



**Saji v tegle & 2 others (Civil Appeal (Application)
E001 of 2024) [2024] KECA 966 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 966 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E001 OF 2024
K M'INOTI, AK MURGOR & S OLE KANTAI, JJA
JULY 26, 2024**

BETWEEN

NADIA KARA SAJI APPLICANT

AND

CONSUELO FAYE TEGLE 1ST RESPONDENT

PAULA J 2ND RESPONDENT

PAULA J BAGSHAW 3RD RESPONDENT

((Being an application for stay of execution and an application for injunction pending the hearing and determination of an appeal from the Ruling and Orders of the Environment & Land Court at Nairobi (Oguttu Mboya, J.) dated 23rd November, 2023 in Nairobi ELC No. E008 OF 2023 "OS"))

RULING

1. The applicant, Nadia Kara Saji has brought this Notice of Motion dated 29th December 2023 pursuant to rules 5(2)(b), 44(1) & (2) and 49 of the Court of Appeal Rules, 2022, seeking orders;
 1. That the Respondents be restrained, whether by themselves, their servants, agents or otherwise whomsoever(sic) from trespassing on, wasting, damaging, alienating or in any other manner disposing of, the parcel of land known as L.R. No. 17/75 (Original No. 17/5/24) (the suit property) or any part thereof pending the hearing and determination of the intended appeal.
 2. That the execution of the Order given by Oguttu Mboya, J. on 23rd November 2023 in Nairobi ELC Suit No. E008 of 2023 (O.S) be stayed pending the hearing and determination of the intended appeal.



2. The applicant's Motion is supported by an affidavit in which she deposed that the Grant of Letters of Administration Intestate for the Estate of Kenneth Robert Baker (deceased) was confirmed on 13th November 1987, and a Certificate of Confirmation of Grant to Original Grantee issued to Purvis Kara Baker (deceased) who was also granted a life interest in the net intestate estate of Kenneth Robert Baker (deceased); that upon its termination it was to vest in his children, Robert Joseph Baker, Consuelo Faye Tegle and Paula J. Bagshaw in equal shares absolutely; that Purvis Kara Baker is her sister, and Robert Joseph Baker, Consuelo Faye Tegle and Paula J. Bagshaw are her step-children, who are foreign citizens domiciled in the United States of America and the United Kingdom; that she recently learnt from an affidavit filed by Consuelo Faye Tegle (a.k.a. Consuelo Smykal Peterson) that their brother Robert Joseph Baker died on 15th April 2013 in the State of Arizona, United States of America. The applicant stated further that while Purvis Kara Baker (deceased) briefly resided on the suit property, her step- children have never resided there.
3. She further deposed that in August, 1992 or thereabouts, she acquired the suit property through adverse possession, where she continues to be in
4. possession to-date without the consent or sufferance of either Purvis Kara Baker (deceased) or her step-children openly, without stealth, without force, without licence, and without interruption continuously for in excess of 12 years; that in 2010 or thereabouts her sister, Purvis Kara Baker (deceased) was abducted by one Michael Odwoma, a former employee, who tampered with the title to the suit property so as to take over ownership and possession; that with the help of the police, she traced and rescued her sister and nursed her back to health; that in order to recover and restore the tampered title to the suit property, Purvis Kara Baker (deceased) executed a General Power of Attorney dated 26th February 2013 appointing her as her Attorney, whereafter she pursued the criminal case against her sister's abductors and also restored the title of the suit property to Kenneth Robert Baker's name as the registered proprietor; that all this was done in absolute good faith and fidelity and for the love and affection of her sister, but without prejudice to her right to claim the suit property by adverse possession.
5. She further deposed that in her Last Will and Testament of 2017, Purvis Kara Baker (deceased) appointed her as her executor and bequeathed to her all her interest real and equitable in the suit property; that Purvis Kara Baker died on 21st February 2018; that notwithstanding that Purvis Kara Baker (deceased) left the property in her will for which she was already in possession, and the whereabouts of his children's being unknown, the estate
6. of Kenneth Robert Baker (deceased) had no administrator; that based, on legal advice from her then advocates, she applied for grant of probate with written will for the Estate of Purvis Kara Baker in Nairobi High Court Succession Cause No. 736 of 2018 which grant was issued on 2nd July 2019 and a Certificate of Confirmation of Grant was issued subsequently; that since the suit property is registered in the name of Kenneth Robert Baker (deceased) and considering that the Confirmed Grant was in respect of the estate of Purvis Kara Baker (deceased), by an application dated 27th October 2021 in Nairobi High Court Succession Cause No. 736 of 2018, she sought to have the suit property transferred directly to her as the administrator and beneficiary of the estate of Purvis Kara Baker (deceased).
7. That on 27th September 2022, Paula Mynan Bagshaw, the 2nd respondent filed a Summons for Revocation of Grant in Nairobi High Court Succession Cause No. 736 of 2018 in the estate of Purvis Kara Baker (deceased) claiming to be one of the children of Kenneth Robert Baker (deceased) and attaching the Certificate of Confirmation of Grant issued in Nairobi High Court Succession Cause



- No. 216 of 1987, in the Estate of Kenneth Robert Baker (deceased) and further claiming that Purvis Kara Baker (deceased) only had a life, and not an absolute interest, in the suit property.
8. The applicant contended that having been in possession of the suit property since August, 1992 or thereabouts and having acquired title through adverse possession on or about August, 2004, by an Originating Summons dated 10th February 2023, she filed ELC Suit No. E008 of 2023 in the Environment and Land Court at Nairobi against Robert Joseph Baker, Consuelo Faye Tegle and Paula J. Bagshaw (the defendants) as Legatees in interest of Kenneth Robert Baker (deceased) where she claimed that their absolute interest in the suit property was extinguished by dint of her having acquired the suit property through adverse possession since 1992; that none of the defendants filed any reply to the Originating Summons, though the 2nd defendant (Consuelo Faye Tegle) filed a Notice of Motion dated 13th April 2023 seeking that the Originating Summons be struck out on several grounds, principal among them being, the existence of the succession cause in regard to the estate of Purvis Kara Baker (deceased).
 9. It was further contended that upon hearing the application, the trial Judge struck out the Originating Summons, and that aggrieved by the decision, she intends to lodge an appeal in this Court and has filed a Notice of Appeal and a draft Memorandum of appeal.
 10. The respondents averred that the applicant having immediately upon Confirmation of the Grant on 13th November 1987 in the Estate of Kenneth Robert Baker (deceased), acquired an interest in possession assured otherwise than by will which vested in them a right to bring an action against the applicant for possession/trespass, and by extension, to have an action brought against them for dis-possession, which legal issue should have been canvassed at, and determined after a full trial and not in an interlocutory application; that having failed to file a Defence or replying affidavit, her claim for adverse possession of the suit property since August 1992 was unchallenged and remained for determination; that as a consequence, the trial Judge misdirected himself by striking out the Originating Summons and for this reason, her intended appeal is arguable.
 11. It was further averred that the 1st and 2nd respondents hold a Certificate of Confirmation of Grant vesting in them an interest in or over the suit property in equal shares absolutely, and nothing stops them from perfecting it and proceeding to acquire title to the suit property; that should they acquire title, and commence dealings with it before determination of her intended appeal, then the intended appeal will be rendered nugatory, if successful; that she will be unable to recover any damages against the respondents who reside outside the jurisdiction of this Court; that finally, her intended appeal is based on her possession, past and ongoing, of the suit property and any action by the respondents to evict her prior to determination of her intended appeal will render it nugatory.
 12. In a replying affidavit sworn on 24th January 2024, Consuelo Smykal Peterson, the 1st respondent opposed the application and deposed that the appeal is not arguable, and that the applicant has not demonstrated how the appeal will be rendered nugatory as the suit property is registered in the name of the late Kenneth Robert Baker (deceased) who was his biological father together with his sister, Paula Bagshaw and late brother; that H.C. Succession Cause No. 736 of 2018, In the Estate of Purvis Kara Baker (deceased) was filed by the applicant and she was issued with a Grant of Probate with Will on 29th August, 2018 and confirmed on 2nd July, 2019; that the applicant thereafter attempted to have the property registered in her name, but was unsuccessful because the suit property is registered in the name of Kenneth Robert Baker (deceased); that the applicant then filed an application dated 27th October, 2021 seeking to have the suit property transferred to her in lieu of the Estate of Purvis Kara Baker (deceased) who was an administrator of the Estate of Kenneth Robert Baker in H.C Succession Cause No. 216 of 1987; that the Court directed that the Deputy Registrar of the High Court have the physical file, being H.C Succession Cause No. 216 of 1987, placed before the court for the applicant's



application in H.C. Succession Cause No. 736 of 2018 to be heard and determined; that on 27th September, 2022, Paula Bagshaw the 2nd respondent applied for revocation of the grant of Probate in H.C. Succession Cause No. 736 of 2018 on grounds that the applicant concealed material information, and that pending before the High Court is a ruling on two applications, one being the applicant's application seeking the transfer of H.C. Succession Cause No 736 of 2018 to the Environment and Land Court for hearing and determination on grounds that the High Court has no jurisdiction over the matter of land, and second, is the application for revocation of the applicant's Grant; that it is therefore not true nor correct that he and the 2nd respondent possess a grant over the suit property, and as such they have no capacity to evict the applicant from the suit property.

