered nugatory if the stay is refused. Mr. Motari also cited *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR in support of the holding that an applicant must demonstrate substantial loss.
11. On behalf of the 3rd respondent, Mr. Alosa submitted that the intended appeal is not arguable and that the grounds of appeal are frivolous. Mr. Alosa cited *Stanley Kangethe Kinyanjui* (*supra*) in which this Court defined an arguable appeal and maintained that the applicants have not demonstrated any proprietary rights since their lease lapsed 19 years ago.
 12. On the nugatory aspect, Mr. Alosa cited *Equity Bank Limited v West Link Mbo Limited*, Civil Appeal No. Nai 78 of 2011 (unreported) in support of the holding that the object of Rule 5 (2)
 - (b) is to preserve the subject matter of the appeal and argued that in the instant case, there is no subject matter to preserve. Lastly, Mr. Alosa pointed out that the trial court noted that the applicants failed to express any interest in renewing the lease.
 13. Our invitation to intervene on behalf of the applicants has been invoked under Rule 5 (2) (b) of the *Court of Appeal Rules*, 2022. The principles that apply in applications under Rule 5 (2) (b) for stay of execution or of further proceedings, or for injunctive relief pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed.
 14. This Court in *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR held that for an applicant to qualify for orders under Rule 5 (2) (b), must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory. In *Eric Makokha & 4 Others v Lawrence Sagini & 2 Others* [1994] eKLR this Court:

“An application for injunction under Rule 5 (2) (b) is an invocation of the equitable jurisdiction of the Court. So, its grant must be made on principles established by equity...”
 15. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court. In *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* (*supra*), this Court described an arguable appeal in the following terms:
 - “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.”
 16. We note that from the draft memorandum of appeal, the applicants are questioning the validity of the 3rd respondent’s lease. The applicants in their intended appeal will also be inviting the Appellate Court to determine whether the learned judge misapplied the law relating to issuance of leases. The other ground cited by the appellants is that the learned judge erred in holding that they ought to have approached the trial court by way of an ordinary suit as opposed to a constitutional petition. Other grounds cited are that the learned judge erred in striking out the appellant’s replying affidavit and



holding that the appellant's ought to have filed a counter-claim challenging the validity of the title yet they had already instituted the constitutional petition.

17. We are alive to the fact that an arguable ground is not one which must necessarily succeed, but one which is not frivolous but raises a bona fide issue that can be argued fully before the Court.

Without saying more lest we embarrass the bench that will hear the main appeal, we are satisfied that the intended appeal is arguable.

18. Turning to the second prerequisite, whether the appeal, if successful, will be rendered nugatory in the event we decline to grant the injunction and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (*supra*) this Court stated:

“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. Determining whether 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 aggrieved party. In *Reliance Bank Limited v Norlake Investment Limited* [2002] 1 EA 227, this Court held that factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides.

20. We have considered the above threshold, in light of the circumstances of this case. The peculiar circumstances of this case, which we must take into account, are that the deceased's lease was for a term of 54 years with effect from 1.1.1950. The deceased died in 1997, barely 7 years before the expiry of the lease in 2004. After the expiry of the lease, the 3rd respondent applied to be allotted the land and the Commissioner of Lands approved the application on 14th June 2005. A letter of Allotment was issued to the 3rd respondent for a period of 99 years from 6th February 2007. The property was re-surveyed and a new grant was issued to the 3rd respondent. The property was registered as Nairobi/Block 42/118.

21. In striking the delicate balance of considering the interests of both parties, a court must be particularly mindful of the rights of the parties at stake in the case, and particularly the prejudice (if any) to be occasioned to either party. As we consider the parties competing interests and the peculiar circumstances of this case we note that the deceased's lease lapsed over 19 years ago. Subsequently, a new lease was issued to the 3rd respondent. From the circumstances of this case, we are satisfied that if an order of injunction is not granted to preserve the suit property, the substratum of the appeal will not be lost. This is because as alluded to above, over 19 years had since lapsed after the expiry of the deceased's lease. Further, a lease has since been issued in favour of the 3rd respondent. In the event the Court hearing the appeal finds that the deceased's interests had not lapsed with the expiry of the lease, appropriate orders can be issued cancelling the subsequent lease. In any event, no compelling argument was urged before us to suggest that the appellants cannot be adequately compensated by way of damages in the event the appeal succeeds.

22. In conclusion, we find that the applicants have not satisfied the two prerequisites. Accordingly, we hereby dismiss the applicants' application dated 28th February, 2024 with no orders as to costs, in light of the circumstances giving rise to the application.



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

P. NYAMWEYA

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

