Lwande & 66 others v Registered Trustees of Telposta Pension Scheme (Civil Application E420 of 2022) [2023] KECA 321 (KLR) (17 March 2023) (Ruling)

Neutral citation: [2023] KECA 321 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E420 OF 2022

DK MUSINGA, KI LAIBUTA & JM MATIVO, JJA

MARCH 17, 2023

BETWEEN

MARIA LWANDE & 66 OTHERS ..... APPLICANT

AND

REGISTERED TRUSTEES OF TELPOSTA PENSION SCHEME .. RESPONDENT

(Being an application for injunction, pending the hearing, lodgment, and determination of an appeal against the Judgment of the Environment and Land Court at Nairobi (Angote, J.) dated 13th October, 2022 in ELC Suit No. 1321 OF 2013)

RULING

1. Before us is a notice of motion dated November 11, 2022 brought by the applicants under Rules 41,42 and 47 of the Court of Appeal Rules, 2010 (now repealed), substantively seeking an order of injunction restraining the respondent, its agents or servants from alienating, selling and/or interfering with the applicants' peaceful occupation of property known as: House Numbers H9/2, H4/3, J11/2, H2/11, H3/2, B2, B3, PF, J4/2, E12, G2/3, P2, B11, G8/3, D1, C8, P7, G5, B12, B2, J5/2D4, H7/3, A11, F8, A6, D6, E1, P6, H1/3, H8/3G2/3, G12/3, K11, K3, 111, L11, K1, B6, G1/2 Jogoo Road, c15, b16, b6, b7 and a6, Elgeyo Marakwet and 35, 1 and 15 South B (hereinafter "suit properties") pending the hearing and determination of their intended appeal.

2. The motion is supported by grounds on the face of the application and a supporting affidavit sworn on November 11, 2022 by one Hunderson Njuku Mwazo, one of the applicants. In opposition to the application, the respondent filed a replying affidavit sworn on November 24, 2022 by one Peter K Rotich, its Administrator/Trust Secretary.

3. The background to the application is that, vide a plaint dated May 8, 2008 the applicants, who were the respondent's tenants in the aforesaid properties sued the respondents at the Environment and Land Court seeking: a permanent injunction restraining the respondent from interfering with their peaceful

and priority right to purchase the suit property; an order of specific performance of all agreements of sale entered into between the applicants and the respondents in relation to the suit properties; and an order compelling the respondent to release and/or supply the applicants with relevant documents to facilitate the applicants to procure financing for the balance of the purchase price of the suit properties.

4. It was the applicants' case that they accepted the respondent's offer to purchase the respective units they occupied and, despite paying the requisite 10% deposit of the purchase price, they were unable to pay the balance thereof because the respondent declined to release completion documents to their financiers and, as a result, they were unable to procure financing to pay the balance of the purchase price. They claimed that the respondents' decision to rescind the sale agreement was malicious and meant to frustrate the transactions, and to unjustly enrich the respondent. They argued that the notices to rescind the agreements were defective.

5. In its defence, the respondent stated that the applicants filed HCCC No 1602 of 2007 against the respondent, which was dismissed with costs, which they were yet to settle; that their suit was incurably defective for want of particulars of the alleged breach of contracts, and neither did they plead fraud in relation to any of the contracts.

6. On October 13, 2022, Angote, J, after considering the argument by parties, dismissed the applicants' suit and found that it was not a term of the contract for the completion documents to be released to the applicants for the purposes of sourcing financing and, as a result, the applicants were in breach of the respective contracts by failing to pay the balance of the purchase price. Nevertheless, the learned judge noted that there was no evidence that the respondent had rescinded the contracts between them and that, therefore, the orders of specific performance could not issue in favour of the applicants.

7. Aggrieved by the judgment, the applicants lodged the notice of appeal dated October 17, 2022 and a letter requesting for the typed proceedings dated November 3, 2022. To demonstrate that their appeal is arguable, the applicants relied on their draft memorandum of appeal dated October 17, 2022, in which they assert they have lived in the suit properties for more than 20 years, and that the respondent violated their right to first priority on the sale of the suit properties by putting up the suit properties for sale to third parties.

