



**English Voice Real Estate Limited v Kazungu (Suing as the Guardian Ad-  
Litem and Heir of the Estate of the Late Baya Yaa Baya) & 3 others (Civil  
Application E007 of 2024) [2024] KECA 1913 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1913 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E007 OF 2024  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
OCTOBER 11, 2024**

**BETWEEN**

**ENGLISH VOICE REAL ESTATE LIMITED ..... APPLICANT**

**AND**

**BARAKA NGOKA KAZUNGU (SUING AS THE GUARDIAN AD-LITEM AND  
HEIR OF THE ESTATE OF THE LATE BAYA YAA BAYA) ..... 1<sup>ST</sup> RESPONDENT**

**RICHARD MARK BINNS ..... 2<sup>ND</sup> RESPONDENT**

**FELICITY ANN BINNS ..... 3<sup>RD</sup> RESPONDENT**

**SIMEON KAZUNGU BAYA ..... 4<sup>TH</sup> RESPONDENT**

*(An application for stay of execution pending hearing and intended appeal from  
the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa  
(M. A. Odeny, J.) delivered on 19<sup>th</sup> March 2024 in ELC Case No. 57 of 2017)*

**RULING**

1. In the Notice of Motion dated 3<sup>rd</sup> April 2024 brought pursuant to section 3 of the [Appellate Jurisdiction Act](#) and rule 5(2) (b) of the [Court of Appeal Rules](#), English Voice Real Estate Limited, the Applicant's, seeks inter alia that:
  - a. There be stay of execution of the Judgment and Decree by the M.A Odeny, J of 19<sup>th</sup> March 2024 in ELC No. 57 of 2017; Baraka Ngoka Kazungu & 2 Others v Simeon Kazungu Bava and another pending the hearing and determination of the applicant's intended appeal.
  - b. The costs of this application be provided for.



2. The applicant's motion is brought on the grounds that the intended appeal arises out of the Judgment in ELC No. 57 of 2017 where the learned Judge allowed the suit filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and ordered cancellation of the titles to Gede/Dabaso/576 and Gede Dabaso /578 (the suit properties) in the name of the applicant, and that they revert to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents names; that the applicant intends to lodge an appeal that raises several triable issues, which are inter alia that the trial court erroneously reached a finding under section 26(1) (b) of the [Land Registration Act](#), yet the suit was brought under the provisions of section 26(1) (a) of the [Land Registration Act](#); that the applicant holds legitimate and indefeasible titles to the suit properties while the respondents have no titles registered in their names in respect of the suit properties; that the Judgment is an abrogation to the principle of sanctity of title, which courts are required to uphold; that the trial court completely absolved the applicant of any wrongdoing regarding the transactions leading to the sale and purchase of the suit properties and failed to consider that applicant's arguments and evidence that it was an innocent purchaser for value and duly held titles to the suit properties; and that, further, the court erroneously relied on the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's uncorroborated evidence.
3. It was contended that, unless a stay of execution of the Judgment and Decree is granted, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents will proceed to execute the Decree with the result that the applicant's intended appeal will be rendered nugatory, and that it will have been deprived of its interests and rights to the suit properties.
4. The application was supported by the affidavit of Christine Constable, the director of the applicant, in which she reiterates the grounds on the face of the application and further deposed that the Judgment found that a sale agreement ranks in priority to a Certificate of Title which was an abrogation to the principle of the sanctity of title. Annexed to the motion is a Notice of appeal dated 20<sup>th</sup> March 2024.
5. In their grounds of opposition dated 12<sup>th</sup> April 2024, the 1<sup>st</sup> respondent opposed the application on the grounds that: the application is misconceived, incompetent and or otherwise an abuse of the court process, and that it ought to be dismissed; that the suit properties in question are agricultural land within a controlled area, transactions affecting it are controlled transactions which in law become void in the absence of consent from the Land Control Board; that the provisions of the [Land Control Act](#) are imperative to the extent that there is no room for the application of any doctrine of equity; that section 6 of the [Land Control Act](#) lays down the sanction for violation of the Act in absolute terms, and that an alienation made in transgression of the Act is ordained to be void for all purposes.
6. It was asserted that the applicant had not obtained consent and that, therefore, the agreement was void for all purposes; that the applicant did not have legitimate and indefeasible titles as alleged in that every subsequent act premised on a nullity cannot accrue legitimacy or legality since sanctity of title was never intended or understood to be a vehicle for fraud or illegalities or an avenue for unjust enrichment of other persons; that a court of law cannot protect title to land which has been obtained illegally or fraudulently merely because a person is entered on the register as proprietor; that, as a consequence, the applicant's title is a product of fraud. Furthermore, the applicant has not shown how the appeal will be rendered nugatory should it ultimately succeed as the applicant can always be compensated by way of damages; that there is no single bona fide arguable ground that has been raised, and neither was any draft memorandum of appeal annexed to the application in order to warrant ventilation before this Court.
7. In a replying affidavit sworn on 12<sup>th</sup> April 2024, Richard Mark Binns, the 2<sup>nd</sup> respondent, opposed the application on his own behalf and on behalf of the 3<sup>rd</sup> respondent, and reiterated the contents of the grounds of opposition.



