



**Mamba & another v Otieno & another (Civil Application
E169 of 2023) [2024] KECA 1202 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1202 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E169 OF 2023
HM OKWENGU, SG KAIRU & HA OMONDI, JJA
SEPTEMBER 20, 2024**

BETWEEN

RAPHAEL OBUDHO MAMBA 1ST APPLICANT

PETER OTIENO OBALA 2ND APPLICANT

AND

NICHOLAS OWAKA OTIENO 1ST RESPONDENT

**JOHN KAMAU KARIUKI (SUED AS THE LEGAL REPRESENTATIVE OF
ERASTUS KARIUKI APOLLO (DECEASED)) 2ND RESPONDENT**

*(Being an application under Rule 5(2)(b) as read with Rule
42(2) and 49(1) of the Court of Appeal, Rules for an injunction)*

RULING

1. By a Notice of Motion dated 27th October, 2023, the applicants, Raphael Obudho Mamba (Raphael) and Peter Otieno Obala (Peter), have moved this Court under Rule 5(2)(b), Rule 42(2) and Rule 49(1) of the Court of Appeal, Rules. They are seeking an order of temporary injunction prohibiting the 2nd respondent Nicholas Owaka Otieno (Nicholas) from destroying the crops of the applicants which are on the suit property; and an order of temporary injunction restraining the two respondents from forcibly evicting the applicants from land known as Kanyamwa/Kabonyo-Kwandiku/206 (hereinafter referred to as the suit property), or alienating, selling or in any way interfering with the suit property.
2. It is not so indicated in the prayers, but it is apparent from the nature of the application, the grounds stated on the face of the motion, and the affidavit sworn by Raphael, that the orders sought are interim orders pending the hearing of an appeal lodged by the applicants, against the judgment of the Environment and Land Court (ELC), delivered on 20th June, 2023.



3. The judgment subject of the intended appeal arose from a suit that was filed by the applicants against the 1st respondent John Kamau Kariuki (sued) as legal representative of Erastus Kariuki Apollo (Deceased); the 2nd respondent, and the 3rd respondent who is the Land Registrar Homabay. The applicants claimed to be beneficial owners and occupiers of the suit property as beneficiaries of Patrick Mamba Aliwa (Aliwa) and Patrick Okola Okojo (Okoyo).
4. The learned Judge of the ELC upon hearing the suit, dismissed the applicants' suit finding that the applicants had not proved their claim nor shown that they were in adverse possession and ordered that any restrictions on the title to the land be removed. In his supporting affidavit, Raphael has sworn that they instructed their advocate to appeal, and that they filed a notice of appeal together with a draft memorandum of appeal. However, no such documents have been annexed to his affidavit.
5. Raphael has also deposed that following the judgment of the ELC, the respondents have taken possession of the suit property and are in the process of seeking buyers for the same. The 2nd respondent has also entered into the suit property, and has started fencing and cutting down the crops that were on the land. The applicants are therefore apprehensive that unless the respondents are restrained by an injunction, their intended appeal would be rendered nugatory and academic.
6. Raphael also urges that their intended appeal is arguable. He has listed several grounds that they intend to take up on appeal. This includes the learned Judge having disregarded their pleadings and having failed to adopt a holistic interpretation of Section 7 of the *Limitation of Actions Act*, with regard to the recovery of the land after the limitation period.
7. The applicants have also filed written submissions in which they urge that they have satisfied the requirements of Rule 5(2)(b) of the Court of Appeal Rules. They maintain that the appeal is arguable and not frivolous. They rely on their draft memorandum of appeal, arguing that they are all over sixty years old and have lived on the suit property all the days of their lives. They accuse the 1st respondent's father who was the registered owner of the suit property, and who was an adjudication officer in the area, of having used his office to take advantage of the illiteracy of the other occupants, to get title to the suit property. They contended that the 1st respondent's father never at any one time during his life time occupied, utilized or entered into the suit property, and there was no evidence how the title to the suit property was obtained.
8. The applicants argue that the intended appeal would be rendered nugatory as the respondents may disposed of the suit property, an action that would render any judgment on appeal incapable of enforcement and a mere academic exercise. The applicants state that the suit property is ancestral land that has been handed down from generation to generation, and is therefore of sentimental value, and cannot be compensated by an award of damages. Finally, the applicants argue that the balance of convenience is in their favour, as the respondents have never been in possession of the suit property, while the applicants would be greatly prejudiced if dispossessed of the same.
9. The application is opposed through a replying affidavit sworn by the 1st respondent. He contends that the application is frivolous, bad in law, incompetent, fatally defective and an abuse of the court process. He maintains that the suit property was legally sold to his father, upon whose death, he undertook the process of succession and thereafter sold the suit property to the 2nd respondent.
10. The 1st respondent disputes the applicants' claim that they were in possession of the suit property, and contends that the orders sought by the applicants are negative orders as the applicants' suit was merely dismissed, and the parties were not ordered to do anything. That there was therefore no positive and enforceable order made by the ELC which can be subject of an order of injunction. He urges that



granting the orders sought by the applicants would cause a lot of prejudice to the 2nd respondent who is currently the registered owner and is in possession of the suit property.