8. The applicants maintained that if an order of injunction is not granted, their appeal would be rendered nugatory since the respondent may at any time move to take control and possession of their homes thereby rendering them homeless and destitute.

9. The respondent opposed the application and maintained that the instant application was incurably defective having been brought under rule 41, 42, and 47 of this court's *Rules*, which are the wrong provisions of the rules of this Court. Instead, the same ought to have been brought under rule 5(2)(b) of this court's *Rules*.

10. It is the respondent's case that the applicants do not have an arguable appeal since there is evidence that indeed the High Court intervened on behalf of the applicant and granted them an extension of time to purchase the suit property. Further, the applicants have approached this court with unclean hands since they have failed to remit rent arrears to the respondent, and the applicant are currently in possession of the suit properties as trespassers. Consequently, the applicants are undeserving of the orders sought.

11. It is also the respondent's case that the applicants have failed to demonstrate that their intended appeal would be rendered nugatory if the orders sought are not granted. The respondent maintains that the applicants will suffer no prejudice if they prosecute their intended appeal outside the suit properties,

since, currently, the huge rent arrears owed by the applicants have put the respondent in deep financial constraint.

12. Counsel for the applicants reiterated the contents of the applicants' affidavit and submitted that, from the material presented before the court, the applicants have a first priority right to purchase their respective premises hence the claim of infringement of the same need to be determined by this court. Consequently, there exists a prima facie case to merit the orders sought as was held by this court in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR cited in *Stek Cosmetics limited v Family Bank Limited* (2020) eKLR.

13. On whether the intended appeal is arguable, counsel argued that although just one arguable issue is sufficient to meet the condition under that heading, the applicants herein will raise several issues for argument before the Court of Appeal. Ie, whether the learned judge erred in law and fact by summarily dismissing the cases of applicants' 1 to 67 excluding the 36 and 49 without subjecting the same to test as to its merits.

14. In conclusion, counsel submitted that the order of injunction is merited, and that the respondent will not suffer any loss unlike the applicants who will suffer irreparable loss if the orders sought are not granted.

15. On behalf of the respondent, it was submitted that, from the draft memorandum of appeal, the applicants do not have an arguable appeal since the learned trial judge was right is dismissing the 1st- 67th applicants case, excluding the 36th and 49th applicants, since they did not have the authority to testify on behalf of the other applicants. Additionally, counsel maintained that since the applicants breached the contracts by failing to pay the balance of the purchase price, the orders of specific performance could not be granted.

16. On the second limb of the twin principle, counsel argued that the applicants' appeal would not be rendered nugatory if the appeal succeeds since the suit property is land, and that damages would be an appropriate remedy. Further, the respondent will suffer prejudice if the orders are granted because it is under an obligation to meet its pension obligations.

17. We have considered the application, the affidavits, the rival submissions, the authorities cited and the law. The principles upon which this court exercises its rule 5(2) (b) jurisdiction are well settled; an applicant must show that he has an arguable appeal and that the appeal would be rendered nugatory unless the stay of execution or injunction pending appeal sought is granted. We need only add that, whether the application is for stay of execution, injunction, or stay of further proceedings, the consideration and applicable principles are the same. See *Chris Mungga N Bichage v Richard Nyagaka Tongi & 2 others* (2013) eKLR where the court succinctly set out the law as follows:

> " The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated."

18. On the first limb, we have looked at the 9 grounds raised in the draft memorandum of appeal. This court is careful to avoid going into the merits of the intended appeal as this will be the preserve of the bench that will hear and determine the main appeal. We are conscious of the fact that the applicants need only demonstrate one arguable ground and not a multiplicity of them, and further

that an arguable appeal is not necessarily one that will succeed. It will suffice for us to mention that the applicants claim before the High Court was founded on written contracts. The key issues remain whether it was a term of the contracts for the applicants to source financing and which party was in breach of the contract. Viewed from this perspective, we find and hold that the applicants have not demonstrated that they have an arguable appeal.

19. Having found that the applicant has not satisfied the first principle which is whether the appeal is arguable, we find no need to address the nugatory test. Accordingly, the application dated November 11, 2022 is hereby dismissed with costs to the respondent.

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

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR