



Amos Njau Mureithi & Rachael Wanjiku Mureithi (Administrators of the Estate of Evanston Mureithi Kiboi - Deceased) & another v Maina & 4 others (Civil Application E359 of 2023) [2024] KECA 889 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KECA 889 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E359 OF 2023
K M'INOTI, AK MURGOR & S OLE KANTAI, JJA
JULY 26, 2024**

BETWEEN

**AMOS NJAU MUREITHI & RACHAEL WANJIKU MUREITHI
(ADMINISTRATORS OF THE ESTATE OF EVANSTON MUREITHI KIBOI -
DECEASED) 1ST APPLICANT**

**GEORGE GITONGA KANYI & CYRUS PETER KANYI (ADMINISTRATORS
OF THE ESTATE OF STEPHEN KANYI MUCHIRI -
DECEASED) 2ND APPLICANT**

AND

STEPHEN MWANGI MAINA 1ST RESPONDENT

WILSON IRUNGU NDIRANGU 2ND RESPONDENT

AIR TRAVEL & RELATED STUDIES LTD 3RD RESPONDENT

HOUSE & HOMES LTD 4TH RESPONDENT

DISTRICT LAND REGISTRAR, NGONG 5TH RESPONDENT

(Application for injunction pending the hearing and determination of appeal from the ruling and order of the Environment and Land Court at Kajiado (Komingoi, J. dated 29th June 2023 in ELCC No. 105 of 2022)

RULING

1. The Motion on Notice determined by this ruling is dated 28th July 2023 and taken out under rule 5(2) (b) of the *Court of Appeal Rules* jointly by Amos Njau Mureithi and Rachael Wanjiku Mureithi (1st Applicant) in their capacity as administrators of the Estate of Evanston Mureithi Kiboi (Deceased)



and George Gitonga Kanyi and Cyrus Peter Kanyi (2nd Applicant), in their capacity as administrators of the Estate of Stephen Kanyi Muchiri (Deceased).

2. The applicants seek an order of injunction to restrain the respondents from selling, transferring, entering, construction on or otherwise interfering with some 49 specified plots, namely Plots Nos. 94875, 94876, 95258, 99163 to 99199 and 99200 to 99208, which are subdivisions of the property known as Title No. Ngong/Ngong/23839 pending the hearing and determination of an appeal from the ruling and order of the Environment and Land Court at Kajiado (Komingoi, J.) dated 29th June 2023.
3. By that ruling, the Environment and Land Court dismissed an application by the applicants for injunction to preserve and safeguard the suit properties pending the hearing and determination of a suit in which they contend that 1st respondent, Stephen Mwangi Maina fraudulently and unlawfully acquired the suit properties before transferring the same to the 2nd respondent, Wilson Irungu Ndirangu, and ultimately to the 3rd respondent (Air Travel & Related Studies) and the 4th Respondent (House & Homes Ltd).
4. Briefly, the background to the application is as follows. At all material times Title No. Ngong/Ngong/23839 was registered in the name of Evanston Mureithi Kiboi (deceased) (Kiboi) who died on 4th January 2001. Stephen Kanyi Muchiri (deceased), who is represented by the 2nd applicant, stakes a claim to a portion of Title No. Ngong/Ngong/23839 on the basis of an order of the High Court which found that Kiboi held the same in trust for him.
5. On or about 14th December 2022, the applicants filed in the Environment and Land Court at Kajiado Suit No. 105 of 2022 challenging as fraudulent the acquisition of Title No. Ngong/Ngong/23839 by the 1st respondent and its subsequent sale and transfer to and subdivision by the 3rd and 4th respondents. They pleaded that the purported sale of Title No. Ngong/Ngong/23839 by the deceased to the 1st respondent on 20th November 2002 was fraudulent because by the date of the purported sale, the deceased was dead for one year and eleven months. They further pleaded that the deceased could not have sold said property to the 1st respondent because they still had in their possession the original title deed to the land. Lastly, they contended that an official search conducted on 16th July 2007, long after the deceased had allegedly sold the suit property to the 1st respondent, showed that Title No. Ngong/Ngong/23839 was still registered in the name of the deceased.
6. Simultaneously with the suit the applicants filed an application for injunction to restrain the respondents from interfering with the suit properties pending the hearing and determination of their suit.
7. It is apt to point out at this stage that despite being served, the 1st, 2nd and 5th respondent did not respond to the suit or the application for injunction. As a matter of fact, during the hearing of the present application, they did not appear even after the 1st and 2nd respondents, with the leave of the Court, were served by substituted service in the form of an advertisement in the Daily Nation of 9th April 2024. The three respondent's literally ran away from the suit.
8. The 3rd and 4th respondents opposed the application on the basis that they were bona fide purchasers for value without notice. They also contended that the applicants were guilty of laches because they did not, after the death of Kiboi, transmit Title No. Ngong/Ngong/23839 to themselves as administrators for a period of more than 20 years. They further contended that they had expended huge sums of money in developing the suit properties and that they had the suit properties in favour of a bank, which the applicants had failed to make a party to the suit.



9. After hearing the parties, the learned trial judge framed two issues for determination, namely,
 - (i) whether the appellants had met the threshold for grant of a temporary injunction, and
 - (ii) which party should bear the costs of the application.
10. By the impugned ruling, the learned judge held, on the first issue that the 3rd and 4th respondents were the registered proprietors of the suit properties under section 26 (1) of the [Land Registration Act](#), and that the applicants had failed to adduce evidence to show that the 2nd, 3rd and 4th respondents obtained the suit properties fraudulently or unprocedurally. Additionally, that the applicants obtained the grant of letters of administration of the Estate of Kiboi in 2002, but had not explain why they had not transmitted Title No. Ngong/Ngong/23839 to the beneficiaries. Lastly, the court found that the applicants had not established a prima facie case with a probability of success at trial.
11. As regards the balance of convenience, the court found that it tilted in favour of the 3rd and 4th respondents because the character of the suit properties had already changed and they were charged to a bank, which had not been joined as a party to the suit. For the foregoing reason the court found the application for injunction bereft of merit and dismissed the same. However, the court directed that costs of the application would abide the outcome of the case.
12. The applicants were aggrieved and lodged a notice of appeal on 13th July 2023 followed by the application now before us.
13. In support of the application, the applicants' learned counsel, Ms Gachihi, relied on the supporting affidavit sworn on 28th July 2023 by Amos Njau Mureithi, as well as written submissions dated 15th August 2023. Counsel submitted that the intended appeal is arguable because the learned judge erred by holding that the applicants did not establish a prima facie case with a probability of success.
14. Counsel contended that it was patently clear that Kiboi could not have transferred Title No. Ngong/Ngong/23839 to the 1st respondent because he was long dead by the date of the alleged transfer. Counsel also relied on the fact that the applicants still had in their possession the original title deed to the said property, which they could not have retained if indeed Kiboi had sold and transferred the said property to the 1st respondent. She further contended that if Kiboi had sold and transferred Title No. Ngong/Ngong/23839 to the 1st respondent, the official search conducted on 16th July 2007 would not have indicated Kiboi as the proprietor on that date. Counsel urged that the learned judge did not address any of these manifest irregularities in holding that the applicants had not established a *prima facie* case.
15. Counsel further cited the fact that the 1st, 2nd and 5th respondents never entered appearance or filed defences to the suit or responses to the application despite being served, including through substituted service, yet they were the best placed to explain to the court the circumstances under which the suit properties were transferred from the name of Kiboi. It was counsel's view that all this evidence adequately demonstrated that the alleged transfer of the suit property by Kiboi to the 1st respondent, the root from which the 3rd and 4th respondent claimed to derive their title, was tainted by fraud and illegality.
16. On whether the appeal risked being rendered nugatory, counsel submitted that there was real possibility of the 3rd and 4th respondents, who were developing a housing estate on the suit properties, selling and transferring the suit properties to third parties, thus placing them beyond the applicants' reach and prejudicing all the beneficiaries of Kiboi.



17. The 3rd and 4th respondents, represented by Mr. Waweru, learned counsel, opposed the application on the basis of two replying affidavits sworn on 5th September 2023 and written submission of even date. The first was sworn by Charles Gakuu, a director of the 3rd respondent and the second by John M. Wambugu, a director of the 4th respondent. The substance of the affidavits and submission was that the applicants' appeal is not arguable and neither would it be rendered nugatory if it were to succeed absent an order of injunction.
18. Counsel submitted that the 3rd and 4th respondents were bona fide purchasers for value without notice and that no fraud was pleaded or proved against them. It was further submitted that the suit properties had completely changed their character over a long period of time and that these respondents had invested heavily in them to the tune of over Kshs 800 million. In addition, the properties were charged to a financial institution which was not a party to the suit.
19. Counsel also took issue with what he considered the applicant's delay of 14 months before seeking relief after discovering the transfer of the suit properties as well as their failure for a period of over 20 years to transmit Title No. Ngong/Ngong/23839 into their names after obtaining letters of administration to the estate of Kiboi.
20. It was counsel's further submission that the intended appeal was not arguable because the applicants had not demonstrated that the learned judge was wrong in her exercise of discretion or that she had misapprehended the principles for grant of an order of interlocutory injunction.
21. On whether the intended appeal risked being rendered nugatory, counsel submitted that it was the 3rd and 4th respondents who stood to suffer greater prejudice because of their huge investment and development on the suit properties.
22. *J. K. Industries Ltd. v. Kenya Commercial Bank Ltd.* [1982 – 88] KAR 1088). Both those principles must be demonstrated. It will not assist the applicants to prove only one of the principles. (see *Republic v. Kenya Anti-Corruption Commission & 2 Others* [2009] KLR 31).
23. It is trite that an arguable appeal is no more than one that is not frivolous. To be considered arguable, an appeal does not have to raise a multiplicity of issues. Even one bona fide issue will suffice. (See *Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 Others* [2014] eKLR). Moreover, for an appeal to be arguable, it must not necessarily succeed when it is finally heard. All that is required is that the appeal should raise an issue worthy of fully consideration by the Court. Indeed, many are the arguable appeals that raise novel points of law, yet fail spectacularly when the appeal is heard.
24. We remind ourselves that at this stage, we cannot make any definitive pronouncements on the chances or otherwise of the intended appeal, that being the province of the Court when it will hear the appeal. The applicants intend to argue that the learned judge misapprehended the nature of a *prima facie* case, granted the fact that the Kiboi was already dead and buried on the date he was alleged to have sold the Title No. Ngong/Ngong/23839 to the 1st respondent; that there could have been no sale and transfer of the said property whilst they still continue to hold its original title; that on 16th July 2007 the records at the Land Registry indicated Kiboi was still the registered proprietor of the land, and more worrying, the deafening silence of the 1st and 2nd respondents on how they acquired the suit properties. In effect the applicants contend that the learned judge erred by ignoring the evidence putting to question the root of the 3rd and 4th respondents'
25. For their part, the 3rd and 4th respondents, maintain that they are bona fide purchasers, that they are the registered proprietors of the suit properties and holders of indefeasible title, that the suit properties



have changed character and are now charged to a financial institution which is not a party to the suit, and that the applicants are guilty of laches.

26. In our view, the issues raised by the applicants are not idle or frivolous. They are eminently arguable. Whether they will succeed or not is, of course, a different matter.
27. We are equally satisfied that without an order of injunction, the intended appeal risks being rendered nugatory. The 3rd and 4th respondents have indicated their intention to alienate the developments they are carrying on in the suit properties to third parties. It is critically important that this dispute is not convoluted any further by involving third parties before the hearing and determination of the appeal.
28. We are therefore satisfied that the applicants have satisfied the two requirements under rule 5(2) (b) of the Court of Appeal Rules. We accordingly grant an order of injunction restraining the 3rd and 4th respondents from selling or transferring the suit properties until the intended appeal is heard and determined. Due to the urgency of the matter, we direct the applicants to file and serve the record of appeal within the forty-five days from the date of this ruling.
29. Costs of the application shall abide the outcome of the intended appeal. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

