



**Muthee v Mohamed & 7 others; Law Society of Kenya & 2 others (Interested Parties)
(Civil Application E063 of 2024) [2024] KECA 950 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 950 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E063 OF 2024
AK MURGOR, S OLE KANTAI & A ALI-ARONI, JJA
JULY 26, 2024**

BETWEEN

DAVID MUTHAMI MUTHEE APPLICANT

AND

MOHAMED KER MOHAMED 1ST RESPONDENT

DAMAH ALLIANCE LIMITED 2ND RESPONDENT

DAWID SHEIKH ABDULRAHMAN 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

THE NAIROBI CITY COUNTY 5TH RESPONDENT

**CECM, BUILT ENVIRONMENT AND URBAN PLANNING, NAIROBI CITY
COUNTY 6TH RESPONDENT**

THE CHIEF LAND REGISTRAR 7TH RESPONDENT

THE ATTORNEY GENERAL 8TH RESPONDENT

AND

THE LAW SOCIETY OF KENYA INTERESTED PARTY

**THE KENYA NATIONAL HUMAN RIGHTS COMMISSION INTERESTED
PARTY**

**INDEPENDENT POLICING OVERSIGHT AUTHORITY INTERESTED
PARTY**

*(Being an application for orders of injunction and status quo pending the hearing and
determination of an appeal against part of the ruling the Environment and Land Court at
Nairobi (E. K. Wabwoto, J.) dated 31st January 2024 in ELC Constitution Petition E012 of 2023)*



RULING

1. The applicant, David Muthami Muthee filed a Constitutional Petition being Nairobi ELC Constitution Petition No. E012 of 2023 David Muthami Muthee vs Damah Alliance and 7 Others against the respondents in the Environment and Land Court seeking to enforce his rights over the suit property. Simultaneously with the Petition, the applicant filed an application seeking to have the respondents restrained from further demolishing, destroying, digging, excavating, constructing, disposing of, transferring, or in any way interfering with the suit property known as Land Reference Number Eastleigh 36/VII/275 (the suit property) and or obtaining or issuing any permits, license or approval whether for the purposes of hoarding, excavation or construction.
2. He also sought for orders that the Land Registrar restores the caveat over the suit property and conservatory orders restraining the 1st, 2nd, 3rd and 4th respondents, their servants, agents, and workmen from further demolishing, destroying, digging, constructing, or in anyway interfering with the suit property and a conservatory order restraining them from obtaining or issuing any permits, license or approval. The application was opposed by the respondents. The trial Judge upon hearing the application dismissed it on the basis that the orders sought were overtaken by the subsequent events.
3. The applicant was aggrieved, and intends to file an appeal against that decision in this Court. He has in the meantime brought this Notice of Motion dated 15th February 2024 pursuant to section 3, 3A of the [Appellate Jurisdiction Act](#), rule 5 (2) (b) of the [Court of Appeal Rules](#), seeking inter alia, that pending the hearing and final determination of the Applicant's Intended appeal from part of the ruling of 31st January 2024 this Court be pleased to issue:
 1.
 - a) An injunction restraining the Respondents, their agents, assigns, employees and or any other person working under their instructions from further excavating, performing construction works, wasting and/or in any way interfering with Land Reference Number 36/VII/275 situate in Eastleigh.
 - b) Stay of proceedings in Nairobi ELC Constitution Petition No. E012 of 2023: David Muthami Muthee Versus Damah Alliance and 7 Others.
 2. That in the alternative, status quo be maintained on the suit property to the effect that there shall be no transaction whatsoever including but not limited to excavation, construction works alienation, charging, leasing or transferring of proprietary interest of the suit property pending hearing and determination of the intended Appeal.
 3. That this Honourable Court be pleased to grant any other Orders that it deems just.
4. The applicant's motion is brought on grounds that, the ruling issued final orders at an interlocutory stage to the effect that the 1st respondent was the owner of the suit property from where the applicant was evicted without the court considering the merits of the Petition; that the applicant is the proprietor of the suit property but was illegally and unlawfully evicted which paved way for the respondents to undertake developments; that the applicant is apprehensive that if the developments continue, he will suffer prejudice that cannot be compensated by way of damages; that the intended appeal raises among others weighty constitutional and statutory issues including *inter alia*; i) the illegal and unlawful eviction of the applicant from his property in the wee hours of the morning with aid of the 4th respondent's officers thereby infringing on his Constitutional Rights; the applicant's rights



