



**Adero & 3 others v Douglas & 3 others (Civil Application
E103 of 2024) [2024] KECA 976 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KECA 976 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E103 OF 2024
SG KAIRU, F TUIYOTT & GWN MACHARIA, JJA
JULY 31, 2024**

BETWEEN

**THOMAS NDINYA ADERO 1ST APPLICANT
TOBBY AUMA ONGANY 2ND APPLICANT
JACK JAMES ONONGNO 3RD APPLICANT
WILLIAM OCHIENG NYAWIR 4TH APPLICANT**

AND

**WILFRED OLUOCH ODALO DOUGLAS 1ST RESPONDENT
ODHIAMBO OMINDE ANDREW 2ND RESPONDENT
ODINYA OOKO 3RD RESPONDENT
DABID KOLA AWITI 4TH RESPONDENT**

*(Being an application for injunction and stay of execution of the orders,
judgement and decree of the Environment and Land Court at Nairobi
(Kimongoi, J.) dated on 9th November 2023 in ELC NO. 366 OF 2021)*

RULING

1. By a Notice of Motion dated 15th January 2024, brought under rule 5 (2) (b) of the [Court of Appeal Rules](#) 2022, the applicants seek orders of injunction restraining the respondents, their servant and/or agents from conducting any business related to the objectives and functions of the Dandora Off Kangundo Road Self Help Group (hereinafter the entity), including distribution, sale or transfer of any land within the scheme, and dissolving the entity or engaging in any action that is counterproductive to the objectives of the entity.



2. status quo orders that no sale and transfer of any property of the entity, calling for any meeting to dissolve the entity or interfering with all documents handed over to the present office bearers pending the hearing and determination of the appeal.
3. The core issue before the High Court, which aggrieved the applicants, was the proposal to dissolve the entity on the basis that it had achieved its objectives. The applicants also sought orders on whether the current officials of the entity are in office legally after failing to convene any Annual General Meeting since 2004.
4. The application is based on the grounds on its face and it is also supported by the affidavit of Thomas Ndinya Adero (1st applicant) sworn on 15th January 2024 on behalf of the other applicants. The 1st applicant deposed that together with the other applicants, they were the founding members of the entity. They came across an advertisement by the present office bearers purporting to dissolve the entity on the basis that its objectives have been accomplished.
5. It was deposed that the learned Judge erred in dwelling on the issue of land ownership only, but failed to address whether the present officer bearers are in office legally, for misunderstanding that the issue before the court was land-

dispute related whereas it entailed wrangles over the projects initiated and ran by the entity; and failing to find that there was no nexus between the entity and Dandora Off Kangundo Road Squatters Resettlement Project, thereby arriving at an erroneous decision.
6. To further support their application, the applicants filed written submissions dated 17th April 2024. They highlighted two main grounds they suppose to be arguable, being that the entity is registered and regulated by law requiring elections are done after every 2 years while the same has not been done since the year 2004; and that if the entity is dissolved, there will be multiple suits filed in relation to the plots being held by the entity.
7. Further, the applicants relied on the case of *Kenafric Matches Ltd v Match Masters Limited & Another* (Civil Application E092 of 2021) (2021) KECA 188 (KLR) (19 November 2021) (Ruling) where this Court outlined the principles for granting injunctive orders under rule 5 (2) (b) of the *Court of Appeal Rules*, 2022. It was urged that the appeal is not frivolous for the reasons that the entity has never conducted elections and it holds land on behalf of its members. On the nugatory aspect, it was submitted that if the entity is to be dissolved, there will be losses amounting to Kshs. 1 billion.
8. Opposing the application, the respondents through Douglas Odhiambo Ominde (2nd respondent) filed a replying affidavit sworn on 25th April 2024. It was deposed that the trial court determined all the issues raised by the applicants in their suit; the applicants ceased to be members of the entity and they have no locus standi to participate in its affairs; and that the respondents were duly elected by the members of the entity who had no issues with them hence their re-election from time to time.
9. ‘Obama Estate’, and that that is now the present status quo.
10. The respondents stated that the applicants have failed to meet the threshold for grant of orders under rule 5 (2) (b) in that the trial court dismissed the applicants’ suit seeking permanent injunction against the respondents from dealing in whatsoever manner with any plots within L.R. Nos. 18271, 18272, 18276 and 18277; and that since the applicants have never owned any of the properties, the intended appeal cannot be rendered nugatory. Furthermore, the orders emanating therefrom were negative in nature as none of the parties were required to do or refrain from doing anything, and were thus incapable of being stayed.



