Mwangi v The Hon Attorney General Of The Republic Of Kenya & 2 others (Civil Application E057 of 2024) [2024] KECA 1305 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1305 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPLICATION E057 OF 2024

MA WARSAME, JW LESSIT & WK KORIR, JJA

SEPTEMBER 20, 2024

BETWEEN

PETER MUCHIRI MWANGI ..... APPLICANT

AND

THE HON ATTORNEY GENERAL OF THE REPUBLIC OF KENYA ..... 1ST RESPONDENT

TAHIRA BEGUM LUIS (SUING AS THE EXECUTRIX OF VINCENT AGHOSTINHO RAFAEL LUIS - DECEASED) ..... 2ND RESPONDENT

THE DISTRICT LAND REGISTRAR, NAKURU ..... 3RD RESPONDENT

(An application for stay of the Judgment/decree of the Environment & Land Court at Nakuru (Omollo, J.) dated 8th February, 2024 in ELC. Cause No. 185 of 2016)

RULING

1. The Notice of Motion before us, dated 22nd May 2024, is brought under Rule 5(2) (b) of the *Court of Appeal Rules* (the Rules) wherein the applicant prays for orders interalia that-

> "This Honourable Court be pleased to issue an order for stay of execution of the aforesaid Judgment/Decree pending the hearing and determination of the Appeal preferred therefrom against the Court's Judgment delivered on 8th February 2024 in the Environment and Land Court by Honourable Justice L.A. Omollo".

2. The salient facts of this application revolve around a dispute between two neighbours over the ownership of the parcel of land known as Nakuru/Piave Settlement Scheme/1057 (the suit property) situated in Njoro Township.

3. The applicant alleges that he purchased the suit property from Settlement Fund Trust (SFT) which gave him a letter of offer to allow him make a deposit for the suit property. He paid the deposit and conveyancing fees, and a charge instrument was prepared in favour of SFT requiring him to pay Ksh.47,400/=. He paid the money and has the requisite receipts. Thereafter, he was given a discharge and transfer and the Land Registrar issued him with a Land Certificate on 16th July, 1987 and he alleged that has been in occupation of the suit property ever since.

4. On the other hand, the respondent who filed the case before the Environment and Land Court contended that her late husband was on 1st July, 1976 employed by the SFT as a farm manager and on or about the 7th day of June, 1980, SFT gave the deceased a letter of offer in respect of the suit property, which he accepted and became an allottee holding a certificate of registration No. 22776. The deceased paid a settlement charge of Kshs.414,450/= and paid a deposit of Ksh.40,750/=. He further paid conveyancing fees and interest thereon at the rate of 6.5% per centum per annum and which the deceased was to pay principal sum and interest by 56 consecutive half-yearly instalments of Ksh.16,166/=. On 17th July, 1987, her late husband was issued with a Title Deed for the said parcel, being Title Number Nakuru/Piave Settlement Scheme/1057 measuring approximately 26.5 hectares.

5. Omollo, J. who was seized of the matter, in her judgment dated 8th February, 2024 dismissed the applicant's counterclaim and found that no evidence has been adduced by the applicant to demonstrate that the respondent forged, falsified and/or altered records to reflect that the Estate of Vincent Aghostinho Rafael Luis Deceased owns the suit property. The court found in favour of the respondent and held that the deceased was the lawful owner of the property comprised in Title Number Nakuru/Piave Settlement Scheme/1057 and that the said property was lawfully vested in the respondent by virtue of being the Executrix and Beneficiary of the Estate of the deceased. In particular the learned Judge stated:

> " 443. I must also mention that the evidence as tendered by the Settlement Fund Trustee is in support of the Plaintiff's case. They have stated that during the process of allocation and documentation there was a mix-up. The mix-up as explained by PW2 related to a typographical error in the letter of allotment which described the parcel number allocated to the 1st Defendant as 1139 while it should have been 1140. He explained that the 1st Defendant was nevertheless settled (the process of showing an allottee his parcel of land) on 1140. The fact of this error was communicated to the District Settlement Officer vide a letter dated 9/5/1980.(it is in the 1st Defendant's further list of documents; Document No 8.) This letter further asked him to amend the records held at his office so as to correct this error relating to the parcel numbers. The letter is copied to file No. EST/751/1140. PW2 explained this to mean estate/ scheme number /parcel number. 1140 is the parcel of land allocated and documented to the 1st Defendant. This means and would mean that as at 9/5/1980 the 1st Defendant was aware of the clerical error and communication relating to its correction...
>
> 463. As has been analyzed in the foregoing paragraphs, the 1st Defendant's claim over the suit parcel is based on documents and processes that are inconsistent with the procedure of allocation of land as enumerated by PW2 (the assistant Director at the Settlement Fund Trust), explanations offered by him on documents appearing in the file which he brought to court...

464. PW2's evidence remains uncontroverted as relates to the procedure in allocating land to the Plaintiff's deceased husband and the 1st Defendant. It is also uncontroverted as it relates to the authenticity of documents held by the Plaintiff. The Plaintiff produced a search certificate and green card for the suit property both of which show that it is registered in the name of Vincent Aghostinho Rafael Luis..."

6. It is that decision that the applicants intend to appeal against and seek to be stayed.

7. Going back to the application, it is premised on the grounds that firstly, the intended appeal is arguable as enumerated in the Draft Memorandum of Appeal dated 11th April 2024 to the extent that: the learned judge failed to acknowledge that he was the first allottee and the lawful owner of the suit; the learned Judge erred in declaring that the deceased was the lawful owner of the suit property and his title deed issued was genuine despite evidence to the contrary and that the learned Judge erred in failing to construe the law and principles pertaining to proof of ownership of land and property in general.

8. Secondly, the applicant is exposed to real and apparent substantial loss of the suit property given that the respondent failed to disclose to Nakuru Succession Court that the suit property is the subject of conflict in an active court matter, being Nakuru ELC Suit No 185 of 2016.

9. Thirdly, that unless this court intervenes, the respondent will execute the impugned judgment given that she has already obtained a rectified certificate of Confirmation of Grant dated 12th March, 2024 which includes the suit property and thus the sale of the suit property may ensue at any given moment to the applicant's detriment and the suit will be rendered nugatory.

10. In opposing the application, the respondent filed a replying affidavit dated 12th June, 2024 and deposed that the parties have been neighbours for over fourty years and the applicant has always resided on Title Number Nakuru/Piave Settlement Scheme/1056 while the respondent has been in occupation of the suit property; that she followed due process in applying for Rectification of Grant, which application was filed immediately after the delivery of the Judgment of the trial court and before the applicant filed his application for stay pending appeal in the ELC; that the application does not satisfy the twin principles for the grant of an injunction and that by dismissing the applicant's counterclaim, the Court issued a negative order which is not capable of being stayed and lastly, that the applicant did not come to court with clean hands as he deliberately withheld from the Court crucial information that he has been charged before the Nakuru Chief Magistrate's Court in Criminal Case No. E490 of 2024 with 18 counts of forgery and making a document without authority pertaining to the suit property.

11. These rival positions were agitated by the parties appearing before us. Relying on his submissions, Mr. Muchiri who was appearing in person added that he urgently needed protection from the Court because the respondent who upon judgment, transferred the suit property to her name, was in the process of selling the suit land to the catholic church and consequently, the suit land would be out of his reach making his appeal academic. Furthermore, he submitted his property, crops, animals and buildings are on the said property and he was likely to be evicted from the property and suffer irreparable loss as a consequence of the orders of the Court.

12. On his part, Mr. Naeku, learned Counsel for the respondent also relied on his written submissions and emphasized that the position on the ground, as established by the trial court, is that the respondent has had continuous use of the suit property for over 40 years. Moreover, the judgment could not evict the applicant from the suit property because he had never resided on it.

13. We have considered the application, submissions by the parties as well as the law. In determining an application under Rule 5(2)(b) we have to satisfy ourselves that the applicant has demonstrated the twin principles that they have an arguable appeal or an appeal that is not frivolous, and secondly, that if the orders sought are not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. See *Reliance Bank Ltd. (in liquidation) v Norlake Investments Ltd.* [2002] 1 EA 227.

14. On arguability, the applicant is not obliged to establish a multiplicity of arguable grounds; even a single arguable issue will suffice. This much was appreciated by this Court in *Transouth Conveyors Ltd. v Kenya Revenue Authority & Another -* Civil Application No. 37 of 2007}} (unreported). Nor are they required to show that the appeal would definitely succeed or that the appeal has very high chances of succeeding. It is sufficient, if they can show that they have raised a serious question of law or a reasonable argument, deserving consideration by this Court.

15. Taking caution not to make final determinations on issues subject of the intended appeal, we are persuaded that whether the deceased was the legitimate owner of the suit property in view of the fact that the applicant was the first allottee of the suit property, is a legitimate arguable point that merits consideration by this Court in the intended appeal.

16. On the nugatory aspect, a brief perusal of the judgment indicates that the court conducted a site visit and concluded that the respondent and not the applicant was in actual occupation of the suit property. In any event, if the applicant's alleged crops, cattle and building are affected in any way, the same can be quantified and compensated by way of costs. Furthermore, no evidence has been placed before the Court to show that the respondent is in the process of selling the suit land to the Catholic Church.

17. In the end, we find the applicant has failed to demonstrate the twin principles for the grant of the orders sought. Consequently, the application is dismissed with costs to the respondent.

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

M. WARSAME

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

W.K. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.