Sanoye v Mukwano Distributors Limited (Civil Application E434 of 2022) [2023] KECA 144 (KLR) (17 February 2023) (Ruling)

Neutral citation: [2023] KECA 144 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E434 OF 2022

DK MUSINGA, K M'INOTI & KI LAIBUTA, JJA

FEBRUARY 17, 2023

BETWEEN

SEURI LEGUSI SANOYE ..... APPLICANT

AND

MUKWANO DISTRIBUTORS LIMITED ..... RESPONDENT

(Being an application for stay of execution and injunction pending the intended appeal from the Judgment and Decree of Environment and Land Court of Kenya at Machakos (C. Ochieng, J.) delivered on 19th October 2022 in E.L.C Case No. 91 OF 2016)

RULING

1. The respondent, Mukwano Distributors Limited, sued the applicant, Seuri Legusi Sanoye, in the Environment and Land Court at Machakos in ELC Case No. 91 of 2016 essentially seeking vacant possession of LR No. 26700/3 situate in Mavoko Municipality "the suit property"; an injunction to restrain him, inter alia, from entering, working, undertaking any construction on, alienating or otherwise dealing in, the suit property; and costs of the suit.

2. In his defence, the applicant alleged that he was the bona fide proprietor of the suit property; that he held the same in trust for "more than 300 members of the Maasai community; that they occupied the property in 1979; that they continuously resided thereon for more than 40 years; that there had been previous proceedings relating to the suit property; and that the respondent had obtained a certificate of title to the suit property fraudulently.

3. In its judgment dated October 19, 2022, the ELC (Christine Ochieng, J.) allowed the respondent's claim with costs and declared that the applicant had unconstitutionally dispossessed the respondent of its property contrary to article 40 of the *Constitution*. The learned judge directed the applicant to give the respondent vacant possession of the property within 90 days from the date of judgment,

failing which an eviction order to issue and, thereafter, the applicant be permanently restrained from trespassing or transacting on the suit property.

4. Aggrieved by the judgment of the ELC, the applicant moved to this court on appeal on 10 grounds basically challenging the learned Judge's decision for, inter alia: failing to appreciate factual evidence advanced by the applicant in his defence; failing to appreciate the context and dint of article 40 of the *Constitution* and the principles of adverse possession; failing to find that the respondent's certificate of title was acquired illegally; and for failing to acknowledge previous proceedings relating to ownership of the suit property.

5. By a Notice of Motion dated November 21, 2022 anchored on 8 grounds set out on the face of the Motion and supported by his affidavit sworn on even date, the applicant seeks stay of execution of the impugned judgment and injunctive relief restraining the respondent from dealing in, or evicting the applicant from, the suit property. He also prayed that costs of the application be in the appeal.

6. Among the grounds advanced in support of the Motion are that the applicant has an arguable appeal, and that, if the respondent was allowed to execute the judgment, the applicant stood to suffer immeasurable loss and anguish. Learned counsel for the applicant, Busaidy Mwaura Ngarua and Co., filed written submissions dated December 7, 2022 citing the case of *Trust Bank Limited vs. Investech Bank Limited and 3 others* [2003] eKLR highlighting the two principles that must be satisfied for grant of orders staying execution, or injunctive relief, pending appeal, namely: that the applicant must demonstrate that his or her appeal (or intended appeal is arguable; and that the appeal would be rendered nugatory absent stay.

7. In addition, counsel cited the cases of *Reliance Bank Limited vs Norlake Investments Limited* [2002] 1 EA p.227 in which the court defined the term "nugatory" and *Kenya National Highways Authority vs. Shalien Masood Mughal and 5 others* [2017] eKLR for the proposition that courts should nullify titles obtained by land grabbers, and the principle of indefeasibility of title to land.(the last part of the sentence does not rhyme).

8. The respondent opposed the Motion vide the replying affidavit of Christopher Ngolo, a director of the respondent, sworn onNovember 30, 2022. According to him, the applicant had no arguable appeal. Ngolo deposed that the impugned judgment was not the first to affirm the respondent's proprietorship of the suit property; that, in its judgment dated July 31, 2019, the ELC at Machakos (O. A. Angote, J.), held that the respondent was the bona fide registered proprietor; that the court also found, on the evidence of a letter dated August 14, 2020 addressed to the Directorate of Criminal Investigations by the Ministry of Lands, that the certificate of title uttered by the applicant was a forgery; that the applicant subsequently disowned the said title; and that the applicant did not plead or claim adverse possession before the trial court. He prayed that, in the event that thiscourt was inclined to grant the orders sought, then it should consider conditional stay in terms that the applicant do furnish security in the sum of KShs. 150,000,000.

