



Mackenzie & 5 others v Mackenzie & another (Civil Application 171 of 2019) [2023] KECA 97 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 97 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 171 OF 2019
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 3, 2023**

BETWEEN

GEORGE MUSAU MACKENZIE & 5 OTHERS APPLICANT

AND

BARRY MAANZA MACKENZIE 1ST RESPONDENT

LAND REGISTRAR MAKUENI COUNTY 2ND RESPONDENT

(Being an application for injunction pending the hearing and determination of an appeal from the ruling and orders of the Environment & Land Court at Makueni (Mbogo C.G., J.) dated 20th May 2019 in ELC No. 24 OF 2017)

RULING

1. The Notice of Motion Application dated June 12, 2019 brought pursuant to Rules 5(2) (b), 42 and 47 of the *Court of Appeal rules*, and supported by an affidavit of even date, sworn by George Musau Mackenzie, seeks grant of an injunction restraining the 1st respondent, his agents, servants or any other person from selling, alienating, disposing off transferring or in any other way dealing with Makueni/kako/67 and Makueni/kako/392 pending the hearing and determination of the intended appeal.
2. The genesis of this matter is that on July 20, 2018, Mbogo, J dismissed with costs the applicants' suit, Makueni ELC case No 24 of 2017: George Musau Mackenzie & Others versus Barry. The applicants, aggrieved by the outcome, filed an application dated August 9, 2018 seeking a review of the Court's aforesaid judgment on grounds that there was discovery of new and important evidence whose effect would affect the findings in the said judgment. The applicants also relied on the existence of "other sufficient reason" as a further ground for the review. On May 20, 2019, the learned Judge dismissed the said application with costs to the 1st respondent, on grounds that it did not meet the legal threshold to justify exercise of the court's discretion in favour of the applicants; and that the applicants' advocate



- Mwangangi and Associates had failed to file a Notice of Change of Advocates in place of the firm of R. M. Mutune Advocates which was previously on record for the applicants.
3. The applicants are dissatisfied with the outcome, and seek to challenge it in their appeal herein, contending that the Judge's exercise of discretion in dismissing their application for review was plainly wrong as the said firm of advocates had duly filed a Notice of change of advocates, and hence the Court reached an erroneous conclusion its findings amounting to wrong exercise of discretion; and that the effect of the impugned ruling means that the 1st respondent is at liberty to deal with the suit properties as he wishes.
 4. The applicant maintains that the intended appeal is not frivolous and refers to the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR for the proposition that 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... it is sufficient if a single bonafide arguable ground of appeal is raised;" that if the orders sought are not granted, the appeal will be rendered nugatory; and the applicants will suffer irreparable loss should the properties be disposed of.
 5. The 1st respondent by way of a replying affidavit dated December 9, 2019 sworn by Barry Manza Mackenzie opposes the application on grounds that: it does not disclose any arguable appeal; the applicants can be compensated by way of damages in the event the appeal succeeds; and in any event, in the matter before the ELC court there were no interim orders that prevented the respondent from disposing of the suit properties.
 6. This Court in the case of *Shimmers Plaza Ltd v National Bank of Kenya Ltd* Civil Appeal No 38 of 2013 the court's determination was succinct that an application under 5(2) (b) reliefs sought must be specific or specified. A party seeking an order of injunction must show that it was specifically prayed for in the notice of motion. This Court further reiterated the holding in *Stanbic Bank Kenya limited v Kenya Revenue Authority* Nai. Civil Application 294 of 2007 where this Court stated that under Rule 5(2) (b) this Court can only make three orders, namely an order staying proceedings, an order staying execution of the Superior Court's orders and lastly an injunction order. (See also *Equity Bank Ltd v West Link Mbo Ltd* Civil Application 78 of 2011).
 7. This Court has also noted in the case of *Oliver Collins Wanyama v Engineers Board of Kenya* [2019] eKLR that under Rule 5(2) (b) whether the application is for stay of execution, injunction or stay of further proceedings, the consideration and applicable principles are the same.
 8. The Supreme Court in *Deynes Muriithi & 4 Other v LSK & Another* [2015] eKLR stated that Rule 5(2) (b) applications arise at an interlocutory stage and the orders issued thereunder are for the purpose of protecting the subject matter of an appeal, the Court of Appeal having yet to finally determine the appeal.
 9. In the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 Others*, Sup. Court App. 16 of 2015 [205] eKLR it was stated that:

“(23) It is clear to us that Rule 5(2) (b) is essentially a tool for preservation.

It safeguards the substratum of the Appeal in consonance with principles developed over the years.”
 10. This Court has set out the parameters to be met for an order for injunction to be granted in an application under Rule 5(2) (b). In the case of *Alferd Mincha Ndubi v Standard Limited* [2020] eKLR. This Court quoted with approval the case of *Ishmael Kangunyi Thande v Housing Finance*



Company of Kenya Limited Civ Appl No Nai 157 of 2006 “to succeed in an application in 5(2) (b) the applicant has to establish that: -

- i. The Appeal is arguable.
- ii. The Appeal is likely to be rendered nugatory if the injunction is not granted and appeal succeeds.

These principles were restated by this Court *Multi Media University & Another v Prof Gitile N Naituli* (2014) eKLR ...from the long line of decided cases on Rule 5(2) (b) the jurisprudence is underlined in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others* (2013) eKLR as follows:

- i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction,
- ii. The discretion is wide and unfettered if it is just to do so,
- iii. Court becomes seized of the matter only after Notice of Appeal is filed under Rule 75,
- iv. In considering whether the appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances,
- v. An applicant must satisfy the twin principles,
- vi. Whether an appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised,
- vii. Arguable appeal is not one that will necessarily succeed but one which ought to be argued fully before court and is not frivolous,
- viii. The court must not make a definitive/final finding as to facts of law in an application under Rule 5(2) (b),
- ix. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party.

11. The applicants central issue, is on the fact that their application for review was dismissed. A look at the application and the Memorandum of Appeal in our view raises no arguable point, as an application for review is discretionary, a position that has been held by this Court in numerous instances. The applicants have failed to show a single arguable issue, or even demonstrate that the learned Judge exercised his discretion wrongly, simply saying that the appeal is not frivolous does not meet the threshold for an arguable point.
12. On the issue regarding the appeal being rendered nugatory, having found that the applicant has not met the 1st principle (of raising at least one arguable ground), it is not necessary to consider the 2nd principle on whether the appeal will be rendered nugatory. Accordingly, the application is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

H. A. OMONDI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA



.....

JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

