



Kilifi Plantations Limited & 2 others v Kilifi Boatyard Limited (Civil Application E020 of 2024) [2024] KECA 1164 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1164 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E020 OF 2024
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
SEPTEMBER 20, 2024**

BETWEEN

KILIFI PLANTATIONS LIMITED 1ST APPLICANT

DARTSTAR LIMITED 2ND APPLICANT

NOVACON PROPERTIES LIMITED 3RD APPLICANT

AND

KILIFI BOATYARD LIMITED RESPONDENT

(An application for stay of further proceedings pending hearing and determination of an appeal from the Ruling of the Environment and Land Court at Malindi (Makori, J.) delivered on 24th May 2024 in Malindi Environment Land Court Case No. 41 of 2023)

RULING

1. Before this Court is an application dated June 24, 2024, which is brought pursuant to the provisions of Article 164(3)(b) of the Constitution, sections 3A and 3B of the Appellate Jurisdiction Act, and rule 5(2)(b) of this Court's Rules. The applicants seek an order of stay of proceedings in Malindi Environment and Land Court Case No. 41 of 2023, Kilifi Plantations Limited and two others Vs. Kilifi Boatyard Limited; stay of proceedings in the same matter pending the hearing and determination of an intended appeal; and that, pending hearing of this application and the intended appeal, this Court does suspend the application of the orders emanating from the ruling dated May 24, 2024 in Malindi Environment Land Court Case No. 41 of 2023.
2. A brief background of this application is that the respondent filed suit against the applicants over and concerning the right of use of a property known as Kilifi Group V 122 (the "suit property"). Contemporaneous with the filing of the suit, the respondent filed a notice of motion dated March 27, 2024 seeking, *inter alia*, an order of temporary injunction to restrain the applicants from denying



it access to a public road through the properties known as: Kilifi Group V 1628 and CR 79667, CR 61950, CR 61951, and leading to the suit property.

3. In support of the application, the respondent averred that it occupied the suit property from 2001 and that, for the past 23 years since its occupation, it had enjoyed uninterrupted use of the public access road; that, as per a Survey Report filed in the trial court, the said public access road had been in existence and use for over forty years since 1982; and that the purported closure thereof directly interfered with its legal interest over the suit property.
4. The trial court determined the application in favour of the respondent finding, *inter alia*, that the prohibition of use of the access road without considering the Survey Report was contrary to an earlier ruling of the same court dated October 23, 2023, and the doctrine of *lis pendens* because it attempted to alter the substratum of the suit before the anticipated hearing since the said access road had been operating and serving as an easement for over 40 years. The trial court was satisfied that the applicant had demonstrated, *prima facie*, the loss that it had incurred by denial of access to the said road. In essence, therefore, the respondent had satisfied the test in *Giella v Cassman Brown* [1973] EA 358.
5. The applicants have already lodged an appeal, to wit, Civil Appeal No. E023 of 2024, from the decision of the trial court.
6. They contend that on the face of the motion and in the affidavit in support sworn by Betty Bundotich, a director of the applicant companies, that they have an arguable appeal with high chances of success on several grounds that include: that the learned judge erred in law and in fact in holding that the respondent had established a *prima facie* case; and in arriving at the decision that the financial rights of the respondent far outweighed the proprietary rights of the applicants.
7. On the nugatory aspect, the applicants stated that the matter before the trial court is scheduled for hearing on September 26, 2024, and the applicants are apprehensive that the learned judge may proceed to issue further adverse orders that may occasion a further violation of their rights over the said properties during the pendency of their appeal.
8. The application is opposed. In his replying affidavit, Peter Bateman, a director of the respondent, stated that the trial court considered all the elements applicable for grant of injunctive orders which the respondent ably satisfied; that the trial court delivered the impugned ruling in accordance with well settled principles of law; and that the applicants are intent on delaying the determination of the main issues between the parties on merit through various persons or entities to claim interest on the suit properties. In this connection, the respondent cited suit number ELC No. E001 of 2024 that was filed by Mr. Lunfrancus Wasi Biry, who claims to have a beneficial interest over the suit land.
9. At the hearing of the application, learned counsel Mr. Mugo held brief for Mr. Anami for the applicants. The respondent was represented by learned counsel Mrs. Akwana. Counsel made brief oral highlights of their respective client's written submissions.
10. We have considered the application, the replying affidavit and submissions, as well as the applicable law. It is trite law 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 v Tony Ketter & 5 Others](#) [2013] eKLR.
11. Regarding the arguability of the intended appeal, it was conceded by the respondent's learned counsel, and in our view, rightly so, that the intended appeal is arguable. We shall say no more on that first limb.
12. As regards the nugatory aspect, this court has held in *Reliance Bank Limited vs Norlake Investment Limited* [2002]1 EA 227 that the factors which render an appeal nugatory are to be considered within



the circumstances of each case and, in so doing, the court is bound to consider the conflicting claims of both sides. Whether the appeal will be rendered nugatory depends on whether or not what is sought to be stayed or restrained, if allowed to happen, is reversible or, if not reversible, whether damages will reasonably compensate the party aggrieved.

13. Counsel for both parties confirmed that the proceedings sought to be stayed (Malindi Environment Land Court Case No. 41 of 2023) are in respect of right of use of the suit property, and not about the access road, which was the subject matter of the impugned ruling, although it was alleged that the access road leads to the suit property. The suit before the trial court, which is scheduled for hearing on September 26, 2024, could be determined either way, even in the applicants' favour. But even if the suit was to be determined against the applicants, that would not be the end of the road for them, they could still lodge an appeal before this court.
14. In the circumstances, therefore, we do not see anything that cannot be reversed if we decline to grant the orders sought. Accordingly, the applicants have not satisfied the second limb for grant of orders under rule 5(2) (b). Consequently, we hereby dismiss this application. The costs thereof shall abide the outcome of the pending appeal.

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

D. K. MUSINGA (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

