



Laxmanbhai Group Ltd v Kiambu Dandora Farmers Company Ltd & 3 others (Civil Appeal (Application) E719 of 2021) [2023] KECA 390 (KLR) (31 March 2023) (Ruling)

Neutral citation: [2023] KECA 390 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E719 OF 2021
HA OMONDI, A ALI-ARONI & JM MATIVO, JJA
MARCH 31, 2023**

BETWEEN

LAXMANBHAI GROUP LTD APPELLANT

AND

KIAMBU DANDORA FARMERS COMPANY LTD 1ST RESPONDENT

ATTORNEY-GENERAL 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

**DIRECTOR-GENERAL NAIROBI METROPOLITAN SERVICES 4TH
RESPONDENT**

(Application for stay of execution of the orders pending the hearing and determination of the intended appeal against the Judgement and order of the Environment and Land Court of Kenya at Nairobi (Mogeni, J.) dated 11th October, 2022 in ELC No. 235 of 2019)

RULING

1. By a notice of motion dated November 2, 2022 Laxmanbhai Group Ltd (the applicant) seeks an order of stay of execution of the judgment and decree made in Nairobi ELC No 235 of 2019 (Mogeni, J) delivered on October 11, 2022 pending hearing and determination of the Appeal. The application is brought under Section 1A, 1B, 3A, 63E, 79G & 95 of the [Civil Procedure Act](#) and Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#). It is not clear why the applicant invoked the [Civil Procedure Act](#) and the [Civil Procedure Rules](#) instead of the [Court of Appeal Rules](#) which govern proceedings in this Court.
2. The grounds upon which the notice of motion is based are *inter alia*, that the applicant sued the respondents for trespass and sought to be declared the absolute sole legal and beneficial owner of the property known as LR No 209/9494 (“the property”). In response, the 1st respondent filed a



defence and a counter-claim against the applicant seeking to have the applicant's title cancelled for being acquired illegally. By a judgment delivered on October 11, 2022, the learned judge dismissed the applicant's suit with costs and allowed the 1st respondent's counter-claim by declaring that the 1st respondent was the absolute owner of the suit property. The title held by applicant was also cancelled and a permanent injunction restraining the applicant from dealing with the suit property in any way was also issued.

3. Aggrieved by the judgment, the applicant lodged an appeal and the instant application supported by the affidavit sworn on October 25, 2021 by the applicant's property manager one Charles Mochoge Nyambegera. He averred *inter alia*: that he was apprehensive that the 1st respondent would commence the execution of the impugned judgment and decree as there are no orders staying the execution; that he has an arguable appeal as enumerated in the memorandum of appeal; that the applicant will suffer irreparable loss not compensable by an award of damages, since the land is very unique and precious commodity; and unless orders of stay of execution are granted, the suit property will be transferred to the 1st respondent who may thereafter deal with it in a manner it deems fit.
4. The 1st respondent opposed the application vide grounds of opposition dated November 8, 2022 and a replying affidavit sworn on November 18, 2022 by Joseph Mwangi Karanja its director. He averred *inter alia*: that the applicant does not meet the threshold for the grant of orders under Rule 5(2) (b) of this Court's Rules since the applicant does not have an arguable appeal to warrant the orders because the applicant did not file any reply to the 1st respondent's counter-claim before the trial court. The 1st respondent also stated that it is the registered owner of the suit property and it has never been dispossessed of the same. Consequently, the instant appeal would not be rendered nugatory should it succeed because the applicant has an avenue for compensation by way of damages should the appeal succeed.
5. The application was heard by way of written submissions. Mr Muoka learned counsel for the applicant submitted that the applicant's memorandum of appeal shows that the learned judge erred in failing to uphold the sanctity of title held by the applicant since 1979 and the applicant has extensively developed the property over the years, so, if stay is not granted, the ensuing loss to the applicant will be irreversible. In support of this submission, counsel cited the dictum *in re Estate of Harish Chandra Hindocha (Deceased)* (2021) eKLR, where this Court held:

