



REPUBLIC OF KENYA



KENYA LAW
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**Mahat v Poghisio (Civil Application E043 of 2022)
[2023] KECA 7 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KECA 7 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E043 OF 2022
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
JANUARY 20, 2023**

BETWEEN

ISSA IBRAHIM MAHAT APPLICANT

AND

SAMUEL LOSURON POGHISIO RESPONDENT

(An application for injunction pending the hearing and determination of an intended appeal against the ruling and order of the Environment & Land Court at Malindi (Olola, J.) delivered on 19th October 2022 in ELC Case No. 53 of 2021)

RULING

1. In his application dated November 15, 2022, Issa Ibrahim Mahat, the applicant, seeks an order of injunction to restrain Samuel Losuron Poghisio, the respondent from developing, constructing, charging, disposing off, transferring, selling or in any way dealing with the property known as LR No 24880 situated in Vipingo Ridge, Kilifi, pending the hearing and determination of his appeal. His intended appeal, based on his notice of appeal, is against a ruling of the Environment and Land Court (ELC) at Malindi delivered on 19th October 2022 in ELC Case No 53 of 2021 in which his application for injunction to restrain the respondent from dealing with the said property pending the hearing of his suit was dismissed.
2. During the hearing of the application before us on December 13, 2022, learned counsel Miss. Bujra held brief for Miss Hanan for the applicant. Mrs Omote, learned counsel, appeared for the respondent. Miss Bujra, referred to the grounds appearing on the face of the application, the supporting affidavit sworn by the applicant, and her written submissions which she orally highlighted. Mrs Omote, referred to the respondent's replying affidavit and the respondent's written submissions which she also orally highlighted. We have considered all the material placed before us and the arguments.



3. The applicant's case before the ELC is that by an agreement for sale dated May 18, 2020, the respondent as vendor, agreed to sell the said property to him for a price of Kshs 30,000,000. He asserts that the respondent wrongfully purported to rescind the agreement and seeks to enforce the sale by order of specific performance. It is on that basis that he moved the ELC, by application dated May 24, 2021, for orders of injunction to restrain the respondent from dealing with the property, pending the hearing and determination of his suit. The respondent's case, on the other hand, is that the applicant breached the agreement for sale; that he issued the applicant with a completion notice, and ultimately rescinded the agreement and the deposit (or part of it) forfeited in accordance with the terms of the agreement.
4. In dismissing the applicant's application, the ELC in its ruling the subject of the intended appeal concluded that the applicant had not shown a clear and unmistakable right that ought to be protected at that stage by an order of injunction. The ELC also found that the applicant had not demonstrated that he was likely to suffer injury that was incapable of compensation by an award of damages if it is ultimately found that the respondent was in breach of the agreement for sale.
5. The principles on which this Court considers applications of this nature are established. First, the applicant is required to demonstrate that the intended appeal is arguable. Secondly, the applicant should demonstrate that if the orders sought are declined, and the appeal ultimately succeeds, it would have been an exercise in futility. See *Stanley Kangethe Kinyanjui v Tonny Keter & others* [2013] eKLR.
6. As regards arguability of the intended appeal, counsel for the applicant referred to the draft memorandum of appeal in which the applicant complains, among other things, that the learned Judge of the ELC erred in concluding that the threshold for granting a temporary injunction in accordance with the principles in *Giella v Cassman Brown* [1973] EA 358 had not been met. It was urged that it will be demonstrated during the hearing of the appeal that the applicant had established a prima facie case with a probability of success. Bearing in mind that an arguable appeal is not one that must necessarily succeed but one that merits consideration by the Court, we do not think the intended appeal is frivolous. It is indeed arguable.
7. As to whether the appeal will be rendered nugatory unless we grant the orders sought, reference was made by counsel for the applicant to the decision of the Court in *GNN v LNN* [2020] eKLR, among others. It was submitted that it is not in dispute that the respondent is currently in possession of the property and is proceeding to construct and develop it without regard to the applicant's rights; that there is a real likelihood that the respondent will transfer the property to a third party to the detriment of the applicant; and that the loss the applicant is likely to suffer cannot be compensated in damages.
8. Counsel for the respondent on the other hand submitted that the perceived danger, on the part of the applicant, of the property being disposed of is unfounded; that the property has remained preserved since the inception of the suit before the ELC even in the absence of restraining orders; and that no evidence has been presented by the applicant to show that this will change. Moreover, counsel urged, the applicant has never paid the full purchase price; has never been in possession of the property; in the event of the appeal succeeding, the damage is easily quantifiable and an award in damages would suffice; and it has not been suggested that the respondent cannot pay damages.
9. The applicant does not contest that he has never been in possession of the property. He has not demonstrated, to our satisfaction, that property is in danger of being disposed of. Neither has the applicant shown why damages would not adequately compensate him should he succeed in his claim and has also not claimed that the respondent would not be able to meet an award of such damages. We are therefore not satisfied that the applicant has demonstrated that the appeal will be rendered nugatory if we decline to grant the orders sought.



10. Consequently, the application fails and is dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF JANUARY 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