to enjoy property acquired through adverse possession and thereafter enforced through a valid court order; reliability of the court on the 1st respondent's ownership documents to determine the issue of ownership of the suit property at an interlocutory stage and without enquiring into how the title to land was acquired when there was a caveat lodged against the title.

5. The applicant further contended that the intended appeal has overwhelming chances of success, and that he stands to suffer irreparable loss if the subject matter of the suit is not preserved pending hearing and determination of the intended appeal; that the respondents are actively undertaking excavation, construction, development and the selling of apartment units — off-plan of the subject matter of the suit which actions if left unrestrained, will render the intended appeal nugatory; that there is every likelihood that unless the orders sought are granted, excavation, construction and development and selling off apartment units off-plan will continue on the suit property unabated, to the applicant's detriment and that the respondents will not be prejudiced in any way whatsoever if the orders sought are granted or the status quo is not maintained.
6. The application is supported by the applicant's affidavit, which largely reiterated the grounds set out in the motion, and annexed a Notice of appeal dated 31st January 2024 and a draft Memorandum of appeal.
7. In response to the application, the 1st to 3rd respondents filed grounds of opposition dated 27th February 2024 in which they opposed the application on the grounds that; the application and the entire proceedings instituted are fatally defective and an abuse of the Court process as the applicant has failed to provide any proof of ownership of the subject property; that the applicant is guilty of material non-disclosure of the facts as he had already filed another appeal against a decision in ELC Suit No.1234 Of 2016 (Formerly HCCC No.956 of 1997) *David Muthami Muthee v Attorney General; Charles Kimeli Muge (Interested Party)* [2019] eKLR over the same subject matter seeking similar orders and which is pending disposal before this Court; that the applicant has not demonstrated the substantial loss he will suffer should the injunction not be granted, that the applicant has not shown that he has an arguable appeal against the trial court's decision.
8. Similarly, the 5th and 6th respondents filed grounds of opposition dated 27th February 2024 in which they oppose the application on the grounds that the application and the entire proceedings instituted by the applicant are misconceived and fatally defective for failure by the applicant to prove that he is the registered owner of the suit property, or demonstrating any illegality on the part of the 5th and 6th respondents or disclosing the specific order sought as against them; that the remedies sought are sweeping injunctive orders against all the respondents which are unreasonable, disproportionate and not grounded on any particularized breach of right; that no loss is demonstrated and the appeal is not arguable.
9. When the motion came up for hearing before us on 15th April 2024, learned counsel Mr. Aziz for the applicant, Mr. Angaza for the 1st to 3rd respondents, Ms. Mogire for the 5th and 6th respondents, Mr. A. Kamau for the 4th, 7th and 8th respondents were in Court. There was no appearance for the 1st, 2nd and 3rd Interested Parties (the Law Society of Kenya, the Kenya National Human Rights Commission, and the Independent Policing Oversight Authority) despite their having been served with the hearing notice.
10. The applicant filed written submissions, where it was submitted that the Memorandum of Appeal demonstrates that the appeal is arguable and would be rendered nugatory if the orders sought were not granted. Highlighting the submissions, Mr. Aziz for the applicant stated that in the ruling, despite the applicant having been evicted and his rights violated, the court declared that the 1st to 3rd respondents were owners of the suit property which was not the issue in contention; that what was in contention



was that the applicant and his employees have been in occupation of the suit property since 1985, and were unceremoniously evicted.

