Kamau v Gikonyo & 2 others (Civil Application 236 of 2020)
[2023] KECA 147 (KLR) (17 February 2023) (Ruling)

Neutral citation: [2023] KECA 147 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 236 OF 2020

K M'INOTI, KI LAIBUTA & GWN MACHARIA, JJA

FEBRUARY 17, 2023

BETWEEN

JENNIFER WANGARI KAMAU ..... APPLICANT

AND

DAVID MUCHIRI GIKONYO ..... 1ST RESPONDENT

CITY COUNCIL OF NAIROBI ..... 2ND RESPONDENT

JOSEPH GATONYE ..... 3RD RESPONDENT

(Application for stay of execution pending the hearing and determination of an appeal from the judgment and decree of the Environment & Land Court at Nairobi (Bor, J.) dated 1st October 2019 in ELCC No. 498 of 2009)

RULING

1. The applicant, Jennifer Wangari Kamau, seeks an order of stay of execution of the judgment and decree of the Environment & Land Court at Nairobi (Bor, J) dated October 1, 2019 pending the hearing and determination of an appeal. Her motion, taken out under rule 5(2) (b) of the *Court of Appeal Rules*, is dated February 23, 2020 and, rather curiously, in addition to the prayer for stay of execution, prays for an order crafted as follows:

> "4. That this honourable court be pleased to set aside the said judgment entered herein on October 1, 2019 and any other order that may be issued pursuant thereto as against the applicant.

2. Other than that the court cannot, in an application under rule 5(2)(b), set aside a judgment which is the subject to an intended or pending appeal, how the court can possibly, in the present, set aside orders that may be issued in future, is legally intriguing.

3. Be that as it may, the background to the application is, shortly, as follows. The 1st respondent, David Muchiri Gikonyo, is the registered owner of the parcel of land known as Plot No Nairobi Block 133/292 over which he holds a certificate of lease. The 3rd respondent, Joseph Gatonye, is similarly the registered leaseholder of the property known as Plot No Nairobi Block 133/291. The two properties are in Komarock (HFCK) phase ii shopping centre, and are adjacent to one another. On the other hand, the applicant claims to be the allottee of the property known as Plot B 01 komarock ii shopping centre. She does not hold any document of title over the said property, save for a letter of allotment issued after those of the two respondents.

4. Sometimes in 2009, the applicant filed a suit, namely ELC Case No 498 of 2009 against the respondents seeking among others, an injunction to restrain them from trespassing or dealing with her plot, special damages of Kshs 100,000 per month, general damages, a declaration that the 2nd respondent, Nairobi City Council, had acted illegally by demolishing her property, compensation for the demolition and cancelation of title No Nairobi Block 133/292. On their part the 1st and 3rd respondents filed against the applicant

5. ELC Case No 579 of 2009 seeking declarations that they were the lawful owners of their respective plots, and a mandatory injunction to remove the applicant therefrom. The two suits were consolidated and heard together.

6. By a judgment dated October 1, 2019, the execution of which the applicant seeks to stay in this application, the Environment and Land Court (Bor, J) found in favour of the 1st and 3rd respondents and allowed their claims in ELCC No 579 of 2009. The court also awarded damages of Kshs 2 million against the applicant.

7. In her application for stay of execution and written submissions, the applicant did not address the principles that guide this court in such applications, but instead dwelt on issues relevant to applications for stay of execution in the High Court under order 42 rule 6(2) of the *Civil Procedure Rules*. Save for the complaint that the learned judge erred by awarding general damages of Kshs 2 million against the applicant without indicating how that amount was arrived at, the arguable point that the appellant intends to pursue in the intended appeal is not demonstrated with any precision in the applicant's draft memorandum of appeal. The applicants counsel did not make matters any better because, when he was offered the opportunity to highlight his submissions, he elected to rely exclusively on the written submissions.

8. On their part, the 1st and 2nd respondents did not attend the online hearing of the application although they were duly served with the hearing notice. Nevertheless, their joint written submissions and replying affidavits sworn on May 27, 2021 by the 1st respondent and on 26th May by Sarah Namayanja Gatonye, the legal representative of the estate of the 2nd respondent who is now deceased, were on record. We have duly considered those filings as we are duty bound to do under the rules of the court.

9. The 1st and 3rd respondents submit that the applicant's intended appeal is not arguable because whilst they hold certificates of lease to their respective properties, the applicant merely holds a letter of allotment issued long after their own letters of allotment. Even if the intended appeal were found to be arguable, they add, it will not be rendered nugatory because they are able and willing to transfer the properties and refund any sums paid by the appellant as the court may direct. They also complain that the applicant has been abusing the process of the court, having been granted a 30- day stay of execution by the trial court and directed to file this application for stay of execution within that period, which she neither complied with nor disclosed to this court.

10. The 2nd respondent, though duly served with the hearing notice, neither filed its submissions nor appeared during the online hearing.

11. We have considered the application, the judgment of the trial court, the submissions and authorities on record. We have already noted that the applicant has not addressed the principles applicable in this court to an application for stay of execution, but instead has focused on irrelevant issues for the High Court. The applicant is obliged to satisfy us that she has an arguable appeal which stand to be rendered nugatory should it succeed, absent an order of stay of execution (See *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR). The issue whether the learned judge erred in awarding Kshs 2 million against the applicant is an arguable issue.

12. That should suffice because even a single arguable issue will do. (See *Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union* CA No Nai 72 of 2001) on whether the appeal will be rendered nugatory, we are not persuaded that the applicant has satisfied that limb. The concerned respondents have deposed that they are ready, able and willing to transfer the properties now registered in their respective names to the applicant, and to refund the amount awarded if so ordered. The applicant has not, in fact, even alleged their inability to do so. The applicant must satisfy both considerations under rule 5(2) (b). In *Republic v Kenya Anti-Corruption Commission & 2 Others* [2009] KLR 31, this court stated:

> "In order that the applicant may succeed, he must demonstrate both limbs, and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb".

13. To the extent that the applicant has not satisfied both considerations, this application must fail. Accordingly, the same is dismissed with costs to the 1st and 3rd respondents. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G. W. NYENGE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR