



Njoki v Gitonga (Suing Through her Lawful Attorneys James Chege Macharia, Alfonse Kisilu and Urbanus Kioko) & another (Civil Application E293 of 2022) [2023] KECA 56 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 56 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E293 OF 2022
KI LAIBUTA, A ALI-ARONI & JM MATIVO, JJA
FEBRUARY 3, 2023**

BETWEEN

CHRISTINE NJOKI APPLICANT

AND

CYNTHIA WANJIRU GITONGA (SUING THROUGH HER LAWFUL ATTORNEYS JAMES CHEGE MACHARIA, ALFONSE KISILU AND URBANUS KIOKO) 1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI 2ND RESPONDENT

(Being an application for stay of execution of the Judgment of the Environment and Land Court at Nairobi (Mbugua J) pending the lodging, hearing and determination of an intended appeal from the Judgment and Decree of the Environment and Land Court at Nairobi dated 28th July, 2022 in Nairobi ELC Case No 705 of 2016)

RULING

1. Vide an application dated August 12, 2022 the applicant moved this Court under sections 3A & 3B of *Appellate Jurisdiction Act* and Rule 5(2) (b), of the *Court of Appeal Rules*, 2010 seeking orders of temporary stay of execution of the judgment and decree issued on July 28, 2022 in Nairobi Environment and Land Court Case No 705 of 2016, Nairobi pending the lodging, hearing and determination of her intended appeal to this court.
2. In the judgment subject of the intended appeal, the 1st respondent sued the applicant contending that she was duly allocated plot No B 55 Umoja Innercore Sector III by the 2nd respondent's predecessor the City Council of Nairobi, vide its letter dated 26th November 2008 at a market sale price of kshs 60,000, which amount she duly paid. The respondent took possession immediately and paid all the requisite payments thereby acquiring proprietary rights to the suit property. However, in blatant breach of her



- proprietary rights, the applicant without any color of right, unlawfully encroached and trespassed on the said property, demolished temporary structures therein and commenced construction of semi-permanent structures without the 1st respondent's consent or knowledge.
3. In response to the suit, the applicant filed a defence dated May 29, 2017 which was subsequently amended on June 25, 2018. She stated that she had an impeachable right to the suit premises, and therefore the structures she might have demolished in the suit premises had been illegally thereon. The applicant also filed a notice of indemnity and cross claim against the 2nd respondent dated December 4, 2019 respectively. The 2nd respondent, on the other hand, filed its statement of defence dated January 26, 2021 wherein it recognized the 1st respondent as the owner of the suit property as her name appeared in its records. It also sought dismissal of the suit with costs.
 4. The matter proceeded for hearing and both parties filed their respective submissions in the High Court at the Environment and Land Court, Nairobi. On July 28, 2022, the said court (Mbugua J) delivered its judgment on the dispute wherein allowing the 1st respondent's suit and determined that the lease and certificate of lease for LR No Nairobi/Block 83/1584 (formerly 855 Umoja Innercore section 111("the suit property")) were obtained illegally and un-procedurally through fraud and, therefore, the applicant had no legitimate proprietary rights over the suit property. A permanent injunction was also issued restraining the applicant from interfering in any way with the suit property. The applicant was also ordered to give vacant possession of the suit property within a period of 45 days, failure to which eviction was to issue.
 5. The applicant, being aggrieved by that judgment, filed a notice of appeal on August 5, 2022 and also applied for copies of proceedings and judgment vide a letter dated August 4, 2022. The applicant is now before us with a motion under rule 5(2)(b) of the [Court of Appeal Rules](#).
 6. Opposing the motion, the 1st respondent's advocate filed a replying affidavit sworn on August 19, 2022 deposing that the applicant has no arguable appeal since there was glaring evidence of fraud by the applicant and, therefore, the law cannot offer any protection to an illegally acquired property. He further deponed that the applicant's appeal would not be rendered nugatory since the 1st respondent is not interested in alienating the suit property. Be that as it may, any loss that may be suffered by the applicant if at all the appeal succeeds, can be compensated by the 1st respondent, who is capable of paying.
 7. The 2nd respondent opposed the motion vide a replying affidavit sworn by its County Surveyor one Geoffrey Cheruiyot, who deponed that, since the suit property is immovable, in the event of a successful appeal, the applicant can take possession any time. Therefore, the applicant has not demonstrated how her appeal would be rendered nugatory in the event that the stay orders are not granted.
 8. On whether the appeal is arguable, the applicant's counsel submitted that the applicant has raised 21 grounds of appeal against the impugned judgment and, in a nutshell, it is arguable whether the applicant successfully proved before the trial court that she was a bona fide purchaser for value without notice. Counsel also contended that in the impugned judgment, the trial court ordered revocation of the applicant's title and issued an order of eviction of the applicant from the suit property within 45 days from delivery of the judgment. Therefore, unless stay of execution is granted, the applicant shall be evicted from the said property within 45 days rendering the appeal nugatory.
 9. The 1st respondent's counsel reiterated the contents of the replying affidavit filed in response to the motion and submitted that the applicant did not have an arguable appeal bearing in mind the illegalities involved, and no good title could be passed to her. On the nugatory aspect, counsel cited [Suleiman](#)



Rabimtullah Omar & another v Musa Hersi Fabiye & 5 others (2011) eKLR, which held that the suit property was located in the country and, indeed, would be available to whoever is ultimately entitled to the same.

10. On his part, the 2nd respondent's counsel submitted that the application is couched in generalities, and has not addressed how the intended appeal is likely to be rendered nugatory in the event that stay is declined.
11. This being an application for stay of execution, the applicant has to satisfy the twin requirements of rule 5(2) (b) of the *Court of Appeal Rules*. As restated in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR, the requirements are that the applicant has an arguable appeal, and that the intended appeal, if successful, would be rendered nugatory if the order of stay sought is not granted.
12. On the first principle as to whether or not 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 this regard, we make reference to *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR where 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.”
13. We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our considered view, the appeal is arguable, inter alia, on the ground as to whether the applicant successfully proved before the trial court that she was a bona fide purchaser for value without notice. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by this Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
14. On the nugatory aspect, as this court held in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] I EA 227, the factors which could render an appeal nugatory are to be considered within the circumstances of each particular case and that, in doing so, the court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the court stated as follows:

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”
15. In the instant case, the applicant deponed in her supporting affidavit that, unless this application is determined immediately and interim orders of stay of execution granted, her certificate of lease for LR Nairobi/Block 83/1584 shall be revoked and she shall be evicted from the said property within 45 days as ordered by the trial court. We are guided by the case of *Mukuma v Abuoga* [1988] KLR 645 in which this Court held, inter alia:

“The discretion of the Court of Appeal under rule 5 (2) (b) of the Court of Appeal Rules is at large but the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render it nugatory.”



16. We are satisfied that no substantial loss will be suffered by applicant. The applicant has not persuaded us that the appeal shall be rendered nugatory if we decline to grant the orders sought. We also find that in there appears to be no threat of alienation of the property and even if this were to happen in the event of a successful appeal, an award of damages would be an adequate remedy. Indeed, the applicant has not even remotely suggested that the respondents are incapable of paying whatever damages are found to be due to her.
17. The foregoing being the case, the order that commends itself is that this application must fail and is therefore dismissed. The costs of the application shall abide the outcome of the appeal.

Orders accordingly.

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

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

