



REPUBLIC OF KENYA



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**HFC Limited v Kampala International University & 11 others (Civil Appeal  
(Application) E409 of 2022) [2023] KECA 159 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 159 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E409 OF 2022  
HM OKWENGU, JM MATIVO & WK KORIR, JJA  
FEBRUARY 17, 2023**

**BETWEEN**

**HFC LIMITED ..... APPELLANT**

**AND**

**KAMPALA INTERNATIONAL UNIVERSITY ..... 1<sup>ST</sup> RESPONDENT**

**JAMES GATHERU MATHENGE ..... 2<sup>ND</sup> RESPONDENT**

**EDITH NDUATA MATHENGE ..... 3<sup>RD</sup> RESPONDENT**

**ABDUL ALEEM SIDIQUE ..... 4<sup>TH</sup> RESPONDENT**

**MULTI-EQUIPPED LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF LAND & PHYSICAL  
PLANNING ..... 6<sup>TH</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 7<sup>TH</sup> RESPONDENT**

**REGISTRAR OF TITLES ..... 8<sup>TH</sup> RESPONDENT**

**DIRECTOR OF SURVEYS ..... 9<sup>TH</sup> RESPONDENT**

**DIRECTOR – GENERAL OF PHYSICAL & LAND USE  
PLANNING ..... 10<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 11<sup>TH</sup> RESPONDENT**

**NAIROBI CITY COUNTY ..... 12<sup>TH</sup> RESPONDENT**

*(Being aAn appeal from the Ruling and Order of the Environment and Land  
Court at Nairobi (Mboya, J.) dated 26th May, 2022 in ELC Case No. E204 of 2020)*



## RULING

1. Before us is a notice of motion dated July 6, 2022 brought by the applicant under section 3A of the *Appellate Jurisdiction Act*, rules 1(2), 5 (2) (b) and 43 of the *Court of Appeal Rules*. The applicant substantively seeks an injunction restraining the respondents and their agents from alienating, all that piece of land known as Land Reference Number 7785/97 (original number 7785/10/92) and the purported subdivided plots thereto to wit; certificate of title IR No 204894, Land Reference No 7785/1489 (original number 7785/99/2 ) and certificate of title IR No 204895, Land Reference No 7785/1490 (original number 7785/99/3) ('suit property') pending the hearing and determination of the appeal; and stay of any further proceedings arising in Environment and Land Court ELC Case No E204 of 2020 – HFC Ltd v Kampala International University & 11 Others pending the hearing and determination of the appeal.
2. The motion is supported by grounds on its body, and the supporting affidavit of Christine Wahome, the applicant's legal manager, sworn on July 6, 2022. The application is unopposed. The 1<sup>st</sup> respondent in support of the instant application has filed a replying affidavit sworn on September 22, 2022 by one Christopher Kiplagat Letting. The 2<sup>nd</sup> to 12<sup>th</sup> respondents did not participate in these proceedings.
3. On the November 28, 2022, during the hearing of the instant application John Ohaga SC appeared for the applicant. There was no appearance for the 1<sup>st</sup> respondent. However, it was agreed that the application be dispensed with on the basis of the submissions already on record.
4. The background to the application albeit in summary form is that the applicant extended loan facility to the 1<sup>st</sup> respondent in the sum of Kshs 54 million. The said facility was secured by a charge created on December 8, 2011 by the 1<sup>st</sup> respondent in favour of the applicant over all the suit property as part of security for the loan facility advanced to it by the applicant. The 1<sup>st</sup> respondent also deposited with the applicant the original certificate of title over the suit property being the grant registered as IR 35407/1.
5. The 1<sup>st</sup> respondent defaulted on the repayment of the loan thereby crystalizing the exercise of the applicant's statutory power of sale. Be that as it may, on or about March 19, 2020, the applicant was informed by Transcountry Valuers Limited ('the valuers') that from an official search obtained from Nairobi central registry in respect of grant registered as IR 35407/1, ('the suit property'), there were glaring discrepancies of the entries on the title document held by the applicant and the one obtained by the valuers' official search. The discrepancies were that the 1<sup>st</sup> respondent was not listed as a proprietor of the suit property and that the charge created on the December 8, 2011 in favour of the applicant was not reflected and or listed over the suit property according to the official search. It was also established that the 9<sup>th</sup> respondent had on June 13, 2017 allegedly authenticated a survey plan No FR 602/172 for the suit property and the same had been subdivided and new certificate of titles issued.
6. Aggrieved by the illegal, fraudulent and unprocedural manner in which the suit property was allegedly transferred and subsequently subdivided, notwithstanding the deposit of the grant registered as IR 35407/1 and the existing proprietary rights to the suit property by virtue of the charge registered in its favour by the 1<sup>st</sup> respondent, on December 8, 2011, the applicant herein filed ELC Case No E204 of 2020 against the respondents herein. Simultaneously with the filling of the suit, the applicant also filed an application dated October 8, 2020 seeking an injunction against the respondents pending hearing and determination of the application.
7. The applicant's application for injunction before the Environment and Land Court was opposed by the 5<sup>th</sup> respondent vide an application dated April 14, 2021 and a notice of preliminary objection dated



- April 13, 2021 where the 5<sup>th</sup> respondent sought to strike out the suit on the grounds that the suit against them did not disclose any reasonable cause of action, since there was no contract between them and the applicant. It was further stated that the relationship between the applicant and the 1<sup>st</sup> respondent was governed by privity of contract.
8. On May 26, 2022, the learned judge of the Environment and Land Court after considering the argument by the parties before him, delivered a ruling encompassing applications dated October 8, 2020 April 14, 2021 and notice of preliminary objection dated April 13, 2021. In the said ruling, while striking out the 2<sup>nd</sup> to 12<sup>th</sup> respondents from the suit, the learned judge held that there was no reasonable cause of action against them on the grounds that there was no contract between them and the applicant. Also, the learned judge in declining to issue an injunction against the 1<sup>st</sup> respondent, held that the applicant's remedy was circumscribed under section 90 of the Land Act and that though the applicant had established a prima facie case with overwhelming chances of success, the applicant would not suffer irreparable loss incapable of being compensated by way of damages.
  9. Aggrieved by the ruling delivered on May 26, 2022, the applicant lodged the notice of appeal dated May 27, 2022. To demonstrate that his intended appeal is arguable, the applicant relied on its memorandum of appeal dated July 1, 2022 wherein the applicant had listed 15 grounds of appeal to demonstrate that the learned judge erred in striking out the 2<sup>nd</sup> to 12<sup>th</sup> respondent from the suit before the Environment and Land Court. The applicant also maintained that if an injunction to preserve the suit property is not granted then the instant appeal would be rendered nugatory since the 1<sup>st</sup> respondent is a foreign company based in Uganda with no known unencumbered property for the purposes of execution in the event the suit against it succeeds. The applicant also averred that the respondents will not suffer any significant prejudice if an order of injunction preserving the suit property is issued together with an order staying further proceedings in ELC 204 of 2020 pending hearing and determination of the appeal.
  10. The 1<sup>st</sup> respondent supported the instant application to the extent that its proprietary rights are to be safeguarded. The 1<sup>st</sup> respondent confirms that it had indeed executed a charge over the suit property in favour of the applicant in exchange of being advanced Kshs 58 million. However, the suit property was fraudulently alienated by the 5<sup>th</sup> respondent and that the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> respondents were actively involved in the survey and planning, sub-division, transfer and registration of the suit property and as a result they are necessary parties in ELC Case No 204 of 2020.
  11. The applicant's counsel submitted that its grounds of appeal are arguable and are not frivolous. Counsel argued that it was important to note that the impugned ruling was rendered before the 2<sup>nd</sup> to 12<sup>th</sup> respondents filed their defences to the matters pleaded by the applicant herein including the issue of fraud, forgery, illegalities, and fraudulent misrepresentation.
  12. On whether the appeal would be rendered nugatory unless an injunction is issued against the respondents in order to preserve the status quo, counsel for the applicant cited the decision by this court in Equity Bank Limited v West Link Mbo Ltd, Civil Application No 78 of 2011, which held that rule 5(2) (b) of this court's rules empowers this court to grant an injunction pending determination of an appeal primarily in order to preserve the subject matter of the appeal or where it would facilitate a just, effective, and proportionate resolution of the dispute or determination of the appeal. Counsel further argued that in the absence of an order for injunction, the respondents are likely to transfer or facilitate the transfer of the suit property to other unsuspecting third parties or deal with the suit property in a manner prejudicial to the applicant's rights with the resultant effect of rendering the appeal nugatory.