9. In response to the applicant's submissions, learned counsel for the respondent, M/s. Okwach and Company, filed written submissions, list of authorities and case digest dated December 15, 2022. They cited the cases of *Co-operative Bank of Kenya Limited v Banking Insurance and Finance Union* [2015] eKLR and *Stanley Kangethe Kinyanjui v Tony Ketter and 5 others* [2013] eKLR, highlighting the twin principles for grant of orders under Rule 5(2) (b) of this *Court's Rules*, namely that the appeal, or intended appeal, should be arguable, and that the appeal, if successful, would be rendered nugatory if stay of execution were not granted. In addition, counsel drew our attention to the meaning of "an arguable appeal" as expounded by this court in *Joseph Gitau Gachau and another v Pioneer Holdings Limited and 2 others* [2009] eKLR.

10. With regard to the second limb of the twin principle applicable to Motions under Rule 5(2) (b), counsel cited the case of *Awale Transporters Ltd v Kelvin Perminus Kianzi* [2019] eKLR in which the Court explained the meaning of the term "nugatory" on which we need not pronounce ourselves. Finally, they submitted that the applicant did not come to court with clean hands, having founded his claim on a forged certificate of title (see *John Njue Nyaga v Nicholas Njiru Nyaga and another* [2013 eKLR).

11. When the applicant's Motion came for hearing on the GoTo Meeting virtual platform, Miss. Ouma, learned counsel for the applicant, admitted that the applicant had disowned the certificate of title in respect of the suit property; that the applicant's case in the intended appeal is founded on adverse possession; that his claim in adverse possession is being raised for the first time in the appeal; and that the same was neither pleaded nor raised in the trial court. In response, learned counsel for the respondent submitted that the applicant's Motion did not merit the orders sought. He urged us to dismiss it with costs to the respondent.

12. Having considered the applicant's Motion, the grounds on which it is made, the affidavits in support and in reply, and the written and oral submissions of counsel for the parties, we take note of the decisive facts that the applicant had disowned the certificate of title to the suit property, presumably in view of the finding that it was a forgery; and that the claim in adverse possession is admittedly intended to be raised for the first time on appeal.

13. In view of the foregoing, we reach the inescapable conclusion that the applicant's appeal cannot be said to be arguable on this ground. In *Kenya Hotels Limited v Oriental Commercial Bank Limited* [2018] eKLR, M' Inoti, J.A. enunciated the principles guiding the court in determining whether or not to allow new points on appeal that were not raised in the trial court in the following words:

> "... the court has developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In *Openda v Ahn*, (*supra*) this court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant's case as conducted in the trial court, not changing it into a totally different case; the matter must have been properly pleaded and the facts in support of the new point must have come out in the trial court; a new point which has not been pleaded or canvassed in the trial court should not be allowed to be taken on appeal, unless the evidence establishes beyond reasonable doubt that the facts before the trial court, if fully investigated, would support the point; where the question is one of law turning on the construction of a document, the new point may be allowed but only if the facts when fully investigated support the new plea.
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> In *Nyangau v Nyakwara* (*supra*) this court allowed a new point to be taken on appeal because the new point raised an issue of jurisdiction. And in *Attorney General v Faroe Atlantic Co Ltd* [2005-2006] SCGLR 271, a decision of the Supreme Court of Ghana which was quoted with approval by this court in *DEN v PNN* [2015] eKLR, it was accepted that in addition to a matter going to jurisdiction, a new point may be taken on appeal where an act or contract is made illegal by a statute. However, even then there is a qualification that the legal question sought to be raised for the first time must be substantial and one that can be disposed of without the need for further evidence.
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> In *Securicor (Kenya) Ltd v EA Drapers Ltd & another* (*supra*) the court, after reviewing a line of decided cases, reiterated that although it has discretion to admit a new point at appeal: "Certainly the cases show that the discretion must be exercised sparingly. The evidence must

all be on record and the new point must not raise disputes of fact. The new point must not be at variance to the facts or case decided in the court below.""

14. In *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others ex-parte Tom Mbaluto* [2018] eKLR, this court held:

> " It is in the discretion of the court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v Ruth Watiri Kibe*, CA No 39 of 2015 and *Openda v Ahn* [1983] KLR 165).
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> In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this court. The Attorney General is entitled to complain, as he does, that he has been taken by surprise and denied a fair opportunity to respond to the new issue. As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance. (See *North Staffordhire Railway Co v Edge* [1920] AC 254)."

15. We adopt the above reasoning in this application. The applicant cannot be allowed to found an "arguable appeal" on an issue or ground that could have been raised before the trial court if at all it had any basis, but which he conveniently omitted or chose not to pursue. It is also noteworthy that, having renounced the certificate of title previously found to be a forgery with the intention of raising a claim in adverse possession for the first time in the intended appeal, the applicant advances no ground that would render the appeal arguable. Accordingly, we need not address ourselves to the second limb of the twin principle, namely the nugatory aspect. In the circumstances, we find that the Motion before us fails and is hereby dismissed with costs to the respondent. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 17TH 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

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR