Muguna v Muhu Holdings Co Ltd (Civil Application E221 of 2024) [2024] KECA 1465 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KECA 1465 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E221 OF 2024

DK MUSINGA, MSA MAKHANDIA & JM MATIVO, JJA

OCTOBER 25, 2024

BETWEEN

JUSTUS GITUMA MUGUNA .... APPLICANT

AND

MUHU HOLDINGS CO LTD .... RESPONDENT

(An application for a mandatory injunction and Stay of Execution of the Ruling of the Environment and Land Court at Nairobi (M. D. Mwangi, J.) dated 7th May 2024 in ELC Appeal No. E085 of 2021)

RULING

1. The notice of motion before us is dated 14th May 2024. It is brought under sections 3A and 3B of the *Appellate Jurisdiction Act* and rule 5 (2)(b) of this Court's Rules. The applicant seeks stay of execution of the judgment and decree rendered by Mwangi, J. on 7th May 2024 pending the hearing and determination of his intended appeal. Further, that a mandatory injunction to restrain the respondent from evicting him from the business premises situate on LR. No. 209/681/2 ("the suit premises") and in the alternative, a mandatory injunction be issued directing the respondent to return and restore forthwith the applicant into the suit premises and pay any financial losses and damages incurred by him as a consequence of the said unlawful eviction.

2. The facts leading to this application are that the respondent issued termination notices to the tenants in the suit premises, including the applicant, which culminated in the tenants filing 8 references in the Business Premises Rent Tribunal ("BPRT"). The ground for termination was that the respondent intended to carry out substantial works of construction and renovation which could not be carried out without obtaining vacant possession of the said premises. As part of hearing the references, BPRT inspected the business premises, and in its judgment delivered on 13th March 2020, dismissed the references and thereby allowed the respondent's notices terminating the tenancies. The tenants were

directed to vacate the premises and hand over vacant possession of the business premises by 1st July 2020 and in default, an order of eviction to issue.

3. The tenants, among them the applicant, being aggrieved by the BPRT's judgment, filed an appeal before the Environment and Land Court being ELC Appeal No.16 of 2020. The appeal was heard and determined by Eboso, J. who dismissed it by his judgment delivered on 2nd February 2021.

4. The respondent then moved the Tribunal, seeking the eviction of the applicant and other tenants with the assistance and supervision of the Officer Commanding Station ("OCS") Kamukunji. The applicant then filed the application dated 21st July 2021 seeking a review of the aforesaid judgment by the BPRT. The BPRT in the ruling delivered on 5th November 2021 dismissed the applicant's application but allowed the respondent's application.

5. The applicant was not done yet. He filed an appeal in the High Court against the said ruling. The respondent on being served with the appeal filed an application seeking to strike out the applicant's record of appeal on grounds that it was incompetent and an abuse of the court process. The respondent argued that the Environment and Land Court, ("ELC") was the final court for appeals arising from the decisions of BPRT under section 15 of the Business Premises (Hotels, Shops and Catering Establishments) Act, ("the Act"). In essence, the respondent was saying that Eboso, J.'s decision on the appeal was final. The applicant through his replying affidavit argued that the respondent's termination notices did not affect him, as he was a tenant in a separate property. He was therefore not a party to the proceedings in the BPRT or the court in Appeal No. 16 of 2020. He cited a ruling dated 26th July 2021, where the court stated that it did not determine the issue of identification of the business premises. He argued that the respondent was precluded under section 120 of the *Evidence Act* from claiming that the appeal was res judicata, as the court never determined the business premises that was subject to the termination notices. The applicant asserted that the application was misconceived, incompetent, and an abuse of the court process, and prayed for its dismissal with costs.

6. Upon considering the application, the learned Judge agreed with the respondent and held that the judgment in ELC Appeal No.16 of 2020 was final and that it lacked the jurisdiction to entertain the appeal, and in the premises struck out the appeal with costs. The interim orders of stay of execution were consequently vacated and the respondent was thus put at liberty to execute the orders issued on 13th March 2020 and 5th November 2021 by the BPRT respectively.

7. It is the above ruling that is the genesis of the instant appeal and application.

8. The application is supported by grounds on the face of the motion and the supporting affidavit of the applicant dated 14th May 2024. The applicant contends that since the respondent did not subject him to business termination proceedings under the Act, or at all, the ELC contravened Articles 10, 25, 27, 48, and 50 of *the Constitution* of Kenya by declining jurisdiction to hear and determine the merits of the applicant's appeal. The appeal was challenging the decision rendered by the BPRT on 5th November 2021 by which the BPRT unlawfully ordered the eviction of the applicant from the business premises. This was despite the fact that the applicant had not been subjected to termination of tenancy proceedings before the BPRT. The ELC thereby contravened rules on natural justice, principles of fair hearing, and the rule of law. The applicant contends further that the ELC lacked jurisdiction to arbitrarily dismiss the applicant's appeal arising from the impugned ruling without delving into its merits contrary to rules of natural justice and in contravention of Articles 10, 25, 27, 48 50, and 159 of *the Constitution* of Kenya. In the process, the High Court abused judicial power and authority conferred upon it under section 13(4) of the *Environment and Land Court Act*, meriting the urgent intervention of this Court. Based on the foregoing, the applicant maintains that the appeal raises serious triable issues of law with overwhelming chances of success and that unless the prayers sought are

granted urgently the applicant's appeal might be rendered nugatory and/or reduced to a mere academic discourse, bearing in mind the fact that the applicant's restaurant business had employed more than 20 employees.

9. The application was opposed by the respondent through the replying affidavit of Lucy W. Muhu, a Director of the respondent, dated 12th July 2024. It is the respondent's case that the applicant is hell-bent on not vacating the suit premises. That the applicant had not shown special circumstances that warrant this Court to grant a mandatory injunction, given that he was well aware that this matter has been heard and determined to its logical conclusion both by the BPRT and ELC on appeal. That this application was therefore an abuse of court process. That the applicant in seeking a mandatory injunction is a gimmick to have this Court to re-litigate the dispute. That in any event, this Court does not have jurisdiction to entertain the application as there is no pending appeal to warrant orders under rule 5 (2) (b) of this Court's Rules. That without the necessary jurisdiction this Court has no other option other than to down its tools as jurisdiction is everything as was held in the locus classicus case of Owners of the Motor Vessel "Lillian S" vs. Caltex Oil(Kenya) Ltd [1989] eKLR. That it is also paramount and imperative that litigation must come to an end.

10. The application was canvased by way of written submissions, with limited oral highlights. At the plenary hearing of the application, Mr. Ngoge, learned counsel appeared for the applicant, whereas Ms. Onyango Opiyo, learned Counsel appeared for the respondent. Mr. Ngoge reiterated and expounded on the grounds and the supporting affidavit of the motion as well as his written submissions which we need not rehash. Suffice to add that on the nugatory aspect, counsel urged that the applicant operates a very busy and popular restaurant on the business premises with several employees who will be affected by the eviction, yet they are not parties to these proceedings. That if the prayers sought are not granted, the applicant and his employees shall suffer unlawful eviction, undue hardship, and suffer irreparable economic losses. Additionally, Mr. Ngoge argued that the provisions of section 15 (4) of the Act does not apply in the circumstances of this case, for two reasons. One, the applicant's tenancy was not the subject of termination proceedings before the BPRT. The subject of termination was the respondent's premises known as Plot No. 209/682/2, and not the business premises occupied by the applicant, a fact admitted by the respondent. That the ELC therefore, ought to have dealt with the appeal on merit, instead of closing the doors of justice on the applicant without according him a hearing. Counsel urged us on the basis of the foregoing to allow the application with costs. Ms. Onyango Opiyo in response submitted that this Court had no jurisdiction to hear and determine this application.

11. Relying on the cases of Mukhisa Biscuit Manufacturing Co. Ltd vs. Westend Distributors Ltd [1969] E.A, Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR and Samuel Kamau Macharia & Another vs. KCB & 2 Others - Supreme Court Civil Application No. 2 of 2011, counsel submitted that by filing and prosecuting the appeal in this Court, the applicant wants this Court to re-examine the Tribunal's decision and judgment of the ELC on further appeal. That this Court does not have jurisdiction to entertain, hear and determine a further appeal as the judgment and decree of ELC was final. It was submitted that since this Court does not have jurisdiction to hear and determine this application and appeal, then this application should wholly fail. This makes the appeal neither arguable nor can it be rendered nugatory in the event the orders sought are denied. Additionally, it was submitted that the application was res judicata and an abuse of the court process. That litigation must come to an end and parties should not be allowed to abuse the court process by trying to reinvent themselves and camouflage as new parties, seeking new orders in different colours, shapes, and sizes. She therefore urged us to dismiss the application with costs.

12. We have considered the application, the grounds in support thereof, the rival affidavits, the respective submissions, the authorities cited, and the law. The jurisdiction of this Court under rule 5(2) (b) of this

Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.

13. This Court in the case of Trust Bank Limited and Another vs. Investech Bank Limited and 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…"

14. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.

15. On the first imperative, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See Stanley Kang'ethe Kinyanjui vs. 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."

16. We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our view, the appeal is not arguable. The applicant is seeking to appeal against a decision of the ELC which struck out the appeal on the ground of res judicata. We have gone through the draft memorandum of appeal and we do not see any arguable point of law that would be worth of consideration by this Court. The issues of violation of the applicant's constitutional rights are new matters that were not ventilated before the ELC. We doubt that they deserve our interrogation. We are aware that section 15 of the Act bars appeals to this Court from a decision of the ELC on appeal from the decision of BPRT. The decision of the ELC in that regard was final. The issue raised by the applicant of the difference between the business premises from which the applicant was evicted from is neither here nor there. We note that the same was not an issue before the ELC. Further, we are aware that the BPRT visited the locus in quo and was satisfied as to the applicant's tenancy on the business premises. If the situation was different somewhat as the applicant wanted us to believe, nothing stopped him from raising the issue with BPRT. Finally, the appeal having been struck out, it gave rise to and resulted in a negative order. The order being negative, as it did not order any of the parties to do anything or restrain them from doing anything is incapable of execution and thus the Court cannot order stay of execution of such negative order. See Chege vs. Gachora ([2024] KEHC 1994 (KLR).

17. Having found that the applicant has not satisfied the first ground, we have no reason to consider the second limb as the requirement is that the two limbs must both be satisfied. In the same breathe, we cannot grant the orders of mandatory injunction sought by the applicant.

18. In conclusion, we are satisfied that the applicant has not satisfied the two prerequisites. Accordingly, the application dated May 14, 2024 is hereby dismissed. The applicant shall bear the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR