



Juma (Administrator of the Estate of the Late Jacob Juma) v Shah & 3 others (Civil Appeal (Application) E306 of 2023) [2024] KECA 887 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KECA 887 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E306 OF 2023
PO KIAGE, A ALI-ARONI & LA ACHODE, JJA
JULY 26, 2024**

BETWEEN

MIRIAM JUMA (ADMINISTRATOR OF THE ESTATE OF THE LATE JACOB JUMA) APPLICANT

AND

**ASHOK RUPSHI SHAH 1ST RESPONDENT
HITEN KUMAR AMRITLAL RAJA 2ND RESPONDENT
COMMISSIONER OF LANDS 3RD RESPONDENT
REGISTRAR OF TITLES 4TH RESPONDENT**

(An application for stay of execution and injunction from the Judgment and Decree of the Environment and Land Court at Nairobi (Komingoi, J.) delivered on 28th July 2022 in ELC Case No. 312 of 2009)

RULING

1. Before the Court is the applicant’s notice of motion dated 25th March 2024 made under Rules 1(2) and 5(2)(b) of the *Court of Appeal Rules (2022)*, seeking a stay of execution of the judgment that was delivered on 28th July 2022, and for an injunction st, 2nd, 3rd and 4th respondents from alienating or encumbering Land Reference No. 18485 contained in Grant No. 64011 (hereinafter referred to as the suit property) or otherwise altering the records of the property, and from entering or remaining upon the said property pending the hearing and determination of the appeal.
2. The application is predicated on grounds that; the appeal is arguable; that the learned judge erred in fact and law in finding the letter of allotment to the deceased was invalid, despite the stand premium having been paid on 25th August, 1992 (six months late); and finding no fault in the letter of allotment to Liney Company Limited whose stand premium was paid for on 22nd November, 1994 (20 months



- late); in holding that the suit property was irregularly allotted to the deceased without proof of fraud; by relying on the testimony of Antipas Nyanjwa and hearsay evidence of Zablun Mabeya as proof of forgery; by disregarding the records kept by the Department of Lands and the Director of Survey evidencing that the deed plan for the grant held by the deceased was valid and that the grant held by the 1st and 2nd respondents was invalid; by holding without proof of fraud, that the deceased's grant was irregularly issued; in holding that the deceased had not explained the root of his title to the suit property despite evidence to the contrary; failing to find that the grant held by the deceased was first in time; and therefore valid; further that the appeal will be rendered nugatory if the orders sought are not granted.
3. In an affidavit in support of the application dated the 25th March 2024, sworn by the applicant Miriam Juma, she deposes that she is the widow of the Late Jacob Juma (deceased); that the suit property was registered in the names of the deceased under an allotment letter dated 1st March 1992 and a Grant No. IR 64011 registered on 16th August 1994; that the deceased was in occupation of the suit property and had constructed structures therein; that the 1st and 2nd respondents filed a claim against the deceased seeking the invalidation of the Grant registered in his name, vacant possession of the property and damages for trespass; that the deceased opposed the claim; that the 1st and 2nd respondents contended that they held the Grant for the suit property allotted to Liney Company Limited on 12th March 1993, registered on 5th December 1994 and transferred to the respondents on 29th March 2007.
 4. The appellant further deposes that in its judgment the trial court invalidated the Grant held by the deceased; and made an order for the vacant possession of the suit property and payment of Kshs. 50 million to the 1st and 2nd respondents on account of damages for trespass; further the 1st and 2nd respondents took the Cabinet Secretary in the Ministry of Lands and the media to the suit premises in a bid to dispossess the estate of the deceased of possession; that she is apprehensive of the Director of Criminal Investigations on the ownership of the suit property and also by the actions of the 3rd and 4th respondents to reconstruct the records of the suit property based on documents provided by the 1st and 2nd respondents. The appeal and submissions have been duly filed.
 5. The 1st respondent has filed a replying affidavit sworn on 9th May 2024 and deposes, that; the applicant is guilty of laches having failed to file the application earlier waiting to do so 19 months after judgement; the application has not been filed in good faith; the applicant filed the application after she saw press reports, in which the respondents had sought the help of the Cabinet Secretary for Lands in taking possession of the suit property; despite the judgment in their favour the 1st and 2nd respondents have been unable to access the property and which situation has persisted for the last 15 years; when the Cabinet Secretary visited the suit premises, she was also locked in the premises by goons and had to get extra security to be able to leave the site; further the 1st and 2nd respondents filed an application seeking eviction and orders directing the OCS Spring Valley Police Station to provide protection and assistance as they sought to remove the applicant from the suit property; the applicant did not oppose the application; that the applicant did not oppose the application for eviction; that however, the application by the applicant was dismissed; there is another case on the subject property being ELC No. E070 of 2023 where Davis Nathan Chelogoi is seeking to be declared the rightful owner of the suit property; the 1st and 2nd respondents filed their defence and counterclaim to the suit but the appellant who is also a party to the suit has not filed any defence; the said Davis Nathan Chelogoi filed an application seeking to restore the title document to his name; the judge ordered status quo to be maintain, which in turn granted Mr. Davis Nathan Chelogoi possession until that suit is heard and determined; that if the applicant's application for an injunction is allowed, it will be in direct conflict with the said status quo orders; that the 1st and 2nd respondents have been denied lawful and free access to the property since 2009 and have applied to the Court of Appeal, seeking to challenge the decision, granting Davis Nathan Chelogoi status quo; the property is registered in the joint names of the 1st



