



Otieno & 9 others v Wagude & another (Civil Application E156 of 2023) [2024] KECA 835 (KLR) (19 July 2024) (Ruling)

Neutral citation: [2024] KECA 835 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E156 OF 2023
HM OKWENGU, SG KAIRU & HA OMONDI, JJA
JULY 19, 2024**

BETWEEN

- RICHARD OTIENO 1ST APPLICANT**
- JOSEPH OGUTU 2ND APPLICANT**
- PAMELA ATIENO ODHIAMBO 3RD APPLICANT**
- PATRICK OUMA 4TH APPLICANT**
- MILKA OUTA 5TH APPLICANT**
- JOSEPHINE OGADA 6TH APPLICANT**
- NICHOLAS OTIENO 7TH APPLICANT**
- MONICA AWUOR 8TH APPLICANT**
- GODFREY ONYANGO 9TH APPLICANT**
- PAMELA ATIENO 10TH APPLICANT**

AND

- MICHAEL OTIENO WAGUDE 1ST RESPONDENT**
- THE LAND REGISTRAR KISUMU COUNTY 2ND RESPONDENT**

(Being an application under rule 5(2)(b) of the Court of Appeal Rules 2010, seeking an order of temporary injunction from the Ruling of the Environment and Land Court at Kisumu (A. O. Ombwayo, J.) dated 8th December 2022 in Case No. 46 of 2020)



RULING

1. By a Notice of motion dated 1st December 2023, brought under rule 5(2)(b) of the *Court of Appeal Rules*, the applicants seek orders of temporary injunction restraining the respondents, their servants or agents from evicting the applicants, cultivating selling transferring disposing of, dealing and or interfering whatsoever with the suit property pending the hearing and determination of their appeal from a ruling delivered by the Environment and Land Court (ELC) on 8th December 2022.
2. Some background to the Notice of Motion can be gathered from an affidavit sworn in support of the motion by the 1st applicant Richard Otieno and the annexed copy of the ruling delivered by the ELC on 8th December, 2022, although several copies[pages?] of the ruling are missing which makes it difficult to fully appreciate the facts. Suffice to note that the applicants had filed a suit against the respondents, the subject of the suit being Kisumu/Dago/4721 & 4722 (original Kisumu /Dago/566), and that the ELC in its ruling struck out the suit on the ground that the suit was res judicata and an abuse of the court process, as the matters raised in the suit had been conclusively determined in Kisumu ELC No. 13 of 2015.
3. The applicants who were aggrieved by the ruling, filed a Notice of Appeal, and are now before this Court with the current motion seeking interlocutory orders under rule 5(2)(b) of the *Court of Appeal Rules*, on the grounds that they have an appeal raising serious issues of law, with high chances of success. They are apprehensive that unless the orders sought are issued the respondents may sell the suit property and evict them from the suit property. The applicants' apprehension has arisen from the fact that the respondents have been bringing prospective buyers to the suit property for purposes of negotiating sale of the property. The applicants contend that their appeal may be rendered nugatory if the suit property falls into the hands of a 3rd party.
4. The applicants have filed written submissions in support of the motion. They rely on *Trust Bank Limited & Another vs. Investech Bank Limited and 3 Others* [2000] eKLR; and *Stanley Kangethe Kinyanjui vs. Tonny Ketter & 5 Others* [2013] eKLR. They maintain that their appeal is arguable, the main issue for determination being how the suit property was transferred to the 1st and 2nd respondents from Marikus Wagude Olwal deceased, without any succession cause. They contend that the deceased was holding the suit property in trust for his family members who were residing on the property. The applicants argued that the suit property is their ancestral land in which they have been residing, and they will therefore suffer irreparable loss if evicted from the suit property, as they will be rendered homeless, and damages would not provide adequate compensation.
5. The respondents did not file any reply to the applicants' motion, nor did they attend court for hearing of the motion, although they were served with a hearing notice, and given an opportunity to file written submissions. This notwithstanding, we have to consider the motion and determine whether the applicants have met the threshold for granting such an order. As the applicants have rightly submitted in their written submissions, where a party has initiated an appeal in this Court by filing a notice of appeal, the Court has discretion to grant an order of temporary injunction under rule 5(2) (b) of the *Court of Appeal Rules*.
6. Again, the applicants are spot on, when they submit that such an order can only be granted where an applicant has satisfied the Court that he has an arguable appeal, and that the appeal may be rendered



nugatory if the orders sought are not granted. In *Charterhouse Bank Limited vs. Central Bank of Kenya & 2 Others* [2007] eKLR, this Court stated:

The principles upon which this Court exercises its unfettered discretion to grant a stay of execution, stay of proceedings or an order of injunction are settled. The applicant should satisfy the court that the appeal or the intended appeal is not frivolous, that is to say, that, the appeal or intended appeal is arguable and, secondly, that unless the application is granted the results of the appeal, if successful would be rendered nugatory. The purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory. (See *Madhupaper International Limited vs. Kerr* [1985] KLR 840; *J. K. Industries vs. Kenya Commercial Bank Ltd & Another* [1987] KLR 506; *Githunguri vs. Jimba Credit Corporation Ltd (No. 2)* [1988] KLR 838).

7. The reliance of the applicants on *Stanley Kangethe Kinyanjui vs. Tony Ketter and 5 Others* (*supra*) is appropriate, as the principles to be applied in an application under rule 5(2)(b) of the *Court of Appeal Rules* have been clearly set out in that decision. Primarily these are whether the applicant has satisfied the Court that he has an arguable appeal, and that if the orders of stay/injunction pending appeal are not granted, the appeal may be rendered nugatory.
8. In regard to the first requirement, that is, whether the applicants have demonstrated that they have an arguable appeal, the applicants have annexed a draft memorandum of appeal from which 5 grounds of appeal have been set out, faulting the learned judge for entertaining the preliminary objection without notice to the parties, basing the ruling on no evidence, misdirecting himself in considering irrelevant issues while arriving at his finding, failing to consider the appellants' submissions and judicial authorities referred to, and delivering a ruling that is against the weight of evidence. At a glance, none of the grounds raised provide a debatable issue on the ruling which was anchored on the preliminary issue of res judicata, given that the applicants have not deposed to any facts in regard to the issue of res judicata.
9. From the supporting affidavit and the written submissions, the applicants have indicated the main issue they intend to raise in the appeal as the issue of how the respondents had the suit property transferred to them from the deceased, without any succession cause for the estate of the deceased. Unfortunately, that cannot be an arguable issue in an appeal arising from the ruling of 8th December 2022 in which the applicant's suit was struck out on the preliminary issue of being *res judicata*, and the Court had no reason to go into the disputed facts. From what we have before us the applicants have not demonstrated that they have an appeal capable of reasonable arguments. To the contrary the applicants have not provided any response to the preliminary issue of res judicata. Consequently, the appeal is frivolous and no more than an attempt to delay and obstruct the execution of previous judgments and orders issued by the several courts.
10. As was stated in *Stanley Kangethe Kinyanjui vs. Tonny Ketter & 5 Others* (*supra*):
 - vii) 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 vs. Pioneer Holdings (A) Ltd. & 2 Others*, Civil Application No. 124 of 2008
11. The applicants having failed to meet the threshold upon which this court can exercise its discretion. This applicants' motion therefore fails. It is accordingly dismissed. As the respondent did not file any reply to the motion or attend the court for the hearing of the motion, we do not find it appropriate to award any costs.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF JULY, 2024.



HANNAH OKWENGU

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

H. A. OMONDI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

