



Munyua v Jam Auto Spares & 2 others (Civil Appeal (Application) E127 of 2023) [2024] KECA 1131 (KLR) (6 September 2024) (Ruling)

Neutral citation: [2024] KECA 1131 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E127 OF 2023
W KARANJA, J MOHAMMED & LK KIMARU, JJA
SEPTEMBER 6, 2024**

BETWEEN

KENFREY GITONGA MUNYUA APPLICANT

AND

JAM AUTO SPARES 1ST RESPONDENT

DISTRICT LAND REGISTRAR 2ND RESPONDENT

NATIONAL BANK OF KENYA 3RD RESPONDENT

(Being an application for injunction orders against the judgment of the Environment and Land Court of Kenya at Kerugoya (E.C. Cherono, J.) dated 25th May, 2023 in ELC Case No. 133 of 2017))

RULING

Background

1. Kenfrey Gitonga Munyua (the applicant) has vide a notice of motion dated 5th July 2023 expressed to be brought pursuant to the provisions of Article 40(1) of the Constitution of Kenya, Section 3A and 3B of the Appellate Jurisdiction Act and Rule 5(2)(b) of the Court of Appeal Rules (this Court’s Rules) sought the following orders:
 - a. Spent
 - b. That pending hearing and determination of the intended appeal, inter-partes, this Court be pleased to issue an order of injunction restraining the 1st respondent either by itself, its directors, agents, servants, officers or any other person claiming interest through them from transferring, selling, charging, interfering, trespassing, demolishing or in any other way dealing with Mwea/Tebere/B/2264 & 2265 (the suit properties).



- c. That the costs of the application be provided for Jam Auto Spares, National Bank of Kenya and the District Land Registrar are the 1st to 3rd respondents, respectively.
2. The motion is premised on the grounds that:
- a. On 25th May 2023, Hon E.C. Cheron, J. delivered a judgment in Kerugoya ELC no. 133 of 2017 Kenfrey Gitonga Munyua v Jam Auto Spares & 2 others in favour of the respondent herein and which effect was to grant the suit properties which has structures constructed on it to the 1st respondent.
 - b. The applicant being aggrieved by the said judgment lodged its Notice of Appeal dated 26th May 2023 before the Environment and Land Court (ELC) at Kerugoya and applied for proceedings.
 - c. The grounds of appeal are that the ELC judge erred in law and in fact in:
 - i. finding that the appellant's case was not supported by evidence on record;
 - ii. finding that the appellant failed to establish his case on balance of probabilities;
 - iii. disregarding the evidence given by the appellant and solely relying on the respondent's evidence;
 - iv. dismissing the appellant's suit; and
 - v. awarding costs to the respondents.
 - d. the applicants' draft memorandum of appeal demonstrates that the applicant has an arguable appeal with a high probability of success against the finding and decision of the ELC;
 - e. the respondent has commenced demolition of structures on the suit property and if the demolition continues and is concluded before the intended appeal is heard and determined, the same will have been rendered nugatory;
 - f. unless this Court urgently intervenes, the applicant is reasonably apprehensive that the respondents may at any time dispose of the suit properties which will cause the applicant to suffer irrevocable losses;
 - g. in the absence of the injunction to protect the subject matter of the appeal, the suit properties, the appeal will be merely academic and will be rendered nugatory as damages cannot compensate the demolition of the structures on the suit property;
 - h. the respondents will not suffer prejudice if an order of temporary injunction is granted pending hearing and determination of the intended appeal; and
 - i. the interest of justice demands that the suit property be preserved by an order of injunction pending appeal.
3. The motion is supported by the affidavit sworn by the applicant giving background information regarding the suit to the effect that: the applicant was the registered owner of the suit properties until the respondents fraudulently transferred the same. That he secured a loan of Kshs. 20,000,000 from the 2nd respondent and charged the suit properties as collateral hence surrendering the title documents to the 2nd respondent. That he later entered an agreement with the 1st respondent for the sale of the suit properties but the 1st respondent failed to perform its part of the bargain which fact resulted to frustration of the contract as the 1st respondent failed to pay Kshs. 18,500,000 on the agreed



date. That both the 1st and 2nd respondents were informed that the contract between the parties had been frustrated. That the 1st respondent in collusion with the 2nd and 3rd respondents fraudulently transferred the suit properties to itself and secured a loan of Kshs. 10,000,000 from the 2nd respondent and charged the suit properties as security. The applicant further deponed that the 2nd respondent did not inform the applicant of this development and the applicant learnt of the change of ownership of the suit properties when he conducted a search at the Lands Registry.

4. The applicant further deponed that he neither consented nor issued any documents to the 1st respondent to aid the transfer. That he visited the suit properties and found a group of men demolishing the developments thereon under the instruction of the 1st respondent. That his efforts to stop the demolition were futile as the group of men threatened to harm him and on reporting to the police, he did not get any assistance. The applicant further deponed that in the circumstances, he resorted to seeking the injunction orders as the only remedy to save the suit properties from the said destruction. The applicant further deponed that he is apprehensive that the 1st respondent may dispose of the suit properties thereby causing him irrecoverable loss.
5. The motion was opposed vide a replying affidavit sworn by Ciliaka Karimi, a director of the 1st respondent who deponed, inter alia, that the application is incompetent, bad in law and an abuse of the court process; that the applicant has not approached the Court with clean hands as the applicant filed a similar application dated 5th September, 2017 before the ELC seeking an injunction pending the hearing and determination of the suit where an interim order of injunction was granted. That the 1st respondent filed an application seeking to review and set aside the interim order of injunction.

That on 8th November, 2019 the ELC dismissed the applicant's application for injunction with costs while the 1st respondent's application for review was allowed with costs. The 1st respondent deponed that the applicant did not appeal against the said ruling.

Submissions by Counsel

6. When the application came up for hearing before us, Messrs Achach & Associates Advocates LLP appeared for the applicant while Messrs Magee Law LLP appeared for the 1st respondent. The 2nd and 3rd respondents did not participate in the hearing of the application. Counsel for both the applicant and the 1st respondent filed submissions and sought to rely on them.
7. Counsel for the applicants relied on the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 that for an interlocutory injunction to be granted the applicant has to establish a *prima facie* case and whether he stands to suffer irreparable damage if the injunction is denied. Counsel submitted that where in doubt the Court ought to decide the issue on a balance of convenience. Counsel submitted that the applicant and the 1st respondent entered into a sale agreement, which expressly indicated that time, was of the essence. Counsel asserted that the 1st respondent blatantly disregarded the said agreement and fraudulently transferred the suit properties to itself without the applicant's consent. Counsel asserted that the respondents infringed the applicant's proprietary rights when they colluded to fraudulently transfer the suit properties to the 1st respondent.
8. Counsel further submitted that the applicant visited the suit properties and found a group of men demolishing property on the suit properties.

Counsel asserted that unless an order of injunction is granted, the demolition on the suit properties will continue and may be concluded before the appeal is heard. Counsel emphasized that this will cause extensive loss to the applicant that cannot be remedied by an award of damages. Counsel concluded by submitting that the balance of convenience tilts in favour of granting the orders sought.



9. Counsel for the 1st respondent submitted that the applicant's application is res judicata as a similar application was filed before the trial court and was determined in favour of the 1st respondent. Counsel further submitted that the applicant has not met the threshold for the grant of an order of injunction under Rule 5(2)(b) of this *Court's Rules*. On arguability, counsel contended that there is no appeal as the applicant failed to file a record of appeal within 60 days and did not serve counsel for the respondents with the notice of appeal as required under Rules 79 and 84 of this *Court's Rules*. Counsel asserted that the applicant has no arguable appeal as the memorandum of appeal raises new issues pertaining to a breach of contract, which issues were not pleaded in the plaint and were not up for determination by the ELC. Counsel further asserted that the applicant did not plead particulars of breach of contract and did not seek remedies for breach of contract. Counsel emphasized that a party should not be allowed to travel beyond its pleadings. Reliance was placed on the Supreme Court decision of *Olive Mugenda v Wilfred Itolondo & 11 others* [2016] eKLR in support of this proposition.
10. On the nugatory aspect, counsel, submitted that the applicant has not demonstrated that he is in possession of the suit properties. In counsel's opinion, the orders of injunction are aimed at evicting the 1st respondent from the suit properties without affording the 1st respondent a fair hearing. Counsel asserted that the applicant's alleged loss can be compensated by an award of damages. Counsel submitted that the 1st respondent is in possession of the suit properties and if an order of injunction is granted, it will cause great prejudice to the 1st respondent. In conclusion, counsel urged this Court to dismiss the application on the ground that it is incompetent, as the applicant has not met the requirements for the grant of an order of injunction.

Determination

11. We have considered the application; the grounds in support thereof, the authorities cited and the law. The jurisdiction under Rule 5(2)(b) of this *Rules* is discretionary and guided by the interests of justice.
12. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this *Court's Rules* are well settled. This Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited & 3 Others* [2000] eKLR delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
13. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court. See: *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR where this Court described an arguable appeal in the following terms:
 - “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.
 - viii) In considering an application brought under Rule 5 (2)(b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”



14. We have considered the grounds set out in the motion and the draft memorandum of appeal. In our view, it is arguable inter alia: whether the ELC erred in law and in fact in failing to give meaning to or properly interpret the clause “time is of the essence” in the agreement for sale. An arguable appeal is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
15. On the nugatory aspect, the position in law is that this depends on whether or not what is sought to be stayed if allowed to happen is irreversible; or if it is not reversible, whether damages will reasonably compensate the aggrieved party. See: *Reliance Bank Ltd V Norlake Investments Ltd* (2002) 1 EA 227.
16. We have considered the above threshold in light of the applicant’s position on the prerequisites. From the circumstances of this case the applicant entered into a sale agreement to sell the suit properties to the 1st respondent for the sum of Kshs. 18,500,000. Part of this purchase consideration was intended to settle the debt that the applicant owed to the 2nd respondent. It is not in dispute that the 1st respondent settled this debt on behalf of the applicant. The value of the suit properties is therefore known. The 1st respondent is in possession. The balance of convenience tilts in favour of the 1st respondent. In the circumstances, we are persuaded that an award of damages would adequately compensate the applicant in the event that the intended appeal succeeds.
17. This Court in the case of *Esso Kenya Limited v Mark Makwata Okiya* [1992] eKLR stated as follows:

“...as it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available.”
18. Accordingly, we find that the appeal, if successful, will not be rendered nugatory, if the orders sought are not granted. In the circumstances, the applicant has failed to satisfy the 2nd limb of the requirements of Rule 5(2)(b) of this *Court’s Rules*.
19. It is well settled that for an application under Rule 5(2)(b) of this *Court’s Rules* to succeed, the applicant must satisfy both limbs of the twin principles. (See: *Republic v Kenya Anti-Corruption Commission & 2 others* (2009) KLR 31, and *Reliance Bank Ltd v Norlake Investments Limited (supra)*).
20. In the circumstances, we find that the applicant has failed to satisfy one limb of the requirements under Rule 5(2)(b) of this *Court’s Rules*. The upshot is that the notice of motion dated 5th July 2023 is dismissed with costs to the 1st respondent. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 6TH DAY OF SEPTEMBER, 2024.

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

Deputy Registrar

