



Jillo v African Banking Corporation Limited & 3 others (Civil Application E109 of 2024) [2024] KECA 1185 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1185 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E109 OF 2024
DK MUSINGA, MSA MAKHANDIA & M NGUGI, JJA
SEPTEMBER 20, 2024**

BETWEEN

KORE NASIRI JILLO APPLICANT

AND

AFRICAN BANKING CORPORATION LIMITED 1ST RESPONDENT

FATUMA MOHAMED HAJI 2ND RESPONDENT

SAHRA KHALIF YUSUF 3RD RESPONDENT

ABDIAZIZ BISHAR HAPI 4TH RESPONDENT

(Being an application for stay of execution of the Ruling and Orders of the Environment and Land Court at Nairobi (Wabwoto, J.) delivered on 19th December 2023 in ELC Appeal No. E065 of 2023)

RULING

1. Before this Court is a Notice of Motion dated 7th March 2024 which is essentially brought under the provisions of rule 5(2)(b) of the Rules of this Court. The applicant seeks stay of execution of the Ruling and Order of the Environment and Land Court (ELC) dated 19th December 2023 in Nairobi ELC E065 of 2023 and all subsequent and/or ancillary proceedings pending hearing of an intended appeal. The applicant also seeks stay of further proceedings of the ELC suit pending hearing of the intended appeal.
2. The background to this application relates to a dispute over the ownership and possession of property known as L.R. No. 36/11/148 Eastleigh (hereinafter referred to as “the suit property”). The applicant averred that he purchased the suit property on 21st December 2021 by way of a public auction at a consideration of Kshs.100,000,000/-. Prior to the said auction, the suit property was registered in the name of the 1st respondent. Upon purchase, a transfer was executed in the applicant’s name on 22nd



- December 2021, and registration of the suit property in his name was effected on 24th December 2021. Thereafter he charged it to the 2nd respondent for a loan facility of Kshs.100,000,000/-.
3. The 3rd and 4th respondents, who were tenants on the suit property, brought proceedings against the applicant in the Business Premises Rent Tribunal (BPRT) to wit, BPRT Case No. E881 of 2022, on grounds that between the applicant and the 1st respondent they did not know who to pay rent to.
 4. The applicant filed a response and reference for the BPRT's determination. The BPRT delivered its decision on 2nd June 2023, holding in favour of the applicant, and directed the 3rd and 4th respondents to enter into new tenancy agreements with the applicant as the registered proprietor of the suit property, failing which they would be liable to eviction from the suit property.
 5. The 1st respondent was aggrieved by the orders issued by the BPRT on 2nd June 2023 and filed an appeal at the ELC, being ELC Appeal No. E065 of 2023. In addition, the 1st respondent filed an application seeking stay of execution of the ruling and orders of the BPRT. The grounds in support of the said application were, inter alia, that the BPRT had no jurisdiction to issue eviction orders in the absence of a landlord/tenant relationship between the applicant and the 3rd and 4th respondents. It was further argued that the BPRT had issued contra orders to Milimani High Court Commercial Court Suit No. 327 of 2017, Fatuma Mohamed Haji vs. African Banking Corporation Limited and 3 Others, which on 17th September 2020 had ordered maintenance of the status quo ante over the suit property, which orders preceded the illegal sale of the 1st respondent's property by the 2nd respondent.
 6. It was argued that unless orders of stay of execution were issued, the 1st respondent stood to suffer substantial loss of her valuable property which had been erroneously vested in the applicant, and who would deal with it in a prejudicial and adverse manner to the interests of the 1st respondent.
 7. The 4th respondent on his part filed a separate application dated 9th October 2023 seeking directions as to who to pay rent to, pending hearing and determination of the appeal by the 1st respondent.
 8. The ELC (Wabwoto, J.) vide a ruling delivered on 19th December 2023 held that the appeal by the 1st respondent was arguable, and that she stood to be evicted from the suit property thus rendering her appeal nugatory. The ELC therefore granted a stay of execution of the orders issued by the BPRT on 2nd June 2023 pending hearing and determination of the appeal. As regards the application by the 4th respondent as to whom to pay rent, the court held that that was a core issue to be determined in the appeal and accordingly declined the said application.
 9. Being dissatisfied with the decision of the ELC, the applicant intends to lodge an appeal before this Court as evinced by the notice of appeal dated 10th January 2024.
 10. The applicant stated that the appeal is arguable and has high chances of success; that the learned judge misdirected himself and improperly exercised his discretion by allowing an application for injunction without security contrary to Order 42 of the Civil Procedure Rules, 2010; erred in law and in fact in finding that the 1st respondent established a prima facie case without having shown a clear and unmistakable right to be protected; and erred in law and in fact in holding that the application for injunction was merited; and restrained any entry and/or interference with the 1st respondent's quiet enjoyment, possession and use of the suit property, which does not belong to her.
 11. On nugatory aspect, the applicant argued that if effect is given to the impugned ruling before the appeal is heard and determined, the applicant stands to suffer substantial loss, and the intended appeal would be rendered nugatory as the appeal before the ELC was scheduled for mention on 19th March 2024.