13. Instead, it was deponed that, it is the applicant, the holder of the Grant of Letters of Administration that is claiming ownership by adverse possession; and that it is only after the Grant of Letters of Administration issued to the applicant on 29th August, 2018 and confirmed on 2nd July, 2019 is revoked, that the suit property will vest in the respondents.
14. By a replying affidavit sworn on 24th January 2023, Paula Bagshaw, the 2nd respondent also opposed the application and reiterated the contents of the 1st respondent's affidavit in reply. She added that if the grant held by the applicant in Succession Cause No. 736 of 2018, Estate of Purvis Kara Baker (deceased), is revoked, then the suit property will be the subject of distribution in the fresh grant sought in Succession Cause 216 of 1987, the Estate of Kenneth Robert Baker (deceased); that the application before the court is a blatant abuse of the court process by a vexatious litigant who has been caught red handed trying to fraudulently acquire prime property worth more than 3 million dollars belonging to the Late Kenneth Robert Baker (deceased), the registered owner; that issuing the orders sought by the applicant will amount to interfering with matters that are live before the High Court and the respondents are entitled to exhaust avenues of distribution of their father's estate as provided for in the Law of Succession Act; that the applicant is in possession of the property by virtue of the fraudulently obtained grant in Succession Cause No. 736 of 2018, the Estate of Purvis Kara Baker (deceased).
15. The applicants and the respondents filed written submissions. Submitting for the applicant on a virtual platform, learned counsel Mr. N. Githuka submitted that the appeal is arguable as demonstrated in the draft Memorandum of Appeal and that the applicant intends to challenge the impugned decision on the basis that none of the defendants filed a Defence or a Reply to the Originating Summons and that therefore, the claim for adverse possession remained unchallenged.
16. On the nugatory aspect, counsel submitted that the applicant has been in possession of the suit property since 1992, and that with the dismissal of the Originating Summons, nothing stops the respondents from regularizing their title and dealing with the suit property, including disposing it off, and evicting the applicant which would effectively render the appeal nugatory.
17. On their part, learned counsel Ms. Ngania for the 1st respondent opposed the motion and submitted that the appeal is arguable as demonstrated in the draft memorandum of appeal, but on the nugatory aspect, counsel submitted that the applicant cannot rely on falsehoods to contend that the appeal will be rendered nugatory, particularly since she is in possession of the suit property and has a grant of probate; that the respondents have no title over the suit property and so, cannot dispose of it; that the trial court did not grant the respondents any Certificate of Grant nor any rights over the suit property as alleged by the applicant. It was submitted that for the respondents to have any stake in the property, their application for revocation in Succession Cause No. 736 of 2016 must first be heard and determined.
18. On his part, learned counsel Ms. Mosoti for the 2nd respondent also opposed the motion and submitted that the application seeks to stay a negative order as, the applicant's Originating Summons



was merely struck out. Counsel went on to submit that the appeal is not arguable since the grant in Nairobi in Succession Cause 736 of 2018, the estate of Purvis Kara Baker (deceased) is yet to be revoked; that in the suit before the High Court, there is an order for stay of proceedings in place, meaning that the status quo pertaining to the applicant's grant remains in force, and therefore the applicant has not demonstrated that the appeal will be rendered nugatory.

19. 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:

“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”.

20. 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 vs Gladys Aganyo* [2016] eKLR and *George Gathuru Karanja vs George Gathuru Thuo & 2 other* [2019] eKLR.
21. As to whether the intended appeal is arguable, the applicant's main grievance is that the trial Judge ought not to have struck out the Originating Summons in an interlocutory application but should have determined the issues in contention after a full trial. It was argued that the intended appeal was arguable since, none of the defendants filed a Defence (or Replying Affidavit) to the Originating Summons and therefore, the cardinal matters of fact that the applicant had been in adverse possession of the suit property since August 1992 and acquired title thereto upon expiry of 12 years, remained unchallenged; that therefore, the trial Judge misdirected himself in striking out the applicant's Originating Summons. It is worthy of note that the respondents have conceded that the appeal is arguable.
22. For our part, after considering that the gravamen of the appeal, this issue turns on whether or not the learned judge was right in striking out the Originating Summons yet it remained unchallenged. We are satisfied that the appeal is arguable.
23. As to whether the appeal would be rendered nugatory, the applicant argued that the 1st and 2nd respondents hold a Certificate of Confirmation of Grant in Succession cause 216 of 1987, the Estate of Kenneth Robert Baker (deceased) which vested the suit property in the deceased's children in equal shares absolutely; that no impediment existed to stop them from perfecting the document and acquiring title to the suit property; that should the respondents acquire title, before the determination of her intended appeal, the appeal will be rendered nugatory, if successful. The 1st and 2nd respondents' response on the other hand is that, not only do they not have title over the suit property and cannot dispose of it, that the Court did not grant them a Certificate of Grant nor any rights to the suit property as alleged by the applicant; that to the contrary, for the respondents to have any stake in the property, their application in Succession Cause No. 736 of 2016 must first be heard and determined.
24. Given that the respondents do not hold title or ownership, and have not acquired possession of the subject property, we are not persuaded that they have any capacity or the capability to evict or dispossess the applicant from the subject property. Our view is that her apprehension at this point in time is



premature, and misplaced, and she has not therefore demonstrated that the intended appeal will be rendered nugatory.

25. In sum, the applicant has failed to satisfy the threshold requirements necessary for applications brought under rule 5 (2)(b) of the rules of this Court, with the result that the Notice of Motion dated 29th December 2023 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.

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

