Maranga v Ouko & 2 others (Civil Appeal (Application) E816 of 2022) [2024] KECA 1400 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KECA 1400 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E816 OF 2022

M NGUGI, F TUIYOTT & JM MATIVO, JJA

OCTOBER 11, 2024

BETWEEN

DR CHARLES MARANGA ..... APPELLANT

AND

ROSELYN DOLA OUKO ..... 1ST RESPONDENT

ARON TAFARI OUKO ..... 2ND RESPONDENT

ANDREW OUKO ..... 3RD RESPONDENT

(Being an application for stay pending hearing and determination of the appeal from the judgment and decree of the Environment and Land Court (K. Bor J.) dated 9th October, 2019 in ELC E311 of 2011 (OS))

RULING

1. In the application dated 23rd December 2022, the applicant, Dr. Charles Maranga, seeks an order of stay of execution of the judgment delivered on 9th October, 2019 by the Environment and Land Court (ELC) in Nairobi (Bor J). He further seeks a temporary injunction restraining the respondents from entering into or otherwise interfering with his possession and occupation of land measuring 2½ acres being part of LR No. 3589/6 (I.R No. 23229) on which there had been a proposed subdivision plan as plot No. 3 LR No. 3589/34. The application is expressed to be brought under sections 3, 3A and 3B of the *Civil Procedure Act*, sections 3(1) 3A and 3B of the *Appellate Jurisdiction Act*, and rule 5(2) (b) of the *Court of Appeal Rules, 2010*.

2. Briefly, the facts forming the background to the application are that the applicant lodged a claim by way of Originating Summons against the respondent in their capacity as the administrators of the estate of one Jason Otinda Ouko (deceased). The applicant sought determination of several questions relating to his claim that he bought 2½ acres of the land comprised in LR No. 3586/6 (I.R. No. 23229) from the late Jason Atinda Ouko in 1989 and whether he is entitled to this portion of land by virtue of

adverse possession. The applicant averred that he paid Kshs. 40,000 to the deceased on 7th October 1989 and immediately took possession of the land. He alleged that before the sale transaction between him and the deceased was concluded, he was sued alongside the deceased over the land. He further alleged that Jason Atinda Ouko died in 1996 and letters of administration intestate over his estate were granted to the respondents; that on 20th June 2011, he was shocked to learn that strangers had invaded the suit land and pulled down his fence, claiming that the parcel of land had been sold to them. He averred that he filed his suit based on the apprehension that he stood to lose the land following the repeated threats that he received.

3. In response to the applicant's claim, the 2nd respondent filed a replying affidavit in which he averred that his father, the late Jason Ouko, was still the registered owner of LR No. 3589/6 (I.R. 23229) which had never been subdivided. He further averred that the plot claimed by the applicant, plot number 3589/34, does not exist. The 2nd respondent denied that the applicant had been in possession of the land as he claimed. He further averred that while there was an incomplete structure on the land that the applicant claimed, he knew of his own knowledge that the applicant and his family reside next to Hillcrest School, and the applicant could not have resided on the suit land, which has no toilet.

4. In the impugned judgment, the court found that it was not in dispute that the applicant agreed to purchase the suit land from the late Ouko and that he paid Kshs. 40,000 on 7th October 1989 for the land even though they did not execute a formal agreement. He had not, however, paid the balance of the purchase price in the 30 years since the transaction. The court further found that the payment by Kenya Pipeline Company Limited to the late Ouko for an easement over the suit property in 1993 was made to him as the owner of the land and not on the applicant's behalf; that had the applicant been in possession of the land at that time, then the compensation funds would have been paid to him and not to the late Ouko. The court further found that the applicant had not paid the balance of the purchase price and therefore found that the late Ouko had terminated the agreement between him and the applicant. It concluded that the applicant was therefore not entitled to an order of adverse possession or specific performance, and it dismissed the applicant's claim with costs to the respondents.

5. The applicant now avers that he intends to appeal against the decision of the ELC, and that his appeal raises arguable grounds which ought to be heard on merit. These grounds, set out in the memorandum of appeal are, inter alia, that the learned judge erred and arrived at the wrong conclusion in finding that the applicant had not made any attempt to pay the balance of the purchase price for almost 30 years when he had adduced evidence to the contrary; that the court erred in attributing the delay of 30 years to him; and in finding that the applicant was not in possession of the suit property. He avers that there is a high probability that the respondents will at any time issue him with an eviction notice from the suit property and if eviction proceeds in the absence of the order sought, he will be greatly prejudiced and the intended appeal will be rendered nugatory.

6. The 2nd respondent filed a replying affidavit sworn on 15th February, 2023 on behalf of all the respondents. He avers that the deceased, Jason Atinda Ouko, is the registered proprietor of the parcel of land known as 3589/6 (IR No. 23229), and that the applicant's claim before the trial court was that he acquired the suit property by way of adverse possession. He noted the contradictions in the applicant's testimony before the trial court in which he claimed to have paid Kshs. 40,000 and alleged that the balance of the purchase price had been offset by a payment of Kshs. 145,000 by Kenya Pipeline Limited to the deceased. It is the respondents' case further that the trial court was correct in finding that having occupied the suit property with the permission of the deceased, he could not turn around and claim adverse possession. The respondents further averred that the trial court was correct in finding that the applicant's prayer for specific performance was unmerited, and was justified in dismissing his claim.

7. The respondents aver further that the applicant's appeal will not be rendered nugatory. They note that the judgment of the trial court was rendered on 9th October 2019, three years before the present application, and the decree issued on 5th November 2019. They contend that if there was a genuine intention to move the court, the applicant would have taken appropriate action earlier. It is their averment that after the decision of the ELC, the land was sold to Mukowe Traders Limited as demonstrated by a copy of the title issued to the purchaser. It is their case that the applicant has been indolent in filing the present application and was only woken from his slumber when the representative of Mukowe Traders Limited visited the suit property in September 2022 and asked the applicant to vacate the suit property.

8. The applicant has filed submissions dated 26th January, 2024 which were highlighted at the hearing by his learned counsel, Mr. Tito. The respondents' submissions dated 17th February 2023 were highlighted by their counsel, Ms. Asli. In his submissions, the applicant relies on the case of *Trust Bank Limited and Another v Investech Bank Limited and 3 others* [2000] eKLR with respect to the principles for grant of an order for stay of execution. He contends that his appeal is arguable with a good chance of success and submits that should stay of execution not be granted, it will be rendered nugatory as he stands to lose 'his only known home'.

9. In their submissions, the respondents argue that the totality of the application is premised on suppression and/or material non-disclosure of facts, and the applicant has thus approached this Court with unclean hands. They further submit that dismissal of a suit is in the nature of a negative order and is incapable of execution, save perhaps for costs. They further submit that in his memorandum of appeal, the applicant has shifted from the substratum of his claim before the ELC, which was a claim in adverse possession, to a claim for specific performance, which was not before the trial court. Their case is that the applicant has not satisfied the threshold for grant of an order under rule 5(2)(b) of this *Court's Rules*.

10. The principles applicable in an application under rule 5(2)(b) were pronounced in *Stanley Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR in which this Court stated:

> "This Court, in accordance with precedent, has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be nugatory if these interim orders were denied. From the long line of decided cases... on Rule 5(2) (b) aforesaid, the common vein running through them and the jurisprudence underlying these decisions can today be summarized as follows:
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> i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court...
>
> ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
>
> iii) ...
>
> iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.
>
> v. An applicant must satisfy the court on both of the twin principles.

vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.

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.

x) 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."

11. In the matter before us, the applicant seeks orders of stay of the judgment delivered on 9th October 2019. His application is dated 23rd December 2022, more than three years after the date of the judgment. The judgment that he impugns was one in which the trial court dismissed his claim in adverse possession with respect to the suit property. It is trite law that a stay order under rule 5(2)(b) cannot issue in respect of a negative order.

12. Clearly aware of this position, the applicant seeks, in the alternative, a temporary injunction restraining the respondents from entering into or otherwise interfering with his possession and occupation of a portion measuring 2½ acres out of L. R. No. 3589/6 (I.R No. 23229) with respect to which he alleges there was a proposed subdivision plan. We have noted the grounds of appeal that he intends to raise before this Court, inter alia, whether the trial court erred in attributing the delay in paying the balance of the purchase price to him and in finding that he had not made out a case for adverse possession or specific performance. Bearing in mind that to satisfy the first principle for grant of orders of stay requires that the intended appeal need not be one that necessarily succeeds, we find that the applicant has an arguable appeal.

13. The question is whether the appeal will be rendered nugatory.

    To determine whether an appeal will be rendered nugatory, we are required to consider whether or not what is sought to be stayed, if allowed to happen, is reversible. If it is not, whether damages will reasonably compensate the party aggrieved.

14. While the applicant contends before us that he is in danger of losing 'his only known home', we note that what he presented by way of photographs before the trial court were photographs of a small incomplete structure; he has taken three years before seeking to protect 'his only known home'; he has not controverted the averment by the respondents that the suit property was sold and transferred to Mukolwe Traders Limited subsequent to the decision of the ELC.

15. At the hearing of the application, Mr. Tito conceded that the applicant had not responded to the respondents' averment that the suit property had been sold to a third party, Mukolwe Traders Limited, prior to the filing of this application, and that any orders we may issue would impact a party who has not been joined as a party to the application. Mr. Tito submitted, a submission that undercuts the applicant's claim that he was in possession, that unless an interim order was issued and the new purchasers put up developments on the land, it would become quite difficult for those developments to be demolished. Finally, we note that the applicant has not averred that the respondents would be incapable of compensating him in damages should his appeal succeed.

16. In the end, we find that the applicant has not satisfied the twin principles that would incline the court to exercise its discretion under rule 5(2)(b) in his favour. We accordingly find the application dated 23rd December 2022 to be without merit. It is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR