



REPUBLIC OF KENYA



**Ibrahim Adde Group Holdings Limited v Ngahu & 3 others (Civil Application E265 of 2024) [2024] KECA 1401 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1401 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E265 OF 2024  
JW LESSIT, DK MUSINGA & A ALI-ARONI, JJA  
OCTOBER 11, 2024**

**BETWEEN**

**IBRAHIM ADDE GROUP HOLDINGS LIMITED ..... APPLICANT**

**AND**

**STANLEY KAMAU NGAHU ..... 1<sup>ST</sup> RESPONDENT**

**MUSDAFA SUGULE ADAN ..... 2<sup>ND</sup> RESPONDENT**

**SAMUEL NDUNG’U NGAHU ..... 3<sup>RD</sup> RESPONDENT**

**ALEX NJENGA NGAHU ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for a stay of proceedings from the Ruling and Order of the Environment and Land Court at Nairobi (Mogeni, J.) delivered on 14th May 2024 in ELC Case No. E021 of 2024)*

**RULING**

1. Before the Court is the applicant’s notice of motion dated 28<sup>th</sup> May 2024 brought under rules 5(2) (b) 43, 44, 45, and 49 of the Court of Appeal Rules, 2022, seeking an injunction and stay of further proceedings pending the hearing and determination of the intended appeal.
2. The application is supported by the grounds on the face of it, and the affidavit of Abdulahi Ibrahim Mohamud, the applicant’s director, sworn on 28<sup>th</sup> May 2024, where he deponed that; the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed an application seeking a temporary injunction and which the applicant opposed by filing a replying affidavit sworn on 14<sup>th</sup> February 2024 and submissions dated 23<sup>rd</sup> February 2024; that on 26<sup>th</sup> February 2024, the Court allowed the application by the 1st, 2nd & 3rd respondents; in its ruling the Court erroneously held that the applicant did not take part in the hearing and determination of the application, which prompted the applicant to file the application dated 26<sup>th</sup> February 2024 seeking to stay, review and/or set aside the ruling of the ELC Court (Mogeni, J.) of 26<sup>th</sup> February



2024; that the ELC Court (Mogeni, J.) dismissed the application for review vide a ruling delivered on 14<sup>th</sup> May 2024; the effect of the impugned ruling was that the applicant's multi-million construction, which was at an advanced stage, was unduly stopped, which is likely to lead to wastage and bleeding of the applicant's finances to the tune of Kshs. 500,000/- daily; the court erroneously held that the applicant did not satisfy the requirements for review, whereas the applicant had pleaded a substantial loss of Kshs.500,000 per day and had annexed a construction contract to demonstrate the loss; and that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents would be unable to refund these costs; that on security for costs the applicant pleaded its willingness to comply with any condition the court would issue; that there is no challenge to the applicant's title as the respondents seem to be seeking for the balance of the purchase price, if any, from the 4<sup>th</sup> respondent; the loss occasioned by the injunctive orders issued in the High Court will be higher than any damages likely to be incurred should the applicant's project continue; the applicant has since filed a notice of appeal; and has sought for certified copies of the ruling and proceedings; that it is just and necessary that the orders sought be issued; that the intended appeal raises weighty issues of both fact and law and has high chances of success and may be rendered nugatory if the orders sought are not granted; the applicant will suffer grave injury, loss and damage and his rights to acquire and own property will in the long run be threatened and violated; the applicant legitimately bought the suit property from the 4<sup>th</sup> respondent; it is not involved in the dispute between the respondents; and is also exposed to third-party claims due to the abrupt stoppage of the project; and that the magnitude of the applicant's loss cannot be covered by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, who are of unknown means.

3. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents objected to the application through the replying affidavit sworn by the 1<sup>st</sup> respondent on behalf of the 2<sup>nd</sup> & 3<sup>rd</sup> and dated 4<sup>th</sup> June 2024, where he deposed that; from the draft memorandum of appeal, the intended appeal does not challenge the temporary injunction issued on 26<sup>th</sup> February 2024, but rather seeks to challenge the judicial discretion of the court in refusing to allow the applicant's application for review in its ruling delivered on 14<sup>th</sup> May 2024; the application dated 28<sup>th</sup> May 2024 is defective as injunctive orders cannot issue against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents as they are not in possession of the suit property; the applicant seeks to lift the temporary injunction issued by the court, yet the ruling of the court has not been varied or set aside; staying the temporary injunction will be tantamount to setting aside the said ruling and allowing the appellant to deal with the suit property as it wishes; the order issued by the High Court was to the effect that the status quo be maintained, and thus, in effect, restraining all parties from dealing with the property pending the hearing of the main suit.
4. The 4<sup>th</sup> respondent filed a replying affidavit sworn on 12<sup>th</sup> June 2024 in support of the application, wherein he deposed that; it is not in dispute that the appellant bought the suit property from him; the suit property came into his possession after the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents sold the same to him via a sale agreement dated 17<sup>th</sup> April 2020; he paid the full purchase price of Kshs. 39 million, which they acknowledged through various acknowledgment notes; the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents never challenged the transfer of the suit property between them and have come to court with unclean hands and ought not to have been granted the injunctive orders by the trial court; it is noteworthy that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' purported completion notice and notice of rescission was served on him 3 years after the sale took place; and after he had transferred the suit property to the appellant; and that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have not demonstrated the loss and damage they will suffer if they applicant's application is allowed.
5. The applicant's learned counsel filed submissions and a list of authorities both dated 7<sup>th</sup> June 2024. In the submissions, on arguability, learned counsel posits that the trial judge erred by not appreciating that the applicant had filed a replying affidavit and submissions in response to the notice of motion dated



24<sup>th</sup> January 2024; and secondly in the ruling delivered on 14<sup>th</sup> May 2024, the court erroneously held that the applicant did not satisfy the requirements for review; in contrast, the applicant had pleaded substantial loss of Kshs.500,000 per day and annexed a construction contract to demonstrate the loss, and that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents would be unable to refund these costs; the main question is whether the trial court exercised its discretion in refusing to review its ruling, and this issue can only be addressed in the substantive appeal if and when it is filed.

6. On the nugatory aspect, learned counsel submits that the appeal will be rendered nugatory as the applicant stands to lose Kshs. 500,000 per day in addition to other substantial losses that cannot be compensated by way of damages, including breach of contract with investors, contractors, and suppliers as well as other third parties.
7. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' learned counsel filed submissions dated 13<sup>th</sup> June 2024 and submitted that the prayer for an injunction is unmerited and will be moot for the reason that the respondents are not in occupation of the suit property; they have not dealt in any way with the suit property; and neither have they trespassed on the suit property: that they laid a claim in their plaint as a matter of right and successfully convinced the court that they were deserving of a temporary injunction to preserve the suit property from annihilation by the applicant.
8. Learned counsel further submits: that the grounds of appeal are frivolous; the trial court rightfully held that the applicant had not met the threshold for grant of an order of review; that the applicant did not show an error apparent on the face of the ruling; neither did it introduce new evidence; that in granting the injunction in favour of the respondents the court saw it necessary to preserve the substratum of the suit from wastage by the actions of the applicant, and it considered that the applicant was already in occupation of the suit premises.
9. On the nugatory aspect, learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents submit that the applicant failed to demonstrate how the appeal will be rendered nugatory.
10. The 4<sup>th</sup> respondent's learned counsel filed submissions in support of the application dated 12<sup>th</sup> June 2024 and submitted that the applicant has a prima facie case with a high chance of success; that the 4<sup>th</sup> respondent legally purchased the property from the respondents and the transfer done in favour of the applicant, having paid the full consideration; that 3 years later, the respondents are activating the termination clause, which should be treated as an afterthought; and that the applicant's ownership of the land is not disputed.
11. On the second limb, learned counsel submits that the applicant will be highly prejudiced since he has already commenced construction on the suit property; that an estimated Kshs.500,000 is lost daily; that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are people of unknown means and may not meet the cost of damages likely to be suffered by the applicant; and that the balance of convenience tilts in favour of the applicant, though this is not a factor that this Court considers in an application for an interlocutory injunction.
12. To succeed in an application under rule 5 (2)(b) of this Court's Rules, an applicant has to satisfy twin principles that are enumerated in many decisions of this court namely:
  - i. An applicant must demonstrate that they have an arguable appeal; and
  - ii. That the intended appeal (or appeal if already filed), if successful, will be rendered nugatory if the execution of the decree, or order of proceedings is not stayed.
13. On the first limb of this twin principle, this Court held in *David Morton Silverstein vs. Atsango Chesoni* [2002] eKLR that for an order of stay to be issued, the applicant must first demonstrate that



the appeal or intended appeal is arguable, not frivolous, and that the appeal or intended appeal, if successful, would absent stay, be rendered nugatory.

14. Regarding the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay of the orders sought, this Court in *Yellow Horse Inns Ltd vs. A. A Kawir Transporters and 4 others* [2014] eKLR observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point would succeed, as this Court held in *Kenya Commercial Bank Limited vs. Nicholas Ombija* [2009] eKLR.
15. The draft memorandum of appeal said to be annexure No. 11 to the affidavit in support of the application is not part of the record. Nonetheless, from the grounds in support of the application, the affidavit and submissions filed by learned counsel for the applicant, we deduce the grounds of appeal to include; the complaint that the trial court failed to appreciate that it erroneously found the applicant had failed to respond to the respondent’s application dated 24<sup>th</sup> January 2024, yet the applicant had filed a replying affidavit sworn on the 14<sup>th</sup> of February 2024, and submissions dated 23<sup>rd</sup> February 2024; and that in the impugned ruling the court erred by failing to appreciate that the applicant had met the necessary threshold for allowing a review. We appreciate that at this point it is not for us to determine the merit or otherwise of the appeal, but just to appreciate that the intended grounds are not frivolous.
16. On the second limb, the applicant maintains that the appeal will be rendered nugatory for the reasons that it is incurring huge losses and the respondents are men of straw. Substantial loss per se is not one of the factors that this Court takes into account in the determination of a rule 5(2) (b) application. This court in the case of *Stanley Kangethe Kinyanjui vs. Antony Ketter* [2013] eKLR stated inter alia that;

“The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.

Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

An applicant must satisfy the court that on both principles. We are not satisfied that the applicant has demonstrated that the intended appeal, if successful, shall be rendered nugatory.

17. As the applicant has not satisfied the twin principles. In the end we hereby dismiss the application with costs to the respondents.

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

**D. K. MUSINGA, (P.)**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL ALI-ARONI**

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**JUDGE OF APPEAL**



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

Signed

**DEPUTY REGISTRAR.**

