



**Hussein v Habib & 3 others (Civil Application E032 of 2023)
[2024] KECA 1217 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1217 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E032 OF 2023
F TUIYOTT, A ALI-ARONI & PM GACHOKA, JJA
SEPTEMBER 20, 2024**

BETWEEN

ABDISALAN ADAN HUSSEIN APPLICANT

AND

SADAFF SHOKATALI HABIB 1ST RESPONDENT

SABAHATT SHOKATALI HABIB 2ND RESPONDENT

PARAGON PROPERTY CONSULTANTS LIMITED 3RD RESPONDENT

THE ESTATE OF SHOKATALI GULAM HUSSEIN HABIB ALIAS GULAM

HUSSEIN HABIB 4TH RESPONDENT

(Being an application for stay of further proceedings of the Environment and Land Court at Nairobi (Mbugua, J.) delivered on 26th January 2023 in ELC Suit No. E300 of 2022)

RULING

1. Before the Court is the applicant's notice of motion dated 17th October 2023 brought under rule 5(2) (b) and 42 of the [Court of Appeal Rules 2010](#), (now 2022 Rules) seeking a stay of proceedings pending the hearing and determination of the appeal.
2. The application is supported by the grounds on the face of it, and the affidavit of the applicant sworn on 17th October 2023, where he deposes: that the Court of Appeal in a ruling delivered on 26th May 2023 granted a stay of the ruling and orders of the ELC at Nairobi (Mbugua, J.) that was delivered on 26th January, 2023 in ELC No E300 of 2022 pending the determination of the applicant's appeal; that the applicant in compliance with the directions of this Court duly filed his record of appeal on 17th July 2023 and now awaits allocation of a hearing date for the substantive appeal; however on 3rd October, 2023 the ELC (Mbugua, J.) issued pre-trial directions for the hearing of ELC No E300 of 2022 and fixed the matter for purposes of confirming compliance for 7th February 2024; that the applicant is



aggrieved with the aforesaid directions as the trial court may proceed to determine the main suit before the determination of the appeal pending before this Court, which may compromise the appeal; that there is a likelihood that the outcome of the appeal would impact upon the proceedings and eventual determination of the ELC case hence the need to stay the proceedings; the applicant is also aggrieved at the expense and inconvenience that may be caused by the two parallel proceedings simultaneously happening, which may also result in conflicting outcomes that would make it not only difficult for the parties to comply, but also be inimical to the smooth administration of justice.

3. In opposition to the application the 3rd respondent filed a replying affidavit sworn on 17th April 2024, through its property managing agent, Faith Mutie. She deposes that after the Court of Appeal directed the applicant to file and serve written submissions in the main appeal within 30 days, the applicant did not do so and the days lapsed; that instead of the applicant prosecuting the substantive appeal, he has resorted to prosecuting the instant application in a bid to scuttle the hearing of the substantive appeal; that the applicant has not made an application for stay of proceedings at the trial court; that the applicant has also failed to file a defence in the matter before the trial court despite having been served with summons to enter appearance and the applicant's advocate having sought and having been granted several opportunities to file and serve the defence. The same is evident from the court record in the trial court, where the applicant's advocate on 3rd November 2023 prayed for 30 days to file a defence, which he has yet to do; that the applicant is intentionally avoiding filing a defence for fear that the defence will be a sham and will expose that he has no legitimate claim to the property; that the actions of the applicant constrained the respondents to file a request for interlocutory judgment.
4. She deposes further that from the record, the applicant is not keen on prosecuting his substantive appeal and neither is he keen on defending the matter before the trial court but is only determined to frustrate both the trial in the ELC Case No E300 of 2022 and at the Court of Appeal Case No E544 of 2023 by focusing on applications that will do little to ensure that the matter before the court is dealt with.
5. Further, that the applicant's actions are in bad faith and are intended to interfere with their respondents' right to access justice; right to be heard without delay; and the overall right to a fair trial; that the applicant has interim orders of stay of execution from this Court and should the status quo remain the applicant will not suffer any injustice or will his appeal be rendered nugatory; that on the other hand, the respondents will suffer grave injustice arising from delayed determination and conclusion of their case; that this Court has the discretion to grant orders for the stay of proceedings which discretion has to be exercised sparingly and only in exceptional circumstances; the applicant has not provided sufficient reasons as to why the application is merited; not intended to frustrate the respondents' case and wasting the court's precious judicial time.
6. The applicant's learned counsel has filed submissions dated 24th April 2024. He relies on the case of Globe Tours & Travel Limited, Nairobi High Court Winding Up Cause No 42 of 2000, where the Court set out the threshold to be met by an applicant seeking a stay of proceedings. He also relies on the case of David Morton Silverstein v Atsango Chesoni [2002] eKLR, where this Court held that each case must depend on its facts. He submits that the application has merit as this Court had declared the existence of an arguable appeal and that there is a high likelihood of conflicting decisions being reached causing embarrassment.
7. He further submits that where a party pursues two parallel court proceedings on the same subject matter, this constitutes an abuse of the court process. In support he relies on the case of Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex-Parte LSK [2020] eKLR, where the Court held that a litigant had no right to pursue two processes which will have the same effect in two courts at the same time; that this Court has inherent jurisdiction to protect itself from abuse; that any further proceedings



herein shall breach the sub-judice principle and throws his weight behind the case of *Thiba Min Hydro Co. Limited v Josphat Karu Ndigwa* [2013] eKLR; that the proceedings in the ELC Court were only commenced in 2022 hence it cannot be legitimately argued that the necessity to proceed with that case is driven by the consideration of expeditious disposal of that case.

The respondents on their part did not file submissions.

8. We find it necessary by way of a background to summarise the facts herein. The respondents sued the applicant in ELC Case No E300 of 2022 claiming inter alia that Shokatali Gulam Hussein Habib alias Gulam Hussein Habib (the deceased) was the registered proprietor of LR No 1870/III/417 (Original No 1870/232/2) I.R No 81623/1 (the suit property) having purchased it in 2009; that on 27th May 2013 the deceased transferred the suit property by way of gift to his children, namely the 1st and 2nd respondents who appointed the 3rd respondent as managers of the suit property and that on 12th September 2022, the 1st and 2nd respondents became aware of trespass on the suit property by the applicant. On his part, the applicant claims to have purchased the suit property from the deceased in March 2019 and has been in occupation since then.
9. By her ruling, (Mbugua, J.) granted the injunctive relief sought by the respondents and directed that in the event, the applicant had entered into the suit property, he ought to vacate, in default, he be evicted. The orders of injunction were to remain in force for one (1) year during which the suit property was not to be alienated. The said ruling of Mbugua, J is what precipitated the first application dated 8th February 2023 before this Court as shown above.
10. 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 namely:
 - i. 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 are not stayed.
11. On the first limb of the twin principle, this Court held in *David Morton Silverstein v Atsango Chesoni* [2000] eKLR that for an order of stay to be issued, the applicant must first demonstrate that the appeal or intended appeal is arguable, that it is not frivolous and that the appeal or intended appeal, would in the absence of a stay, be rendered nugatory.
12. Regarding the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay of the orders sought, this Court in the case of *Yellow Horse Inns Ltd v A. A Kawir Transporters and 4 others* [2014] eKLR, observed that an applicant need not show multiple arguable points, as one would suffice. Neither is the applicant required to show that the arguable point would succeed, as this Court held in *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR.
13. We note that the applicant did not attach a draft memorandum of appeal to the application, nor did he set any of the grounds he intends to raise in his appeal in his affidavit in support of the application. The Court is left to try and gather the likely grounds of appeal from the grounds on the face of the application and the supporting affidavit. In brief, the applicant alludes to the fact that he will suffer financially in having two competing matters at the same time; the outcome of the appeal in Appeal No E544 of 2023 may have an impact on the ELC matter and if the suit in the High Court is determined it may affect the outcome of the appeal.
14. Appeal No E544 of 2023 which is pending before this Court touches on an interlocutory injunctive order that was issued pending hearing and determination of the main suit, whereas the main suit would be considering the issue of ownership. We find that the two issues are different and distinct, suffice it to



say that it is not for this Court as now constituted to determine the merit or otherwise of the intended appeal or the appeal already filed. We are not satisfied that the grounds as set out in motion raise any arguable ground and accordingly, it is our finding that the applicant has not satisfied the first limb that he has an arguable appeal.

15. Even if we were to consider the second limb as to whether the appeal could be rendered nugatory if stay orders are not granted, the applicant did not demonstrate in any way how the intended appeal will be rendered nugatory absent stay.
16. The applicant having failed to demonstrate the twin principles his application is dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

F. TUIYOTT

.....

JUDGE OF APPEAL ALI-ARONI

.....

JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