13. Counsel for the 1<sup>st</sup> respondent in support of the instant application submitted that the application was arguable with high chances of success and that unless stay of further proceedings is granted by this Court, ELC Case No 204 of 2020 slated for hearing on October 19, 2022 will proceed for hearing in exclusion of the 2<sup>nd</sup> to 12<sup>th</sup> respondents who are necessary parties to the said suit.
14. We have given due consideration to this application, the affidavits in support and the submissions made by counsel together with the authorities cited. The precepts upon which this court exercises its rule 5(2) (b) jurisdiction are well settled; an applicant must show that he has an arguable appeal and that the said appeal would be rendered nugatory unless the stay of execution or injunction pending appeal sought is granted. We need only add that, whether the application is for stay of execution, injunction, or stay of further proceedings, the consideration and applicable principles are the same.
15. It is incumbent upon an applicant to satisfy the court on both limbs in order to obtain the relief sought which is always at the discretion of the court. See, *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR*.
16. On the first principle, as to whether 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 applicant in order to warrant ventilation before this court. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others*) [supra] this Court described an arguable appeal in the following terms:
  - ' 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.
  - viii). In considering an application brought under rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.'
17. Turning to the matter at hand, our perusal of the draft memorandum of appeal reveals that prima facie there are several arguable points to be urged in the intended appeal. For instance, it is arguable that the learned judge of the Environment and Land Court erred in finding that the applicant's suit did not disclose any reasonable cause of action against the 2<sup>nd</sup> to 12<sup>th</sup> respondents. The court is minded to avoid going into the merits of the intended appeal as this will be the preserve of the bench that will hear and determine the main appeal. As we have stated on numerous occasions, an arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration. Therefore, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the appeal is arguable.
18. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (supra) this court stated that:
  - ' ix). The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
  - 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.



19. In determining whether or not an appeal will be rendered nugatory the court has to consider the conflicting claims of both parties and each case has to be considered on its merits. In this case, both the applicant and the 1<sup>st</sup> respondent are in consonance that there is the need for a stay of further proceedings in ELC Case No 204 of 2020 in order to avoid the suit progressing without the input of the 2<sup>nd</sup> to 12<sup>th</sup> respondent whom they believe are necessary parties to aid the Environment and Land Court to ascertain the real dispute between the parties. Both the applicant and the 1<sup>st</sup> respondent are also in concert that the 5<sup>th</sup> respondent fraudulently acquired the ownership of the suit property and as a result, the 5<sup>th</sup> respondent needs to be prevented from selling the illegal sub- divisions of the suit property to unsuspecting third parties. These assertions have not been rebutted by the 5<sup>th</sup> respondent.
20. From the circumstances of this case we are satisfied that if an order of injunction and an order of stay of further proceeding in ELC Case No 204 of 2020 is not granted to preserve the suit property and the property is dealt with in an adverse manner, the substratum of the appeal will have been lost and the intended appeal shall have been rendered nugatory.
21. We believe that the interests of both parties will be served by allowing the instant application dated July 16, 2022. Accordingly, we issue the following orders:
  - a. An injunction be and is hereby issued restraining the respondents, whether by themselves, their agents, from selling, disposing, charging, or in any manner dealing with all that piece of land known as Land Reference Number 7785/97 (original number 7785/10/92) and the purported subdivided plots thereto to wit; certificate of title IR No 204894, Land Reference No 7785/1489 (original number 7785/99/2 ) and certificate of title IR No 204895, Land Reference No 7785/1490 (original number 7785/99/3) pending the hearing and determination of the appeal;
  - b. That there be a stay of any further proceedings in Environment and Land Court ELC Case No E204 of 2020 – HFC Ltd v Kampala International University & 11 Others pending the hearing and determination of the appeal against the ruling and order of the Environment and Land Court (Mboya, J) dated May 26, 2022;
  - c. Costs of this application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J MATIVO**

.....

**JUDGE OF APPEAL**

**W KORIR**

.....

**JUDGE OF APPEAL**

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

*Signed*



**DEPUTY REGISTRAR**