8. In their written submissions, learned counsel for the applicant Ms. Omondi and Mr. Omboka reiterated the contents of the grounds of the motion and the supporting affidavit. Particularly on the nugatory aspect, it was submitted that, unless the order for stay of execution of the Judgment is granted, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents will proceed to execute the Decree and have the titles to the suit properties revert to them before the intended appeal is heard; that the assets of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are unknown and they have not demonstrated by their response that they would be able to pay damages in the event the appeal is successful.
9. On their part, learned counsel Ms. Metto holding brief for Ms. Chepkwony for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, submitted that the applicant does not have an arguable appeal as a draft memorandum of appeal was not annexed to the motion; that the applicant's title is a product of fraud, and that they established their case against it.
10. On the nugatory aspect, counsel for the respondents submitted that the appeal will not be rendered nugatory as the suit properties can be valued and the applicant compensated in terms of the value; and that they are in a position to pay the value thereof but that, in any event, they do not intend to sell the suit properties.
11. Despite having been served, there was no appearance by the 4<sup>th</sup> respondent.
12. As a brief background to the dispute, the 1<sup>st</sup> respondent executed an agreement in 2005 for sale of the suit parcels to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who thereafter took possession. Due to old age and infirmity, the 1<sup>st</sup> respondent instructed the 4<sup>th</sup> respondent to oversee the transfer of the suit properties to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents; that in 2009, the 4<sup>th</sup> respondent fraudulently caused the 1<sup>st</sup> respondent who had by then lost his eyesight to execute another Sale Agreement purporting to sell the same suit properties to the applicant to whom the parcels were transferred, which necessitated the suit.
13. On their part, the applicant claimed that they conducted due diligence on the titles to the suit properties through one Mr. Hargreaves, a representative of Access Kenya Ltd, who was facilitated the transaction, and that they paid a sum of Kshs. 8.14 million; that she acquired the suit properties through the 4<sup>th</sup> respondent, and that the documents were duly executed by the 1<sup>st</sup> respondent; that, in 2010 after the transfer was concluded, she went to the site to fence the property and met the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who claimed to be the owners of the suit properties.
14. On considering the matter, the trial Judge held that the applicant's title was procured through misrepresentation by the 4<sup>th</sup> respondent and, as a consequence, the applicant could not rely upon the doctrine of innocent purchaser for value. The court proceeded to allow the 1<sup>st</sup> to 3<sup>rd</sup> respondents suit as prayed.
14. In so far as applications filed under rule 5 (2) (b) of this *Court rules* are concerned, the requirements to be satisfied are amplified in the case of *Republic v Kenya Anticorruption Commission and 2 others* [2009] eKLR thus:

“The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds their results or success could be rendered nugatory”.
15. Concerning whether the intended appeal is arguable, the applicant contends that it has an arguable appeal based on several grounds set out in the motion, inter alia, that: the trial Court was in error



in making a finding under section 26(1) (b) of the Land Registration Act, yet the suit was brought under section 26(1) (a) of the Land Registration Act and that, in so finding, the court reached an erroneous decision; that the trial court further failed to appreciate that the applicant holds legitimate and indefeasible titles to the suit properties, whereas, the respondents do not have any titles registered in their names in respect of the suit properties; and that, therefore, the Judgment was an abrogation from the principle of sanctity of title. On their part, the respondents contend that the applicant did not acquire good title in view of their failure to obtain Land Control Board Consent, and of the alleged fraud perpetrated by the 4<sup>th</sup> respondent. As to whether or not the applicant acquired good title is a matter that we find to be arguable, and worthy of ventilation before this Court.

16. On the nugatory aspect, the applicant is apprehensive that if the orders for stay are not granted, the respondents will proceed to cancel its name from the register of titles to the suit properties and cause them to revert to the 1<sup>st</sup> to 3<sup>rd</sup> respondents' names; that the assets of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are unknown; and that they have not demonstrated that they would be able to pay damages in the event the appeal is successful.
17. As to whether there is the likelihood of the appeal being rendered nugatory having regard to the circumstances of the case, we are of the view that there is no risk of the titles or the suit properties being removed from the jurisdiction of this Court were they to revert to the 1<sup>st</sup> to 3<sup>rd</sup> respondents. We say so because, firstly, the respondents have indicated that they have no intention of selling or transferring them, and secondly, they have also confirmed that in the event they were transferred, there is every likelihood that they would be in a position to compensate the applicant. For these reasons, we are not persuaded that the appeal would be rendered nugatory.
18. In sum, the applicant having failed to satisfy the two limbs required in applications brought under rule 5(2) (b) of the rules of this Court, the Notice of motion dated 3<sup>rd</sup> April 2024 is unmerited and is hereby dismissed with costs in the appeal.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024.**

**A. K. MURGOR**

**JUDGE OF APPEAL**

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**DR. K. I. LAIBUTA C.Arb, FCI Arb.**

**JUDGE OF APPEAL**

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**G. V. ODUNGA**

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