“We find that in the circumstances of the rival position as laid before us, declining the relief sought would pave the way for the respondent to execute the judgment and decree granted in his favour as deemed fit, which may result either in an irreversible consequence or one that would likely be reversed after considerable hardship or expense and would therefore be highly prejudicial to the applicant, hence we allow the application and order as follows...”
6. Mr Murunga learned counsel for the 1st respondent reiterated the contents of the 1st respondent's grounds of opposition and submitted that basically the court's position was that the applicant excised a portion of the 1st respondent's title illegally, and the court having found that the title was void *ab initio* as there was a subsisting title in the first place, there is nothing for the court to preserve.
7. Counsel further submitted that the court is being invited to stay the execution of the judgment and decree, yet the applicant has not attached the current search whose cancellation they seek to stay. It is the 1st respondent's position that the applicant's title has already been cancelled, and the burden is on the appellant/applicant to show the court a current search showing that the title is still in place.
8. On the part of the 2nd and 3rd respondents, their counsel Mr Kamau did not oppose the application. He submitted that if the stay is not granted, the appeal would be rendered nugatory.



9. We have considered the application, the grounds in support thereof, the replying affidavit, the grounds of opposition, the submissions, authorities cited and the law. Our jurisdiction under Rule 5(2)(b) is discretionary. However, the court must be satisfied on the twin principles, namely, that the intended appeal is not frivolous and is arguable; secondly, that if the order sought is not granted, the intended appeal will be rendered nugatory. These principles were aptly summarized in *Patrick Mweu Musimba v Richard N Kalembe Ndile & 3 Others* (2013) eKLR held as follows:

“The law applicable in respect of applications under Rule 5(2)(b) of the Court of Appeal Rules is well settled. Whereas the court has unfettered discretion to grant the orders sought, there are some principles on which such discretion must be based. In order for an applicant to succeed in such applications, he must establish that he has an arguable appeal i.e. one that is not frivolous while also bearing in mind that an arguable appeal is not necessarily one that will succeed. He must in addition establish that if the orders of stay or injunction sought are not granted, then in the event his appeal or intended appeal succeeds, the same would be rendered nugatory or ineffective. See *Githunguriv Simba Credit Corporation Ltd 2* (1988) eKLR 838, *J K Industries Ltd vs Kenya Commercial Bank Ltd* (1982-88) 1088, and *Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd* (2006) eKLR 1.”

10. We are also guided by the decision in *Eric Makokha & 4 Others v Lawrence Sagini & 2 Others* (1994) eKLR CA where this Court in an application under Rule 5 (2) (b) stated:

“An application for injunction under Rule 5 (2) (b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity...”

11. 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. See *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* (2013) eKLR where this Court described an arguable appeal in the following terms:

“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.”

12. We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our view, the appeal is arguable inter alia, whether the court erred in failing to hold that the title issued by the Registrar was conclusive evidence that the appellant was the proprietor and the absolute and indefeasible owner thereof. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the 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.

13. Turning to the second principle, whether the appeal, if successful, would be rendered nugatory in the event 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.”

14. In determining whether or not an appeal will be rendered nugatory, this 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. See the case of *Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA 227.
15. We have considered the above threshold, in light of the rival positions herein on this prerequisite. It is apparent that the ownership of the suit property is disputed with both parties claiming to be the legal and beneficial owners. Although the trial court dismissed the applicant’s suit and upheld the 1st respondent’s title, the applicant has already initiated the appeal process against that decision. The respondents being currently in possession of the suit land, there is nothing to prevent them from disposing the suit property, or using or developing the same in a way that may change the character of the property. Should this happen, the applicant’s appeal if successful will be rendered otiose as the situation may be irreversible and an award of damages may not be adequate.
17. We believe that the interests of both parties will be served by orders restraining the respondents from parting with possession of the suit property or developing the suit property or in any way changing the character of the suit property pending the hearing of the appeal. We allow the motion to this extent and make orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

H. A. OMONDI

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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

