



Lariak Properties Ltd & another v Metro Pharmaceuticals Ltd (Civil Application E452 of 2022) [2023] KECA 209 (KLR) (24 February 2023) (Ruling)

Neutral citation: [2023] KECA 209 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E452 OF 2022
DK MUSINGA, K M'INOTI & KI LAIBUTA, JJA
FEBRUARY 24, 2023**

BETWEEN

LARIAK PROPERTIES LTD 1ST APPLICANT

ZACHARIAH BARAZA T/A SUIMA AUCTIONEERS 2ND APPLICANT

AND

METRO PHARMACEUTICALS LTD RESPONDENT

(Application for stay of further proceedings pending the hearing and determination of an appeal from the ruling and order of the Environment & Land Court at Nairobi (Angote, J.) dated 25th November 2022 in ELC MISC. No. 19 of 2022)

RULING

1. The motion on notice determined by this ruling is dated December 7, 2022. It was taken out by the two applicants, and seeks an order of stay of further proceedings in Environment & Land Court Miscellaneous Application No 19 of 2022 pending the hearing and determination of an intended appeal against the ruling and order of Angote, J dated November 25, 2022 in the said application. Although the parties expended considerable time and energy on precisely what orders the court has been asked to grant and their effect, the terms of the motion before us are fairly clear, and we intend to focus on them. In paragraph (c) of the motion, the applicants pray as follows:

“(c) Pending the hearing and determination of the intended appeal, this honourable court be pleased to stay any further proceedings in Nairobi Environment & Land Court Misc No 19 of 2022 - *Lariat Properties Ltd v Metro Pharmaceuticals Ltd*.”

2. Prayers (a) and (b) in the motion are now water under the bridge because the first prayer sought certification of the application urgent, whilst the second, a lately common, albeit utterly misconceived



plea without any basis in the rules of this court, prayed for *ex parte* orders pending the hearing of this application. Prayer (d) is the traditional plea for costs of the application. Accordingly, we shall focus on the terms of the application before us, and will not be detracted by erroneous intitlement of the application or the prayers sought by the parties in any other pending application.

3. The background to this application is by all standards fairly alarming. The respondent made serious allegations against the applicants that they had used forged or unlawfully obtained orders from the subordinate court in Chief Magistrates Court Case No E361 of 2022, on the basis of which they purported to evict the respondent from the property in Nairobi known as LR No 187/111/46 (the suit property). On November 8, 2022, the Environment and Land Court (ELC) at Nairobi (Angote, J) called for the file from the subordinate court and directed the 1st applicant and or its advocates as well as the 2nd respondent to appear before him the next day, November 9, 2022, at 2.30 pm, for directions.
4. In taking that action, the learned judge indicated that he had invoked the supervisory jurisdiction conferred by section 18(1) of the [Civil Procedure Act](#), and the inherent jurisdiction under section 3 of the same [Act](#).
5. The applicants appeared before the learned judge through Mr Khaemba Advocate, and the court made a further order requiring Mr Nyanyuki, Advocate and the 2nd applicant to swear affidavits by November 11, 2022 on the circumstances under which they had carried out the eviction on the suit property. Thereafter they were directed to appear before the court on November 14, 2022 at 2.00 pm for further directions. The applicants duly filed affidavits as directed and appeared before the learned judge on November 14, 2022.
6. On November 14, 2022, the learned judge heard counsel and considered the affidavits. He found that the 2nd respondent, an auctioneer and an officer of the court, had carried out the eviction contrary to the express order of the subordinate court. He accordingly found the 2nd applicant in contempt of the orders of the subordinate court and directed him to appear in court on November 18, 2022 at 2.30 pm for mitigation and sentencing.
7. On 16th and November 17, 2022, the 1st and 2nd respondent respectively filed notices of preliminary objection contending, in the main, that under the [Constitution](#) and unlike the High Court, the ELC did not have supervisory jurisdiction over subordinate courts; that section 18(1) of the [Civil Procedure Act](#) applied to the High Court and not the ELC; that although the ELC initially enjoyed supervisory powers over subordinate courts pursuant to section 13 (5) of the [Environment & Land Court Act](#), that jurisdiction was subsequently taken away by parliament through repeal of the section; that the 2nd applicant was cited and found guilty of contempt of court without any application to cite or commit him; that it was the subordinate court which had jurisdiction to deal with any contempt alleged against the applicants; that the 2nd respondent was denied a proper opportunity to be heard; and that since they had raised an issue of jurisdiction, it should be determined immediately.
8. After hearing the parties on the preliminary objection, the learned judge held in a ruling dated November 25, 2022 that the supervisory jurisdiction vested in the High Court applied *mutatis mutandis* to ELC as regards matters environment and land; that the court had jurisdiction to deal with contempt matters; and that the appellants had been afforded a fair opportunity to be heard through the filing of affidavits. Accordingly, the learned judge dismissed the preliminary objection. The 1st appellant was aggrieved and, on November 20, 2022, lodged a notice of appeal, followed by the motion now before us.
9. At the hearing of the motion, Mr Okatch, learned counsel, for the 1st applicant, relied on his written submissions dated January 12, 2023 and submitted that the intended appeal is arguable because it



raises a question of jurisdiction, which must be conferred by the Constitution or statute, and never is inferred or implied. He relied on the decision of the Supreme Court in Benson Ambuti Adega & 2 Others v Kibos Distillers Ltd & 5 Others [2020] eKLR in support of the proposition that a court cannot arrogate itself jurisdiction through craft of interpretation. Counsel added that article 162(3) of the constitution Parliament to determine the jurisdiction and functions of the ELC, pursuant to which Parliament enacted the Environment & Land Court Act, and after initially giving the ELC supervisory jurisdiction over subordinate courts, parliament nevertheless subsequently took away that jurisdiction through an amendment of the Environment & Land Court Act. He relied on the decision of the High Court in Patrick Musimba v National Land Commission & 4 Others [2016] eKLR and that of the ELC in Sabina Moraa Swanya v Kemunto Ontario & Another [2021] eKLR in support of the view that the ELC no longer enjoys supervisory jurisdiction over subordinate courts.

11. Counsel further submitted that the supervisory jurisdiction conferred by article 165(5) of the Constitution is specific to the High Court, and does not extend to the ELC. Other issues that the 1st applicant has framed in its draft memorandum of appeal to be canvassed before the court in the intended appeal include whether the ELC had jurisdiction to deal with the contempt of court issues, and whether the applicants were afforded a fair opportunity to be heard.
12. On whether the appeal risked being rendered nugatory, counsel submitted that, having been irregularly and improperly convicted of contempt of court, the 2nd applicant risked being sentenced to imprisonment, an event that cannot be undone if the appeal succeeds after he has already served the sentence.
13. Mr Ohaga, SC, learned counsel for the 2nd applicant, supported the application. However, counsel proceeded, both in his written submissions and oral highlights, as though the application before us is, in addition, an application for stay of execution, which, as we have clarified earlier on, it is not. The drawback was that it irritated the respondent and drew the pithy response that there's nothing to stay in the ruling of November 25, 2022, which merely dismissed a preliminary objection. Be that as it may, nothing much turns on the mischaracterisation of the application to the extent that both the prayers for stay of execution and stay of proceedings are governed by the same twin principles.
14. Like counsel for the 1st applicant, learned counsel submitted that the intended appeal is arguable as it raises the question whether the ELC had supervisory jurisdiction in the matter, and whether the 2nd respondent was afforded a fair hearing before the court found him guilty of contempt of court. In addition, it was contended that the appeal will determine whether in an adversarial system the court can proceed *suo moto*, call for the file and find a party in contempt of court without being appropriately moved by any party.
15. On whether the appeal stands to be rendered nugatory, counsel submitted that the prescribed sentence for contempt of court was sentence of two years' imprisonment or a fine of Kshs 2 million which, if meted out against the applicant, would render the appeal nugatory if it succeeds. Counsel relied on Rev Jackson Kipkemboi Kosgey & 7 Others v Rev Samuel Muriithi Njogu & 4 Others [2007] eKLR where this court found that refusal to grant an order of stay would render an intended appeal nugatory if the appeal succeeded after the applicant had been sentenced to a term of imprisonment.
16. Lastly, we heard Mr Ahmednasir, SC, learned counsel for the respondent, who opposed the application on the basis of a replying affidavit sworn on January 7, 2023 by Mr Niraj Shah, a director of the respondent, as well as written submissions and authorities both dated January 17, 2023. Counsel submitted that the intended appeal was not arguable because the applicants were mischievously proceeding against the respondent who was a stranger, rather than the true owner of the suit property, the estate of Batuk Lakhmshi Lalji. In counsel's view, such litigation must be dismissed in limine



- because without the real owner of the property in court, the application for stay of proceedings is a futile and academic exercise which will not resolve the dispute. He cited the decision in [Desai v Patel t/a Sandpipers Construction & Civil Engineering Services & 13 Others](#) [2001] KLR 120 in support of the view that the court has power to stop an action at any stage when a party is wrongly sued.
17. Next counsel submitted, on the authority of [Peter Gatirau Munya v Dickson Mwenda Kithinji & 2 Others](#) [2014] eKLR, that it was not in public interest to grant orders against a stranger.
 18. We have anxiously considered the application, the impugned ruling of the ELRC, the illuminating submissions and the authorities cited by counsel. To begin with, the issues raised by the respondent are really not before us in this application. Those issues must be raised and determined by the trial courts before we can be invited to consider them. As of now, we cannot determine the contested issues put forth by the respondent before they have been addressed and determined by the trial courts.
 19. The applicants need to satisfy us that their intended appeal is arguable and if it is, that it risks being rendered nugatory if the appeal succeeds but, in the meantime, the status quo has been irretrievably or irredeemably altered so as to render the successful appeal only a pyrrhic victory. (See [Trust Bank Ltd & Another v Investech Bank Ltd & 3 Others](#) [2000] eKLR). They are obliged to establish both considerations, it is not a case of either, or. (See [Republic v Kenya Anti-Corruption Commission & 2 Others](#) [2009] KLR 31).
 20. An arguable appeal is not one that must necessarily succeed at the hearing. It is an appeal which is not frivolous, an appeal that raises even one *bona fide* issue that deserves full consideration by the court. (See [Yellow Horse Inns Ltd v A A Kawir Transporters & 4 Others](#) [2014] eKLR).
 21. Looking at the applicants' draft memorandum of appeal which, among others, raise the questions whether the ELC has supervisory jurisdiction over subordinate courts; whether in the circumstances of this case the ELC could exercise contempt of court jurisdiction; and whether the 2nd applicant was afforded a fair hearing before he was adjudged in contempt of court, we are persuaded that the intended appeal is arguable. We are constrained at this stage not to say more, lest we embarrass the bench that ultimately hears the appeal. Indeed, at this stage, we cannot make any definitive pronouncements on the merits or otherwise of the intended appeal. (See [Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others](#) [2013] eKLR).
 22. On whether the intended appeal will be rendered nugatory if stay of proceedings is not granted, we are equally persuaded that it will. The 2nd respondent is on the brink of being sentenced to two years' imprisonment or to a fine of two million shillings on the basis of a process that is impugned in the intended appeal. A served jail term cannot be undone.
 23. We are accordingly satisfied that the applicants have discharged their duty in respect of the two limbs under rule 5(2)(b) of the [Court of Appeal Rules](#) and are entitled to an order of stay of proceedings. However, an order under the said rule is discretionary and is intended to meet the ends of justice. We already have adverted to the matters of great public interest implicated in the intended appeal. In the circumstances, we shall issue only a conditional order of stay of proceedings so as to ensure that the intended appeal is heard and determined expeditiously and without delay.
 24. Accordingly, we direct that there shall be an order of stay of proceedings for a period of 45 days from the date of this ruling. Within that period, the applicants must file and serve the record of appeal for fast-tracked hearing of the appeal. In default of filing the record of appeal as directed, the order of stay of proceedings shall automatically lapse. Costs of this application shall be in the intended appeal. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023



D. K. MUSINGA (P.)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