- and 2nd respondents; the property has since been converted into Nairobi block and issued 29 titles; the subdivision took place in the absence of any injunction or status quo orders; the titles are already issued; the land consists of 7.3 hectares, which is equivalent to 18.25 acres and is worth Kshs.1 billion.
6. The 1st respondent deposed further, that the 1st allottee of the suit property was a company known as Liney Company Limited which was issued with an allotment letter dated 12th March 1993 for 6 hectares; after survey and re-evaluation, it was discovered that the land measured 7.389 hectares and the 1st allottee company sold and transferred their shares on 18th November 1994 to a couple, Dipti Kumar Shah and Kiran Kumar Shah by way of an agreement dated 18th November 1994, in 1995 Dipti Kiran Shah and Kiran Kumar Shah subdivided the 18 acre plot into 29 plots; in an agreement dated 23rd January 2007, the 1st respondent agreed to purchase the property from Liney Company Limited then owned by Dipti Kiran Shah and Kiran Kumar Shah; the 1st respondent approached the 2nd respondent for additional funding and upon payment of the purchase price the property was transferred in their names as joint tenants with equal shares; they became the registered owners on 29th March 2007 and took possession of the same; in 2009 the applicant came and forcefully entered the property with goons and alleged to have been issued with a letter of allotment and the title; the matter proceeded in court and judgment was entered in favour of the 1st and 2nd respondents; the 1st and 2nd respondents were awarded the sum of Kshs. 50 million as damages; no execution proceedings have been commenced hence there is no need to grant stay orders.
 7. The 1st respondent further deposes that one Davis Nathan Chelogoi filed a suit ELC No. E070 of 2023 claiming ownership of the suit property; hearing proceeded on 27th July 2023; though it was established by officers from the 3rd and 4th respondents that the documents presented by the 1st and 2nd respondents were genuine and formed part of the record held by the Land Registry, the trial court handed over the suit property to the said Davis Nathan Chelogoi and froze the title and records in the Lands Office.
 8. Learned counsel for the applicant has filed submissions and a case digest both dated 16th April 2024. He submits that the appeal raises arguable points; the applicant's grant was granted on 9th August 1994 and registered on 16th August 1994 whereas the 1st and 2nd respondents' grant was dated 1st December 1994 and first registered in the name of Liney Company Limited on 5th December 1994; the two grants bear identical deed plans; the one held by the applicant was as authentic by the Director of Surveys in a letter dated 29th December 2008; further that the Grant issued to the deceased was first in time; and that it will be argued on appeal that it ought to have been given priority. In support of this argument, learned counsel relies on the case of *Wreck Motor Enterprises v The Commissioner of Lands & 3 Others* [1997] eKLR, *Gitwany Investment Limited v Tajmal Lmted & 3 Others* [2006] eKLR, and *Lawrence P. Mukiri, Attorney of Francis Muroki Mwaura v Attorney General & 4 Others* [2017] eKLR for the proposition that in a case where there are two titles, the first in time ought to prevail.
 9. On the nugatory aspect, learned counsel submits that there is a real threat of the applicant being dispossessed of the title; on 5th March 2024, the 1st and 2nd respondents with the assistance of the Cabinet Secretary, Ministry of Lands attempted to take possession of the suit property using the assistance of the police; that on 27th July 2023, the 3rd and 4th respondents carried out a purported hearing in which they determined that the records of the suit property be reconstructed to entrench the 1st and 2nd respondents as the registered owners of the same. Learned counsel relies on the cases of *Githunguri v Jimba Credit Corporation Limited (No. 2)* [1988] KLR 838, *Rahab Waithira Nderu & 6 Others v Josephine Mukami Nderu* [2007] eKLR and *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR, where the courts have granted a stay of execution and/or injunction to protect the subject matter of the appeal.



10. Learned counsel for the 1st and 2nd respondents also filed his submissions and a list of authorities both dated 9th May 2024. On whether the appeal is arguable, learned counsel submits that there is no arguable appeal and adds that the applicant did not adduce any evidence on how the deceased paid for the suit property, while the 1st and 2nd respondents gave credible evidence and in support of their case called 5 witnesses, 2 of whom were from the Lands Office; the appellant did not produce any evidence of how the deceased acquired the alleged title; while the 1st respondent produced the transfer and sale agreement in which they paid the sum of Kshs. 33 million; during the hearing, the 1st and 2nd respondents demonstrated at length, the history of their title; while the applicant despite being allowed on many occasions to call witnesses to testify in support of the ownership of the suit property, did not call any witness: the court considered the applicant's defence and scrutinized the documents produced therein and found that the same was as a result of a syndicate that had been covered up at the preliminary investigations where the appellant was found to have acquired the title irregularly.
11. On the nugatory aspect, learned counsel submits that the 1st and 2nd respondents filed an application seeking eviction of the applicant in the trial court and that the applicant did not oppose the application; she has filed the instant application on the pretext of threats of eviction; in any case there is no such threat as the eviction orders were denied on 22nd April 2024; the applicant is not at risk of being evicted by the 1st and 2nd respondents; further in ELC No. E070 of 2023 Milimani, in a ruling, delivered on 22nd April 2024 status quo orders were issued; the applicant has not challenged the said orders and in any case, the 1st and 2nd respondents' hands are tied and there is no risk of the records being reconstructed: as regards the sum of Kshs. 50 million that was awarded as damages, the applicant is not facing any threat of execution for that sum; that the applicant has not offered any security for the said amount; further that the orders sought by the applicant would highly prejudice the 1st and 2nd respondents if granted since they have been denied usage of the property since 2009 as their existed status quo orders which barred the Commissioner of Lands and the Registrar of Titles for 15 years, which is a gross injustice to them.
12. To succeed in an application under Rule 5 (2)(b) of the *Court of Appeal Rules*, an applicant has to satisfy the twin principles that are enumerated in several of our decisions. The principles are:
 - i. That an applicant must demonstrate that he has an arguable appeal; and
 - ii. That the intended appeal (or appeal if already filed) will be rendered nugatory if the execution of the decree, order, or proceedings is not stayed.
13. On the first limb of the twin principle, this Court held in *David Morton Silverstein v Atsango Chesoni* [2002] eKLR that for an order of stay to be issued, the applicant must first demonstrate that the appeal or intended appeal is arguable, that is, it is not frivolous and that the appeal or intended appeal, would in the absence of a stay, be rendered nugatory.
14. *Yellow Horse Inns Ltd v A. A Kawir Transporters and 4 Others* [2014] eKLR, observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point would succeed in the end, as this Court held in *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR. From the memorandum of appeal, the applicant has raised several grounds that deserve to be ventilated at the hearing of the appeal.
15. Turning to the second limb as to whether the appeal shall be rendered nugatory if stay orders are not granted, the applicant averred that she is apprehensive and fearful that if the execution of the judgment is not stayed, she will be evicted thus making the intended appeal nugatory. It is worth noting that the applicant has been in possession of the suit property for the last 15 years and counting and at no point has that changed regardless of the judgment in favour of the respondents. The lackluster approach of the applicant is seen in the long delay in bringing the application and, when she failed



to file a response to an application seeking eviction orders, yet that is more of a threat to her than the investigations ongoing by the Directorate of Criminal Investigations. We say so because depending on how the investigations pan out, the applicant will have an equal status quo order in a ruling, delivered on 22nd April 2024 in ELC No. E070 of 2023 Milimani. We are not persuaded that the appeal, if successful, will be rendered nugatory.

16. From the above analysis the applicant has failed to demonstrate the second of the twin principles. As such, the application is dismissed with costs to the 1st and 2nd respondent.

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

P. O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