11. In their submissions dated 25th April 2024, the respondents additionally submitted that one of the applicants' main grounds of appeal is that the High Court erred when it misconstrued the process of filing and prosecuting a representative suit; that Order 13 Rule 1 of the *Civil Procedure Rules* provides that a party bringing a suit on behalf of others, must file an authority to act or plead duly signed by the other parties to the suit. They relied on the case of *Research International East Africa Ltd v Julius Arisi & 213 Others* (2007) eKLR where this Court underscored the rationale of the mandatory provisions of Order 13 Rule 1 (*supra*). Hence, the applicants' intended appeal cannot be termed to be arguable.
12. In support of the proposition that the orders sought to be stayed are negative, the respondents relied on this Court's case of *Registered Trustees Kenya Railways Staff Retirement Benefits Scheme v Milimo Muthomi & Co. Advocates & 2 Others* (Civil Appeal (Application) E383 of 2021) (2022) KECA 491 (KLR) (18 February 2022) (Ruling).
13. It was also emphasized that the orders being sought have been overtaken by events; that the party against whom the orders being sought are being directed to, is not a party to this suit; and that flowing from the cardinal principle that no party ought to be condemned unheard, the application ought to be dismissed with costs.
14. We heard the parties via the Go to virtual platform on 30th April 2024. Learned counsel Mr. Omino appeared on behalf of the applicants while learned counsel Mr. Wafula appeared on behalf of the respondents. They basically regurgitated the averments in the affidavits in support of, and in opposition to, the application, and we shall therefore not rehash the oral submissions.
15. We have carefully considered the application, the grounds in support thereof, the response, the submissions made by each side, the authorities cited and the law.
16. Komingoi, J. dated and delivered on 9th November 2023. This Court's discretion under rule 5 (2) (b) allows the Court to grant stay of execution orders, injunction and/or stay of proceedings as it may deem or think fit.
17. Before we address whether the applicants have met the threshold for the grant of orders of injunction, it is imperative that we first address the question of whether the orders sought to be stayed are negative in nature as argued by the respondents.
18. We have considered the final orders issued by the trial court. The learned Judge was not convinced that the applicants had proved their case and, in the premise, dismissed the applicants' suit with costs. While it is true that neither party was required to do or to refrain from doing anything, the nature of the orders as crafted by the applicants before us seeking injunctive relief, is one which this Court can grant even if the orders being challenged are negative in nature.
19. The principles for granting injunctive orders under rule 5 (2) (b) of the Court of Appeal Rules is a well-trodden path. The applicant must establish that the intended appeal is arguable and that it will be rendered nugatory if the orders sought are not granted.
20. *Trust Bank Limited and Another v 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...”

21. We have perused the Memorandum of Appeal as annexed by the applicants. The applicants raised 10 grounds of appeal. The applicants are mainly aggrieved by the fact that the learned Judge failed to allegedly address the core issue in the suit they filed in the High Court; that the learned Judge heavily relied on the respondents’ evidence to the exclusion of the applicants’; and that the learned Judge misconstrued the process of filing a representative suit. The orders as sought by the applicants is to refrain the respondents from further dealing with the suit plots.
22. We are cognizant that a single bona fide arguable ground raised by the applicants will suffice. Without stating more lest we embarrass the bench that will ultimately hear the appeal, we are of the view that the grounds raised in the memorandum of appeal are not idle and ought to be given a chance to be ventilated. Hence, the applicants have satisfied the first limb.
23. *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* (2013) eKLR, this Court stated 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. 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.”
24. Even as we consider if the intended appeal will be rendered nugatory, we have to weigh and balance the competing interests. The applicants contend that if injunctive orders are not granted, the appeal will be rendered nugatory because the objectives of the entity are not yet completed. The respondents took the position that there is nothing to be granted since the plots have already been allocated.
25. According to the documents annexed to the applicants’ application, there are minutes which show the allottees of the various plots. Further, in the list of names, there is a column written original ownership and alternate ownership. We believe that the ‘alternate ownership’ column are the new allottees.
26. The applicants did not rebut the deposition by the respondents that the plots have already been developed. In the respondents’ replying affidavit, there is pictorial evidence of how the area has since developed with individual houses, schools, medical and market centres public amenities like the Police Station and so forth
27. Therefore, it is more probable than not, that the suit plots have already been distributed to third parties. In the premises, it is not possible to grant injunctive orders against persons who are not parties to this appeal without them being given an opportunity to be heard.
28. We further observe that the applicants asked for status quo orders on the sale of plots belonging to the entity. As we have observed hereinabove, the said plots were already sold to third parties or are even being held by the original owners and there is substantial development which has taken place. On the basis that the plots have already been sold to third parties, the orders of status quo sought have obviously been overtaken by events.
29. In addition to the foregoing the applicants have not outlined with specificity the plots which they seek status quo order to be maintained. We cannot possibly issue a ‘blanket order.’ By parity of reasoning and considering the material before us, we find that the applicants’ have not established that if the appeal is successful, they will suffer nugatory absent of stay.



30. It is well settled that for an application under rule 5(2)(b) of this *Court's Rules* to succeed, the applicant must satisfy both limbs of the twin principles; that is that the appeal is arguable and the same will be rendered nugatory if stay is not granted.
31. In the circumstances, the applicants having failed to satisfy both limbs of the requirements under rule 5(2)(b) of this *Court's Rules*, we find the Notice of Motion dated 15th January 2024 devoid of merit and is hereby dismissed with costs to the respondents.
32. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. W. NGENYE - MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

