



Brookshill Limited & another v National Land Commission & 3 others; Omar & 2 others (Interested Parties) (Civil Application E072 of 2024) [2024] KECA 1759 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KECA 1759 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E072 OF 2024
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
DECEMBER 6, 2024**

BETWEEN

BROOKSHILL LIMITED 1ST APPLICANT

ASHBROOK LIMITED 2ND APPLICANT

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

COUNTY GOVERNMENT OF KWALE 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

SALIM HUSSEIN OMAR INTERESTED PARTY

SULEIMAN ALI MWADZUNGWE INTERESTED PARTY

HATIBU MJAKA MTENGO INTERESTED PARTY

(Being an application for an injunction pending appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Kwale (A. E. Dena, J.) delivered on 3rd May 2023 in Petition No. 25 of 2021)

RULING

1. We need to point out right at the onset that the record as put to us does not contain copies of the pleadings and proceedings in the trial court and that, therefore, we can only discern the factual



background of the dispute leading to the intended appeal and the Motion before us from the impugned judgment and the affidavits filed in support and in reply to the Motion before us.

2. As is evident from the scanty record placed before us, the applicants, Brookshill Limited and Ashbrook Limited, petitioned the Environment and Land Court at Kwale in Petition No. 25 of 2021 seeking: a declaration that the 1st respondent's decision to suspend the approvals for construction of the perimeter wall on the suit properties to wit title Nos. Kwale/Diani Beach Block/1526 and 1527 violated the applicants' constitutional rights and provisions of the Fair Administrative Actions Act and the [National Land Commission Act](#); an order of certiorari to quash the impugned decision; a permanent injunction restraining the respondents from interfering with the applicants' use possession, ownership and interest over the suit properties'; an order that the Officer Commanding Station (OCS) Diani police station restrains the interested parties from interfering with the suit properties; a declaration that the suit properties are not ancestral land but private land solely and legally owned by the applicants; general damages against the 1st respondent for arbitrarily suspending approval of construction of the perimeter wall; exemplary damages against the 1st respondent; and costs of the petition.
3. In opposition to the applicants' petition, the 1st, 3rd and 4th respondents, and the Interested Parties, filed their responses essentially denying the applicants' claim. In particular, the 3rd and 4th respondents claimed that they had been wrongly joined in the petition and, accordingly, urged the ELC to dismiss the petition with costs. On its part, the 2nd respondent did not respond to the petition.
4. In their response, the Interested Parties contended that the suit properties comprised part of their ancestral land dating as far back as 1909 when the British colonial government allegedly dispossessed their forefathers; that, sometime in 2011, they wrote to the Minister of Lands seeking to have the historical injustice occasioned to the native community by the dispossession aforesaid corrected; that the suit properties were subdivisions of Kwale/Diani Beach Block/198, which was at all material time registered in the name of Diccon Croft Willock as lessee for a term of 99 years, and which was to expire on 1st January 2013; that Diccon Croft Willock had requested to have Kwale/Diani Beach Block/198 subdivided into two portions comprising the suit properties; that the head title was subdivided into the suit properties aforesaid; that the applicants had purported to have acquired the suit properties with effect from 1st July 2007 in the absence of any evidence of extension of lease; that the Ministry of Lands disclosed evidence of forged Green Cards in respect of the suit properties, and that Diccon Croft Willock was still the lawfully registered proprietor thereof; and that registration of the suit properties in the appellants' names was fraudulent.
5. On its part, the 1st respondent also opposed the applicants' petition and substantially concurred with the averments made by the Interested Parties. In addition, it filed a cross-petition contending that the head lease comprising the suit properties was registered in the name of Diccon Croft Wilcock and had never been transferred to the applicants or the 1st and 2nd interested parties; that the applicants and the 1st and 2nd interested parties colluded with officials from the 1st and 2nd respondents to sub-divide the head lease and process certificates of leases; that the requisite consents had not been obtained for the subdivision of the head lease and transfer of the suit properties; and that the head lease expired in 2013 and, in the absence of extension, the same automatically reverted to the 1st respondent as trustee for the residents of Kwale County.
6. In its cross-petition, the 1st respondent sought a declaration that the purported transfers to the applicants and the 1st and 2nd interested parties were illegal, null and void; a declaration that the head lease, upon expiry, had reverted to the 1st respondent as public land; an order directing cancellation of the titles to the suit properties; and for costs of the cross- petition.



7. In its judgment, the ELC (Dena, J.) identified 6 issues for determination, 3 of which are relevant to the appeal. On the 1st issue as to whether the 1st Respondent's act of suspending the approval of construction of the wall on the suit parcels contravened article 47 of *the Constitution* and the Applicants' right to *Fair Administrative Action Act*, the court found that the 1st Respondent's decision to suspend the development approval was in breach of the applicants right to fair administrative action under article 47 of *the Constitution*.
8. On the 2nd issue as to whether registration of the Applicants as proprietors of the suit properties was legal, the learned judge noted that the applicants "did not present any history of the property before the subdivisions"; that the applicants "failed to provide evidence that would support a valid purchase and sale transaction occurred to confer them with good title" and that the applicants "were not bonafide purchasers for value without notice, and neither was their title legal."
9. Finally, on the 3rd issue as to whether the Cross Petitioners (the 1st respondent herein) were entitled to the reliefs sought in the Cross Petition, the learned judge noted that it was

"imperative that the register in respect of the suit property be rectified accordingly" as the applicants "titles did not meet the legal compliance of a good title"; that, by operation of law, the suit land should revert to the Lessor to wit the 1st respondent; and that the suit land was public land. Accordingly, the court dismissed the petition with costs; declared the cross-petition successful; ordered that the register for the suit property be rectified to expunge the entries in respect of the applicants and the 1st and 2nd interested parties; and ordered the applicants to bear the costs of the cross-petition.
10. Dissatisfied with the judgment of A. E. Dena, J., the applicants moved to this Court on appeal on 8 grounds set out on the face of their memorandum of appeal dated 2nd May 2024 faulting the learned Judge for, inter alia: holding that the registration of the applicants as proprietors of the suit properties was irregular and unlawful; applying a standard of proof unknown to law to determine the legality of the applicants' title; holding that the applicants failed to comply with the requisite conditions for the process of registration of the properties in their names; holding that the suit properties had reverted to the government and comprised public land; dismissing the applicants' case and allowing the 1st respondent's cross-petition; and for awarding costs to the 1st, 3rd and 4th respondents.
11. By a Notice of Motion dated 24th June 2024 filed pursuant to rule 5(2) (b) of the Court of Appeal Rules, the applicants seek: an injunction restraining the 1st respondent and the Interested Parties from dealing in, evicting them from, demolishing or otherwise interfering with the applicants' structures and occupation of, the suit properties, namely title Nos. Kwale/Diani Beach Block/1526 and 1527 pending appeal; orders that the status quo obtained as at 22nd February 2024 be maintained; and that costs of the application be provided for.
12. The applicants' Motion is supported by the annexed affidavit of Niraj Shah, a shareholder in the applicants, sworn on 24th June 2024 essentially deposing to the grounds on which the Motion is anchored, namely that:
 1. On 3rd May 2023, Justice A. E. Dena delivered a judgment and:
 - a. dismissed the Applicants Petition dated 9th October 2019 with costs; and
 - b. directed that the titles to the Properties Title Numbers Kwale/Diani Beach Block/1526 and 1527 (the Properties) do revert to the 1st Respondent to hold in trust for the people resident in Kwale.



2. The Applicants filed a Notice of Motion Application dated 21st February 2024 before the superior court and sought orders of injunction restricting the 1st Respondent from demolishing the Applicants’ structures on the property and evicting the Applicants pending the hearing before this court.
3. The superior court issued injunction orders dated 22nd February 2024 restraining the 1st Respondent from demolishing or otherwise evicting the Applicants from the Property pending the hearing of the said application.
4. The superior court delivered a ruling on 29th June 2024, Justice A. E. Dena, and dismissed the Applicants’ Notice of Motion Application dated 21st February 2024 on the grounds that there was a similar application pending before this court. However, the court issued an order of status quo for 14 days to enable the Applicants file this Notice of Motion Application.
5. Whereas the Applicants had filed before this court a Notice of Motion dated 20th February 2024, the same had been withdrawn on 6th May 2025 and therefore no similar application was pending determination before this court as at the time the learned judge of the superior court delivered the ruling.
6. The Applicants have filed their record of appeal dated 2nd May 2024 in Mombasa Court of Appeal Civil Appeal No. E083 of 2024 and the same is pending hearing before this court. The Applicants have demonstrated that they have an arguable appeal as evidenced by the Memorandum of Appeal annexed to this Application.
 2. It is therefore in the interest of justice that an order be issued to preserve the subject of the appeal and to protect the Applicants from the threatened evictions and demolitions of property which the 1st Respondent had begun in December 2023 but only stopped because of the court orders of 22nd February 2024.
 3. The Applicants are apprehensive that unless an injunction is granted, the 1st Respondent and its agents shall continue with the demolitions and evictions against the Applicants thereby completely rendering the subject of the appeal nugatory.
 4. The Applicants have an arguable appeal and therefore it is important that the court do protect the Applicants’ occupation rights and the structures on the property pending the hearing of the appeal.
 5. The Applicants stand to suffer irreparable loss which cannot be compensated by damages should the appeal succeed.
 6. It is in the interest of justice that this Notice of Motion Application is heard on priority basis and the orders sought granted.”
13. In support of their Motion, learned counsel for the applicants, M/s. Hamilton Harrison & Mathews, filed written submissions, a list and digest of authorities dated 25th June 2024 citing ten judicial authorities, including two of which are relevant to the principles required to be met for grant of orders under rule 5(2) (b) of this Court’s Rules, namely: Githunguri vJimba Credit Corporation Limited [1988] eKLR; and Equity Bank Limited v West Link Tours Mbo Limited [2013]eKLR, submitting that this Court exercises discretion as a court of first instance when dealing with applications under rule 5(2) (b) even where a similar application has been made in the High Court.
14. Counsel submitted further that the applicants have demonstrated that they have an arguable appeal, which this Court ought to allow them to argue; that they have already filed the record of appeal in Civil



- Appeal No. E083 of 2024; and that, unless the orders sought are granted, the applicants will be evicted from the suit properties and their appeal rendered nugatory. They urged us to allow the Motion.
15. In opposition to the applicants' Motion, the 1st respondent filed a replying affidavit of Saumu Beja Mwachaja, its County Executive Committee member (CEC) in charge of environment, natural resources, land and planning, sworn on 4th July 2024, and in which she stated that the suit properties had already changed hands in that Kwale/Diani Beach Block/157 was allocated to the 1st respondent while No. 156 was allocated to certain residents of Kwale County on application to the 2nd respondent; and that the applicants' Motion lacks merit, and that it was a waste of judicial time and ought to be dismissed with costs.
 16. Learned counsel for the 1st respondent, M/s. Madzayo Mrima & Jadi, filed written submissions, a list and digest of authorities dated 8th July 2024 citing two judicial authorities that are of no relevance to the principles required to be satisfied for grant of orders under rule 5(2) (b) of the Rules of this Court. Counsel argued that the applicants have not met the threshold for grant of the orders sought; that they will not suffer irreparable harm which cannot be adequately compensated by way of damages if the orders sought are not granted; and that the applicants do not have an arguable appeal.
 17. On their part, the Interested Parties filed a replying affidavit sworn on 17th July 2024 by Hatibu Mjaka Mtengo, the 3rd Interested Party, essentially associating themselves with the 1st respondent's position that the suit properties have already been reallocated to the 1st respondent, and to third parties, who are strangers to the appeal; that the applicants are not registered as proprietors of the suit properties; that an injunction is an equitable remedy sought by a party who has a right or interest capable of being protected; that the applicants have no proprietary interest or rights capable of being protected or worth protecting; that, if the orders sought were granted, they would occasion hardship; and that the applicants have not demonstrated that they have an arguable appeal, or that the intended appeal would be rendered nugatory if the orders sought were not granted.
 18. Learned counsel for the Interested Parties, M/s. Munyao, Muthama & Kashindi, filed written submissions dated 2nd August 2024 citing the cases of Trust Bank Limited & Another v Investech Bank Limited & 3 Others [2000] eKLR, highlighting the twin principles that must be satisfied for grant of orders under rule 5(2) (b); Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR in which this Court defined an arguable appeal as not one with a high probability of succeeding, but one which ought to be argued fully before the Court; and Reliance Bank Ltd v Norlake Investments Limited [2002] EA 227, submitting that there will be no harm or hardship occasioned to the applicants if the orders sought are not granted and that, in any event, the suit properties have since been vested in third parties. They urged us to dismiss the Motion.
 19. The 2nd, 3rd and 4th respondents did not file any affidavits in reply or submissions in response to the applicants' Motion.
 20. As this Court has pronounced itself time and again, for an applicant to merit stay of execution, preservative orders or injunctive relief pursuant to rule 5(2) (b) of the Court of Appeal Rules pending appeal, he or she must demonstrate to the satisfaction of the Court that he or she has an arguable appeal; and that the appeal (or intended appeal as the case may be), if successful, would be rendered nugatory if the orders sought were not granted. The two requirements constitute what is commonly referred to as the twin principles that must be satisfied before such orders can avail (see Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC [2020] eKLR; and Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 Others [2014] eKLR).



21. We also take to mind the fact that, as this Court has often stated, even one ground of appeal is adequate to satisfy the first limb of the twin principle. *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR is a case in point.
22. The decisive question here is whether the applicants have demonstrated that they have an arguable appeal and, if the answer is in the affirmative, whether their appeal would be rendered nugatory if the interim injunctive relief and preservatory orders sought are not granted.
23. Turning to the issue as to whether the applicants have an arguable appeal, we hasten to observe that the genesis of the dispute between the parties revolves around the propriety of the applicants’ previous registration as lessees in respect of the suit properties, which registration has since been cancelled in execution of a decree of the trial court that ensued from the impugned judgment; that the structures erected on the suit properties have since been demolished; and that the suit properties have since changed hands to the 1st respondent and third parties who are strangers to the appeal. In effect, the applicants’ Motion has been overtaken by events, but without prejudice to their right to pursue the appeal to its logical conclusion and, if successful, take such steps as they consider necessary to secure compensation.
24. A cursory look at the grounds of appeal advanced in the applicants’ memorandum of appeal, viewed in the backdrop of the record as put to us, reveals substantive issues of law and fact deserving of the Court’s inquiry. As already observed, even one ground suffices – see *University of Nairobi v Ricatti Business of East Africsa* (supra).
25. With regard to the 2nd limb of the twin principle, the term “nugatory” was defined in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA p.227 at p.232 as “worthless, futile or invalid”. It also means “trifling”.
26. Having concluded that the applicants’ intended appeal is arguable, the decisive question is whether the intended appeal, if successful, would be rendered nugatory if the injunctive orders sought are not granted. The applicants have not demonstrated to our satisfaction that, if the injunctive relief sought is not granted, the 1st respondent would not be able to compensate them for any loss that might arise (such as the quantifiable value of the suit properties or of the demolished structures previously erected thereon) in the event that their intended appeal were successful. Having considered the record as put to us, we find nothing on the record or from the submissions by counsel for the applicants to suggest that the intended appeal (if successful) would be rendered worthless or futile in the event that the orders sought were declined.
27. The applicants having failed to satisfy the twin principles required to be met for grant of orders under rule 5(2) (b) of the Court of Appeal Rules, their Notice of Motion dated 24th June 2024 fails and is hereby dismissed with costs to the 1st respondent and the Interested Parties. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

A. K. MURGOR

..... **JUDGE OF APPEAL**

DR. K. I. LAIBUTA CARb, FCIArb.

..... **JUDGE OF APPEAL**

G. V. ODUNGA

.....



JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