12. The application was opposed by the 1st respondent through a replying affidavit sworn on 15th March 2024. She challenged the jurisdiction of this Court to hear and determine this application on grounds that the notice of appeal dated 10th January 2024 was never served upon her within the mandatory seven (7) days period provided under rule 79 of the Rules of this Court, and had already filed an application to strike it out.
13. On the merits of the application, the 1st respondent stated that the applicant had not demonstrated that he has an arguable appeal that would be rendered nugatory unless the orders sought are granted. She added that if this Court was to grant the order sought by the applicant, her appeal before the ELC would be rendered moot and an academic exercise, since she is in physical occupation of the suit property. In addition, she averred that if this Court grants the order sought by the applicant, she would be evicted from the suit property, and that this Court would have aided the applicant to unlawfully acquire possession thereof without having complied with the mandatory procedures on eviction as provided under section 152E of the *Land Act*.
14. At the hearing hereof, learned counsel Mr. Ochieng appeared for the applicant, while Mr. Gakunga, learned counsel was present for the 2nd respondent. The other respondents, although served with the hearing notice, did not make any appearance.
15. Mr. Ochieng orally submitted that the suit property was sold to the applicant; that the sale had not been set aside; and that the issue between the parties was primarily as regards possession. He contended that the 1st respondent had no locus standi with regard to the suit property and urged this Court to allow the application and stay the proceedings before the ELC pending hearing and determination of the intended appeal.
16. On his part, Mr. Gakunga indicated that the 2nd respondent's support for the application and basically adopted the arguments made by counsel for the applicant, reiterating that the suit property had already been sold and transferred to the applicant.
17. We have considered the application, the respective submissions as well as the applicable law. It is now well established that in an application of this nature, an applicant must satisfy this Court that the appeal or the intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR. Even one arguable ground of appeal will suffice. See Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.
18. The ELC is faulted for, inter alia, its interpretation and appreciation of the provisions of Order 42 of the Civil Procedure Rules and more specifically granting stay of execution of the orders issued by the BPRT without provision of security by the 1st respondent. Whether the learned judge improperly interpreted the said provisions, and whether he exercised his discretion improperly in granting the orders sought by the applicant are issues that can only be interrogated on appeal. The applicant has, in our view therefore, established that his intended appeal is not idle and hence arguable. In this regard, we are cognizant of the fact that 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. See *Joseph Gitabi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008*. The applicant has therefore satisfied the first limb for grant of the orders of stay under rule 5(2) (b).
19. Turning to the nugatory aspect, we are cognizant of the fact that proceedings before the ELC are live. Therefore, in the circumstances, we are of the view that if the said proceedings were to continue, the ELC is likely to hear and determine the said appeal before the intended appeal by the applicant is heard and determined by this Court, thus rendering it a mere academic exercise. The applicant has therefore



satisfied this Court that his intended appeal will be rendered nugatory in the absence of the orders sought in this application.

20. Consequently, we grant the prayers as sought in the application dated 7th March 2024. The costs of the application shall abide the outcome of the intended appeal.

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

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