11. On the nugatory aspect, it was submitted that the 1st to 3rd respondents are actively undertaking construction on the suit property to the applicant's detriment; and that the construction and development works will be irreversible by the time of the intended appeal's determination. It was submitted that the respondent's unlawful ownership can only be mitigated by the granting of the orders sought; and that the respondents will not be prejudiced in any way if the conservatory or injunction orders are granted or the status quo on the suit property is maintained.
12. For his part, learned counsel Mr. Angaya informed the Court that he had not filed written submission, but submitting orally, counsel stated that, the stay orders sought are overtaken by events as, construction is ongoing on the suit property; that in any event, the applicant's Petition being based on rights violations, the remedy available to him was damages and not stoppage of the ongoing construction works. Counsel asserted that in this case, it was the 1st to 3rd respondents, and not the applicant who would suffer prejudice were this Court to grant the orders that are sought.
13. On behalf of the 4th and 5th respondents, learned counsel Ms. Mogire submitted that no specific orders were sought against the 4th and 5th respondents, and therefore they have no stake in the proceedings. Counsel went on to submit that the submissions notwithstanding, the applicant's application is overtaken by events as the construction works on the suit property are underway.
14. Learned counsel Mr. Kamau for the 4th, 7th, and 8th respondents did not oppose the application. Counsel submitted that the appeal is arguable as one of the grounds in the intended appeal is that despite the removal of the caveat lodged by the applicant against the title, and the property transferred, no explanation was provided as to how it was removed. On the nugatory aspect, counsel urged us to consider this limb against the background of the ongoing developments on the suit property.
15. In so far as applications filed under rule 5 (2) (b) of this *Court rules* are concerned, the threshold requirements to be satisfied were spelt out in the case of *Republic vs Kenya Anticorruption Commission and 2 others* [2009] eKLR thus:
16. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds their results or success could be rendered nugatory”.
17. As pertains to the first limb, whether the appeal is arguable, we have variously held that an arguable appeal is not one which must necessarily succeed but one which raises a bona fide issue worthy of consideration by the Court. See *Kenya Tea Growers Association and Another versus Kenya Planters Agricultural Workers' Union*, Civil Application No. Nai 72 of 2001 (UR); *Somak Travels Ltd v Gladys Aganyo* [2016] eKLR and *George Gathuru Karanja v George Gathuru Thuo & 2 other* [2019] eKLR.
18. When the applicant's complaint in the intended appeal is that, in the ruling, the trial judge issued final orders at an interlocutory stage of the Petition to the effect that the 1st respondent was the owner of the suit property without addressing the merits; that the court failed to consider the issue of whether or not the applicant's rights were violated in the manner of his removal from the suit property.
18. However, when we consider the record, what was before the trial judge was an application seeking orders of injunction to restrain the 1st to 3rd respondents from demolishing, destroying, digging, excavating, constructing, disposing of, transferring, or in any way interfering with the suit property or



obtaining or issuing any permits, license or approval whether for the purposes of hoarding, excavation or construction. In the ruling, the trial judge declined to grant the orders of injunction sought for the reason that the applicant had already been evicted from the suit property, and the development works by the 1st to 3rd respondents were effectively underway. As to whether or not the trial court rightly or wrongly exercised its discretion to decline to grant the injunction orders sought for these reasons may be an arguable matter, though as to whether he will succeed having regard to the circumstances of the case, remains to be seen.

19. On whether the intended appeal will be rendered nugatory, it is of significance that the applicant filed a Constitutional Petition seeking to enforce his rights over the suit property, and simultaneously with the Petition, he sought orders to restrain the ongoing construction works on the suit property. As pointed out by some of the respondents, and we agree, the rights violations sought to be pursued by the applicant in the Petition would, at this juncture, more appropriately be compensated in damages, rather than by halting the construction works on the suit property. For this reason, we are not persuaded that the intended appeal would be rendered nugatory were we to decline to grant the orders sought in this application, and if the appeal were to succeed.
20. In sum, the applicant having failed to satisfy the threshold requirements for applications brought under rule 5 (2)(b) of the rules of this Court, the Notice of Motion dated 15th February 2024 is unmerited and as such, fails. Costs in the intended appeal.

It is so ordered.

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

A. K. MURGOR

JUDGE OF APPEAL
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S. OLE KANTAI

JUDGE OF APPEAL
.....

ALI- ARONI

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

Signed

DEPUTY REGISTRAR