11. We have carefully considered the motion before us, the affidavit in support and in reply and the submissions. Under Rule 5(2)(b) of the Court of Appeal Rules, an applicant must satisfy the twin principles of arguability and the nugatory aspect (See Stanley Kangethe Kinyanjui -vs- Tony Ketter & 5 others [2023] eKLR). That is to say, that the applicants before us, must demonstrate that they have an arguable appeal, which is not frivolous, and that if the orders sought are not granted, the intended appeal would be rendered nugatory.
12. Under Rule 5(2)(b) of the Court of Appeal Rules, a notice of appeal is necessary to confirm that the court's jurisdiction has been properly invoked. As mentioned earlier, no notice of appeal was laid before us though the applicants have made reference to it. However, we note that the respondent in his replying affidavit at paragraph 16 has deposed that the applicants' notice of motion was brought three months after filing the appeal. That being so, we take it that there is an appeal that has been properly filed, and therefore this Court's jurisdiction has been properly invoked.
13. There is an issue as to whether the learned Judge made a positive order that is capable of stay. The learned Judge dismissed the applicants suit and therefore it was a negative order that is not capable of stay, but the applicants have come before us seeking an injunction pending appeal under Rule 5(2)(b) of the Court of Appeal Rules. The Rule states as follows:
 - “Subject to sub rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may-
 - a.
 - b. in any Civil Proceedings where a notice of appeal has been lodged in accordance with rule 77, order stay of execution, and injunction or a stay of any further proceedings on such terms as the Court may think just.”
14. It is evident from the above provisions, that apart from an order of stay of execution, the Court has powers to issue an order of injunction or to stay any further proceedings pending the hearing of an appeal (See also Peter Anyang' Nyong'o & 2 others vs Minister for Finance & another [2007] eKLR). The applicants herein have not sought to stay execution, which in any case would not be possible, as the order for dismissal of the suit is not one capable of being stayed. The applicants have sought an order of injunction to restrain the respondents from carrying out activities related to the suit property, which activities would be contrary to their interests. The order sought is not an extraneous order, but one which is anchored on the applicants' claim to ownership that was dismissed by the ELC. This Court therefore has discretion under Rule 5(2)(b) of the Court of appeal Rules to issue such an order.
15. In Charter House Bank Limited vs Central Bank of Kenya & 2 others, [2007] eKLR, the 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.”

16. The issue that we must therefore address is whether the applicants have satisfied this Court that they have an arguable appeal that is not frivolous, and whether their appeal would be rendered nugatory if the orders sought are not granted. In doing so we take note of *Stanley Kinyanjui vs Tony Ketter* (supra) in which the Court stated:

“On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.

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 Gitabi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.*”

17. No memorandum of appeal was attached to the applicants’ motion, but in his affidavit sworn in support of the motion at paragraph 16, Raphael has identified several issues that they intend to raise on appeal. We reproduce the same herein verbatim:

- i. Disregard of pleadings, evidence and submissions on record: The learned Judge erred in law by disregarding the applicants’ pleadings, evidence and submissions that the applicants herein were the bonafide owners of the suit land and that the land had been alienated and registered to a third party through illegal means. The learned Judge also disregarded the applicants’ pleadings, evidence and submissions that the first registered owner of the land did not pay any consideration for the land whereas he was in a position of making a title having been an adjudication officer.
- ii. Failing to appreciate Section 7 of the *Limitation of Actions Act*. The learned Judge erred in law by failing to adopt a holistic interpretation of Section 7 of the *Limitation of Actions Act* specifically that the time for recovery of the land had long lapsed since the land was in the possession of the applicants more than twelve years from the date of registration.
- iii. Findings on the procurement of the title to the land. That the learned Judge erred in fact and law in failing to investigate the source of title to the land which the applicants submitted was procured by a person in authority through illegal means. The learned Judge erred in law by allowing the respondents to depart from their pleadings and relying on grounds not having been submitted by the respondents in their defence. The learned Judge erred in fact and law by ignoring the glaring illegalities committed in procuring the title and the inconsistencies presented by the respondents in justification of the title. The learned Judge also erred in fact and in law in dismissing the plaintiffs’ case against the backdrop of no documentary evidence presented by the defendants in justification of the title. The learned Judge also erred in fact and in law in disregarding the evidence to the effect that the suit land was transferred to the 2nd respondent during the pendency of the suit and in the face of a court inhibition issued against the title.

18. It is not for us at this stage to consider the merits of the issues intended to be raised on appeal or whether they may succeed on appeal. It suffices that at least one of the issues raised is capable of a reasonable argument on appeal. The issue of the findings made by the ELC court and whether the same is supported by the evidence that was adduced before the ELC is one capable of argument. So is the



issue regarding the interpretation of Section 7 of the Limitation of Actions act. The appeal is therefore not frivolous, and we are satisfied that the applicants have met the threshold of arguability.

19. On the nugatory aspect, the applicants are apprehensive that the respondents may dispose of the suit property to third parties. There is no doubt that such an eventuality would complicate the situation and render the applicants appeal a mere academic exercise. The 2nd respondent who has title to the suit property, appears to be in possession of the suit property. Although the applicants contend that he has done so irregularly, that has not been demonstrated.
20. As was stated in Charter House Bank Limited vs Central Bank of Kenya & 2 others (supra), the purpose of granting an injunction pending an appeal is to preserve the status quo and to prevent the appeal being rendered nugatory. In order to achieve this aim, and balancing the interest of both parties, we find it appropriate that we preserve the status quo by restraining the respondents through an order of injunction, from alienating the suit property or in any way encumbering it or disposing it off, pending the hearing and determination of the appeal. Costs shall abide the outcome of the appeal.

It is so ordered.

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

HANNAH OKWENGU

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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

