Kwamwere (Suing as an Administrator of the Estate of the Estate of John Kamwere Gichuhi – Deceased) & another v Nderitu (Civil Application E051 of 2023) [2024] KECA 922 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KECA 922 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E051 OF 2023

S OLE KANTAI, FA OCHIENG & WK KORIR, JJA

JULY 26, 2024

BETWEEN

RUTH WANJERI KWAMWERE (SUING AS AN ADMINISTRATOR OF THE ESTATE OF THE ESTATE OF JOHN KAMWERE GICHUHI – DECEASED) ..... APPLICANT

AND

GEORGE KIMANI & DAVID KANOGA KAGUMA (SUING AS ADMINISTRATOR OF THE ESTATE OF ELIUD KIARII KAGUMA – DECEASED) ..... APPELLANT

AND

VINCENT NYINGI NDERITU ..... RESPONDENT

(An application for stay of execution pending hearing and determination of the appeal from the Judgment and order of the Environment and Land Court of Kenya at Nyahururu (Y. M. Angima, J.) delivered on 2nd March 2023 in ELC Case No. 19 of 2018)

RULING

1. Before us is a notice of motion dated 26th July 2023, seeking an order for a stay of execution of the judgment delivered on 2nd March 2023.

2. The applicants herein were the plaintiffs in Nyahururu ELC No. 19 of 2018. In that suit they had sought the following reliefs against the respondent;

    a. A declaration that the plaintiffs are entitled to the exclusive and unimpeded right of possession and occupation of all that piece of land known as Parcels Nos. Nyandarua/Njabini/90 and 91 (the suit properties).

b. A permanent injunction restraining the defendant whether by himself or his servants or agents, or otherwise, howsoever, from interfering with the plaintiffs' utility and occupation of Parcels Nos. Nyandarua/Njabini/90 and 91 (the suit properties).

c. Vacant possession of the suit properties.

d. General damages for trespass.

e. Costs of this suit.

f. Any further relief that the Honourable Court may deem fit to grant."

3. The applicants asserted that the respondent had wrongfully entered into the suit properties and took possession thereof, from sometime in the 1970s.

4. Although the dispute was referred to the District Land Disputes Tribunal, the same was ultimately referred to the Court, for determination.

5. The respondent denied having ever encroached onto the applicants' properties. His case was that he had always occupied the parcels of land that were lawfully his.

6. The respondent also lodged a counter-claim, asserting that the applicants had encroached onto his land, Nyandarua/Njabini/615. He therefore sought the eviction of the applicants from the said parcel of land.

7. Meanwhile, the applicants disputed the counterclaim and insisted that parcel No. 615 never existed in the original survey map. The applicants claimed that parcel No. 615 was created later, and effectively superimposed upon the suit properties.

8. Having heard the case, the learned trial Judge held that the applicants failed to adduce credible evidence to support the contention that the respondent had trespassed onto the suit properties.

9. It was the further finding of the learned trial Judge that the applicants' intended challenge to the creation of parcel 615 could not be attained through a suit in which the respondent was accused of trespass. The learned Judge held the view that the applicants ought to have brought a suit against the Settlement Fund Trustees.

10. Meanwhile, as regards the counter-claim, the trial Court held that the title deed, together with the copies of the land register and the Registry Index Map of the Scheme, coupled with the Report of the District Surveyor dated 27th August 2013, demonstrated that the respondent was the owner of parcel 615, whilst the owner of parcels No. 90 and 91 had encroached upon parcel 615.

11. Consequently, the trial court ordered the applicants to deliver vacant possession to the respondent, of the respective portions of parcels 90 and 91 which had been found to have encroached on parcel 615.

12. Being dissatisfied with the judgment, the applicants lodged an appeal before this Court.

13. As the applicants were apprehensive of possible eviction from the suit properties, pending the determination of the appeal, the applicants sought an order for a stay of execution.

14. In answer to the application, the respondent filed a replying affidavit. As far as he was concerned, the applicants had failed to demonstrate the prejudice and damage which they would suffer if the court rejected the application for a stay of execution.

15. The respondent also delved into an analysis of the evidence tendered; questioning the failure of the applicants to place before us the expert evidence allegedly produced by an Assistant Surveyor who represented the licensed surveyor.

16. In his view, the said report could have aided this Court to substantiate the allegation that parcel 615 did not exist.

17. The respondent emphasized that he had never laid claim to the suit properties. Therefore, in his considered opinion, the order directing the applicants to deliver vacant possession of the portions they had encroached upon, was only intended to remedy the situation in which the applicants had been in an illegal occupation of the respondent's land, for over 30 years.

18. The respondent was of the view that an order for a stay of execution would be highly prejudicial to him, considering the long period when he had been denied the opportunity to occupy his own land.

19. In an application for a stay of execution, the court is called upon to determine two twin factors: whether or not the applicant had an arguable appeal; and secondly, if the failure to grant an order for stay of execution could render the appeal nugatory.

20. Rule 5(2)(b) is a procedural provision allowing the Court to protect the subject matter of an appeal or an intended appeal. In the *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR case, this Court held that:

    i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.

    b. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.

    c. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.

    d. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni,* Civil Application No. Nai 189 of 2001.

    e. An applicant must satisfy the court on both of the twin principles.

    f. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.

    g. 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. Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.

h. 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. Damji Pragji (supra).

i. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile, or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.

j. 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.

k. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403."

21. At this stage, the Court is not called upon to venture into an analysis of the appeal, to ascertain its strengths and its weaknesses. If anything, the Court is called upon to ensure that it refrains from making any determinative findings, lest the ruling rendered at this interlocutory stage, cause embarrassment to the bench that will ultimately determine the substantive appeal.

22. In the case of *Dennis Mogambi Mang'are v Attorney General & 3 others* [2012] eKLR, this Court held that:

23. In our considered opinion, the appeal raises at least one arguable issue. In so saying we note the subtle acknowledgment by the trial Court that whereas the Settlement Fund Trustees allocated land to parties in 1963, the final area list had discrepancies from the original allotment. It would be interesting to contemplate how the Court ought to determine whether to recognize the original allottee or the person appearing on the final area list.

24. The trial court expressed itself thus;

> " The court is of the opinion that the SFT contributed to the dispute by failing to timeously explain to the plaintiffs the discrepancies in the acreage allocated to the parties in 1963 and the one appearing in the final area list."

25. Was the trial Court holding that whereas the applicants had been allocated land in 1963, parts thereof could be taken away from them and given to the respondent, in the final area list? In that regard, we say no more.

26. On the question concerning whether or not the appeal could be rendered nugatory if the stay was not granted, we note that the respondent acknowledged that the applicants had been on the suit properties for over 30 years.

27. In our considered opinion, the eviction of the applicants whilst the appeal was still pending, would render the appeal nugatory. We so hold because the applicants would have been uprooted from a parcel

of land which they have been in occupation of for over 30 years, yet there was a possibility that they could ultimately be found to be entitled to the said parcel of land.

28. Our sense of justice demands that the applicants be allowed to remain on the suit properties pending the determination of the appeal.

29. Accordingly, we grant an order for a stay of execution of the orders made in the counter-claim, pursuant to which the applicants would otherwise be evicted. This order will remain in force until the appeal is heard and determined.

30. On the question of costs, we order that the same shall abide by the outcome of the appeal. The party who will attain success in the substantive appeal shall stand awarded the costs of this application.

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

S. ole KANTAI

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR