Nderitu v Wang'ondu (Civil Application E060 of 2024) [2024] KECA 1798 (KLR) (11 December 2024) (Ruling)

Neutral citation: [2024] KECA 1798 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E060 OF 2024

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

DECEMBER 11, 2024

BETWEEN

JOHN MAINA NDERITU .... APPLICANT

AND

SARAH MURINGI WANG'ONDU .... RESPONDENT

(Being an application for stay of execution pending hearing of the appeal against the judgment and decree of the Environment and Land Court of Kenya at Nyandarua (Y. M. Angima, J.) dated on 23rd May, 2024 in ELC Cause No. 94 of 2023 (Formerly Nyahururu ELC No. 003 of 2020)

RULING

1. A brief history of the litigation before the Environment and Land Court (ELC) is necessary in order to put the issues urged before us into a proper context. By a plaint dated 22nd October 2020, the respondent, in her capacity as the administratrix of the estate of the late John W. Ngorongo- deceased, who was the registered proprietor of Title No. Nyandarua/Ndaragwa/247 (the property) sued the appellant accusing him of violating a written agreement dated 24th February, 2018 entered between the parties herein. The gravamen of the respondent's claim was that the terms of the said agreement were that the applicant was to utilize the said property for the purpose of grazing his livestock for a period of one year. However, contrary to the said agreement, the applicant refused to vacate the suit property after the expiry of the agreed term despite demand. Consequently, the respondent sought the following reliefs against the applicant:

    a. A declaration that the defendant's occupation and use of the property known as Title No. Nyandarua/Ndaragwa/247 amounts to trespass and intermeddling with the deceased's property.

b. A mandatory injunction compelling the defendant to forthwith vacate and remove all structures he has put up on Title No. Nyandarua/Ndaragwa/247 and in the event the defendant does not comply with this order, an eviction do issue against the defendant to be enforced by the O.C.S.

c. A permanent injunction restraining the Defendant from trespassing, claiming, encroaching, entering, alienating, or in any way dealing with the property Title No. Nyandarua/ Ndaragwa/247.

d. General damages for trespass.

e. Costs of this suit.

f. Any other or further or further relief this honourable court may deem fit to grant in the circumstances of this case.

2. In his amended defence and counter-claim dated 23rd May 2022, the applicant admitted entering into the said property pursuant to a contractual license dated 31st December, 2017 under which he was to occupy the entire property with effect from 1st January, 2018. It was his case that he was to fence the property at his own expense with barbed wire, convert it into arable land by cutting down trees, and he was entitled to cultivate the land and undertake any activities of his choice, and that once the property was converted into arable land the parties would negotiate terms of a formal lease.

3. In his counter-claim, the applicant pleaded that he had incurred a cost of Kshs.10,666,504/= by developing the property for the benefit of the respondent and since the respondent was not willing to negotiate and grant him a lease over the suit property, she was obligated to refund him the said expenses.

4. Vide judgment delivered on 23rd May 2024, the ELC dismissed the applicant's counter-claim on grounds that the claim was in the nature of special damages which were not pleaded with particularity. The trial court held that the respondent had proved her claim for trespass and recovery of the property and considering the size of the suit property, length of the trespass and the fact that the applicant had generated income from the suit property, the respondent was awarded a sum of Kshs. 4,000,000/= as general damages. The trial court issued a mandatory injunction compelling the applicant to vacate and remove his structures from the suit property within 60 days from the date of the judgment, in default, he shall be forcibly evicted therefrom.

5. Aggrieved by the above verdict, the applicant moved this Court by his application dated 26th June 2024, the subject of this ruling. The application is brought under Rules 5 (2) (b), 43, 44 and 47 of the *Court of Appeal Rules*, 2022 and Articles 25 (c), 50 and 159 of *the Constitution*. In the main, the applicant prays for stay of execution of the said judgment by restraining the respondent or her agent from interfering with the said land and/or doing anything prejudicial to him pending the hearing and determination of his appeal against the said decision.

6. The grounds in support of the application are: his appeal is not frivolous as demonstrated by the annexed draft memorandum of appeal. (However, no draft memorandum of appeal is annexed). The applicant states that the appeal is arguable since the learned judge exercised his discretion wrongly occasioning miscarriage of justice, and that unless the stay is granted, his appeal would be rendered nugatory because he has heavily invested in the land by cultivating about 10 acres which were rocky and full of shrubs. Therefore, he will suffer prejudice if the respondent is not restrained.

7. In his further affidavit sworn on 16th October 2024, the applicant averred that the respondent raided the property and evicted his staff and blocked them from accessing their houses, that the respondent

has already obtained a decree dated 24th May, 2024 and is threatening to execute it, and if the judgment is not stayed pending the determination of his intended appeal, he will suffer financial loss.

8. In opposition to the application, the respondent in his replying affidavit sworn on 6th December, 2024 averred that the applicant's application is fatally defective and ought to be struck out with costs because it offends the mandatory provisions of the *Oaths and Statutory Declarations Act* in that the applicant's supporting affidavit is not signed by the purported deponent and is not commissioned by a Commissioner for Oaths. Therefore, the application offends Rule 45 (1) of the *Court of Appeal Rules*, 2022 which requires every formal application to the Court to be accompanied by an affidavit.

9. On the merits of the application, the respondent averred that the application is an abuse of the Court process since the applicant has not substantiated what specifically is arguable about the appeal or how the appeal would be rendered nugatory. He also averred that the eviction the applicant seeks to stay has already been settled through a consent order recorded before the trial court on 14th November, 2024.

10. The respondent further averred that the applicant in his replying affidavit to the application sworn on 12th November, 2024 expressly indicated that he had not failed and/or refused to comply with the said judgment and that he had encountered challenges on where to take his animals and remove the fixtures and it is for that reason that the respondent's counsel acceded to the request for more time on condition that the applicant vacates the suit property and hands vacant possession on or before 20th January 2024. Lastly, the respondent averred that the applicant does not have to be on the suit property in order to pursue his alleged monetary claim.

11. In support of the application, learned counsel for the applicant Mr. Ondieki highlighted his written submissions dated 22nd July, 2024. The crux of his submissions was that the applicant has demonstrated that the appeal is arguable and may be rendered nugatory unless stay orders are granted. He also submitted that it is fair and just to issue stay orders since the applicant risks to incur tremendous loss because the trial court failed to take into account the developments done on the said land which include installation of barbed wire fence, cattle shed and drilling borehole and the fact that the applicant took a loan of Kshs.7,500,000/= from KCB which the Court ought to have considered.

12. Learned counsel for the respondent Mr. Muriungi in opposition to the application essentially reiterated the contents of the respondent's replying affidavit alluded to earlier and urged this Court to dismiss the application. However, as at the time of writing this ruling, the respondent's written submissions were not in the e-filing portal and it is not clear whether the submissions were filed.

13. We have given due consideration to the application, the affidavits in support of the application and in opposition thereto, as well as the rival submissions urged by the parties in support of their respective positions. Our invitation to intervene on behalf of the applicants has been invoked under Rule 5 (2) (b) of the Court of Appeal Rules.

14. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5 (2) (b) of this *Court's Rules* are well settled. In *Chris Munga N. Bichage vs Richard Nyagaka Tongi, Independent Electoral & Boundaries Commission & Robert K. Ngeny* [2013] KECA 141 (KLR), this Court expressed itself as follows:

> "The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of

the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated."

15. Before considering the merits of the application, it is important we address a preliminary issue raised by the respondent regarding the applicant's failure to sign and have his affidavit in support of the application commissioned by a commissioner for oaths. Section 5 of the *Oaths and Statutory Declarations Act*, Cap 15 Act provides for particulars to be stated in jurat or attestation clause as follows:

> "Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

16. Section 8 of the Act provides for power to take declarations as follows:

> " A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule."

17. Section 5 reproduced above is couched in peremptory terms.

    Accordingly, an affidavit must be sworn before a Magistrate or a Commissioner for Oaths and it must state in the jurat or attestation at what place and on what date the oath or affidavit is taken or made. The applicant's affidavit did not conform to this statutory edict. Even after the respondent raised the omission in his replying affidavit and in his oral submissions, the applicant did not bother to respond to the said concern either in his submissions or by way of an affidavit. Clearly, the applicant's supporting affidavit is defective for failure to comply with mandatory provisions of Section 5. It cannot be allowed to stand. Accordingly, we expunge the applicant's affidavit in support of his application dated 26th June, 2024 from the Court record. Our above finding would ordinarily have rendered the entire application incompetent. However, also on record is the applicant's further affidavit sworn on 16th October, 2024 also in support of the application. We shall consider whether the said affidavit would suffice to support the application.

18. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court on appeal. However, the applicant's further affidavit is silent on the issue of arguability of the appeal. Rule 44 (1) of the *Court of Appeal Rules*, 2022 requires applications to this Court to be supported by an affidavit. Further, even looking at the grounds in support of the application, there is ground that can be deemed as arguable.

19. In our considered view, therefore, the applicant has failed to satisfy the first requirement of demonstrating the existence of an appeal that is arguable. Having failed to establish the first prerequisite, it is not necessary for us to go into the realm of the nugatory aspect, because as we said earlier, the two principles are conjunctive and not disjunctive. We can only state that if the applicant's appeal succeeds, he will still be in a position to pursue the remedies available to him under the law.

20. We need not say more. The upshot of the above analysis is that the application before us is devoid of merit. We dismiss the same with costs to the respondent.

DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF DECEMBER, 2024.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb

....

JUDGE OF APPEAL

I certif y that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.