



Gathoni v Ethics and Anti-Corruption Commission & 2 others (Civil Application E437 of 2022) [2023] KECA 222 (KLR) (3 March 2023) (Ruling)

Neutral citation: [2023] KECA 222 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E437 OF 2022
HM OKWENGU, KI LAIBUTA & JM MATIVO, JJA
MARCH 3, 2023**

BETWEEN

KURIA GATHONI APPLICANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

KONGO ALIAS DANIEL KONGO 2ND RESPONDENT

ROSE WAMBUI KURIA 3RD RESPONDENT

(Being an application for stay of proceedings pending appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Nairobi (M. D. Mwangi, J.) dated 24th May 2022 in E.L.C No. E315 of 2015)

RULING

1. We need to point out right at the outset that the scanty record before us has been selectively compiled to exclude such vital documents as: the 1st respondent's plaint in ELC No E315 of 2021; the respondents' statements of defence (if any); the 1st respondent's notice of motion dated August 20, 2021 and its subsequent amendments and further amendments; the affidavit in support of its motion; the 3rd respondent's affidavit in reply to the 1st respondent's motion dated August 20, 2021; the applicant's notice of motion dated November 2, 2021; his supporting affidavit; and his notice of preliminary objection, all of which are relevant in determination of the applicant's motion now before us. Whether the glaring exclusion by the applicant of these records was by design or inadvertent is not for us to judge.
2. Presented with this scanty record, we can only go by the impugned ruling dated May 24, 2022, the applicant's motion dated November 21, 2022, his affidavit in support of the motion, the 1st respondent's replying affidavit, and the rival submissions of the respective learned counsel. It is noteworthy that the mainstay of the applicant's intended appeal is that, by the impugned ruling,



- the learned Judge erred in failing to find that the 1st respondent's suit against him did not disclose a reasonable cause of action.
3. Gathering from the impugned ruling, the background of the motion before us is that the 1st respondent, the Ethics and Anti-Corruption Commission, instituted proceedings against the applicant, the 2nd and 3rd respondents in the Environment and Land Court at Nairobi in ELC No E315 of 2021 seeking nullification of the transfer of LR No 209/250 (the suit property) to the 3rd respondent, Rose Wambui Kuria, on the grounds that the suit property was fraudulently and illegally transferred to the 3rd respondent with the assistance of, or in collusion with, the applicant and the 2nd respondent.
 4. In addition to its substantive suit, the 1st respondent filed a notice of motion dated August 20, 2021, amended on October 26, 2021 and amended further on December 6, 2021, praying for orders that, pending hearing and determination of the suit: the 3rd respondent be restrained from alienating, wasting, transferring, disposing of, further charging or in any other way dealing with the suit property; and that the 3rd respondent be directed to deposit all the proceeds from the suit property with the court or in an interest-earning account in the joint names of the 1st and the 3rd respondents.
 5. The 1st respondent's motion was supported by an affidavit of James Kamau Kariuki, an investigator with the 1st respondent, and was made on the grounds, *inter alia*: that the City Council of Nairobi (the Council) was the registered owner of the suit property as lessee from the Government of Kenya; that a grant had been issued and registered in the name of the Council; that the suit property was reserved to provide accommodation for staff of the Council; that the applicant and the 2nd respondent connived to and illegally transferred the suit property to the 3rd respondent; that the 3rd respondent had put the suit property into commercial use as a motor vehicle bazaar trading as Valley Road Motors; and that the 3rd respondent benefitted and continued to benefit from proceeds of the public land.
 6. The 3rd respondent opposed the 1st respondent's motion *vide* a replying affidavit referred to in the impugned ruling. Her case was that she was the lawful registered owner of the suit property; that she acquired the property in due process; that she paid KShs 508,000 to the defunct Nairobi City Commission in consideration therefor; that she took possession more than 30 years ago, and has been in continuous actual possession and occupation thereof; and that she did not discretely solicit for its transfer and registration as alleged by the 1st respondent.
 7. On his part, the applicant herein filed a notice of motion dated November 2, 2021 seeking to strike out the 1st respondent's suit against him on the grounds that the suit did not disclose a reasonable cause of action against him; and that it was, therefore, an abuse of the process of the court. In addition, the applicant filed a preliminary objection to the entire suit contending that it was time barred; that it was defective for misjoinder; that the plaint offended mandatory provisions of law; that the suit was scandalous, frivolous and vexatious; and that the jurisdiction of the court had been improperly invoked. It is also noteworthy that the applicant's motion, supporting affidavit and preliminary objection have, for some reason, been excluded from the record before us.
 8. It would also appear from the record as put to us that the 2nd respondent, Habib Omar Kongo *Alias* Daniel Kongo, did not file any reply to the 1st respondent's motion aforesaid. Neither did he respond to the applicant's motion dated 2nd November 2021.
 9. In its ruling dated 24th May 2022, the ELC (M. D. Mwangi, J.) allowed the 1st respondent's application to the extent only of the order that an interlocutory injunction do issue restraining the 3rd respondent from alienating, wasting, transferring, disposing, further charging or in any other way dealing with the suit property pending the hearing and determination of the suit. The learned Judge dismissed the applicant's motion and preliminary objection aforesaid, and directed that costs be in the cause.



10. The relevant paragraphs of the impugned ruling read as follows:

“ 24. The main issue for determination in the case by the plaintiff is whether the 3rd defendant lawfully acquired the title to the suit property. That is an issue that squarely falls within the jurisdiction of this court. The 2nd defendant’s objection to this court’s jurisdiction is therefore overruled.

... ..

33. The plaintiff’s case against the 2nd defendant is that he participated in the alleged fraud and or illegality in his position as an officer of the defunct City Council of Nairobi. That is what gives rise to the plaintiff’s complaint against the 2nd defendant jointly with the other defendants.

... ..

40. The court has carefully looked at the provisions of section 42 of the Limitation of Actions Act. The said section surely excludes certain proceedings. sub rule (1) provides that the Act does not apply to, ‘(d) proceedings by the government to recover possession of government land’, amongst other issues.”

11. Dissatisfied with the decision of the learned Judge, the applicant moved to this court on appeal on the grounds that the learned judge erred in law and fact: by finding that he had jurisdiction to hear and determine the dispute; by finding that the 1st respondent’s case disclosed a reasonable cause of action against the applicant; by finding that the applicant had been properly joined in the suit; by finding that the suit was not time barred; by granting an order of injunction; and by disallowing the orders sought by the applicant.
12. By a notice of motion dated 21st November 2022 and made pursuant to rule 5(2) (b) of this Court’s Rules, the applicant seeks stay of proceedings in ELC No E315 of 2021 “pending hearing and determination of this application”.
13. The applicant’s motion is supported by his annexed affidavit sworn on 21st November 2022 and is made on the grounds, *inter alia*, that he was apprehensive that the suit before the ELC might proceed to hearing “before this application is heard and determined since the matter has been scheduled for mention on September 29, 2022 for purposes of fixing a hearing date”; that he has an arguable appeal with high chances of success; that his “application” would be rendered nugatory if the orders sought are not granted; that the respondents do not stand to suffer any prejudice if the orders sought are granted; and that it is in the interest of justice that the orders sought are granted.
14. In support of the applicant’s motion, learned counsel, M/s Kariuki Muigua & Company, filed written submissions, list and bundle of documents both dated December 19, 2022 citing the case of Stanley Kangethe Kinyanjui vs. Tony Ketter and 5 Others [2013] eKLR highlighting the twin principle for stay of proceedings under rule 5(2) (b) pending appeal. They urge us to grant the orders sought.
15. The 1st respondent opposes the applicant’s motion *vide* the replying affidavit of James Kamau Kariuki sworn on December 9, 2022. According to Mr Kariuki, the applicant’s motion is an abuse of the court process in view of the multiplicity of applications made by the applicant seeking the same orders in the superior court; that the orders against which the application is lodged were conditional on the substantive suit being heard and determined within 1 year of the issuance of the said orders; that the applicant is determined to delay the hearing of the main suit; that it is in public interest that the substantive suit be heard and determined within the shortest time possible; and that this application



should be dismissed with costs to the 1st respondent. Likewise, the multiple applications alluded to have not been exhibited for our noting.

16. Opposing the applicant's Motion, learned counsel for the 1st respondent, Ms Faith Ng'ethe, filed written submissions, list of authorities and case digest dated January 10, 2023 citing the cases of [Stanley Kangethe Kinyanjui \(ibid\) and Gatirau Peter Munya vs. Dickson Mwenda Kitbinji and 2 Others](#) [2014] eKLR inviting the Court to consider the 3rd factor for consideration in granting orders under [rule 5\(2\) \(b\)](#), namely public interest. Counsel submitted that granting the orders sought goes against public interest. According to her, recovery of public property against those suspected of having illegally benefitted from illegal acquisition of public land is a matter of public importance. She urges us to dismiss the applicant's motion with costs to the 1st respondent.
17. When the applicant's motion came for hearing via the goto Meeting virtual platform on February 14, 2023, the 2nd respondent did not appear at the hearing despite having been duly served. Neither did he file any reply to the applicant's motion or written submissions in that regard. On their part, learned counsel for the 3rd respondent, Mr William Mutua, did not file any reply or written submissions, but appeared at the hearing and indicated that the 3rd respondent elected not to participate in the application.
18. Whether or not to grant orders sought by the appellant pursuant to rule 5(2)(b) of the [rules](#) of this court pending appeal, the court must be satisfied that the applicant has an arguable appeal and that the intended appeal, if successful, would be rendered nugatory if stay of proceedings in ELC No E315 of 2021 is not granted.
19. The principles that apply in applications under rule 5(2) (b) of this court's [rules](#) for stay of execution or of further proceedings, or for injunctive relief pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed.
20. These principles were enunciated in, among others, the following judicial pronouncements of this court, including those cited by the parties, and to which we now turn. On the first limb of this twin principle, this court held in [Anne Wanjiku Kibeh vs. Clement Kungu Waibara and IEBC](#) [2020] eKLR that, for stay orders to issue in similar cases, the applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory (see also [Kenya Tea Growers Association and Another vs. Kenya Planters Agricultural Workers Union](#) [2012] eKLR; and [Ahmed Musa Ismail vs. Kumba Ole Ntamorua and 4 Others](#) [2014] eKLR).
21. Having carefully examined the impugned ruling, we are satisfied by the clarity with which the learned judge addresses the settled points of law and procedure with regard to the jurisdiction of the trial court, the question as to whether the 1st respondent's plaint raised a reasonable cause of action against the applicant, the issue of joinder of parties and limitation of actions, which are sought to be challenged in the intended appeal.
22. As already observed, the mainstay of the applicant's intended appeal is that, by the impugned ruling, the learned judge erred in failing to find that the 1st respondent's suit against him did not disclose a reasonable cause of action. The other grounds relating to the alleged misjoinder and limitation of action are anchored on the main issue. Indeed, a cursory look at the impugned ruling and the grounds



of appeal advanced in his memorandum of appeal, even in the absence of the pleadings and other documents excluded from the record, point to the absence of an arguable appeal.

23. Whether or not the applicant has an arguable appeal in relation to the issues considered in the impugned ruling is easily determinable by clear understanding of what is meant by the phrase “cause of action”. Lord Pearson in *Drummond Jackson vs. British Medical Association* (1970) 1 WLR p.688 at p.696 put it thus:

“A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint.”

24. Thomson Reuters, *Words and Phrases*, Vol 1 at p 228 defines the phrase “reasonable cause of action” in the following words:

“There is some difficulty in affixing a precise meaning to the term reasonable cause of action In point of law, and consequently in the view of a Court of justice, every cause of action is a reasonable cause. But; obviously some meaning must be assigned to the term 'reasonable' ... a pleading will not be struck out unless it is demurrable and something worse than demurrable.”

25. We do not consider it arguable on appeal that the 1st respondent’s suit against the applicant was devoid of cause for complaint; that it did not disclose a reasonable cause of action; or that it was comprised of a claim not supported by facts.

26. Though excluded from the record before us, the gist of the plaint by which the 1st respondent filed suit, and the motions and affidavits mentioned in the opening paragraph herein, are referred to in the impugned ruling with clear identification of the 1st respondent’s cause for complaint. The 1st respondent had sought nullification of the transfer of the suit property to the 3rd respondent on the grounds that the suit property was fraudulently and illegally transferred to the 3rd respondent with the assistance of, or in collusion with, the applicant and the 2nd respondent.

27. Having carefully examined the record as put to us, the applicant’s notice of motion dated November 21, 2022, the affidavit in support thereof, the 1st respondent’s replying affidavit, the written and oral submissions of learned counsel for the applicant and for the 1st and 3rd respondent, the impugned ruling the relevant findings of which are highlighted in the foregoing paragraphs, the applicant’s memorandum of appeal dated November 21, 2022, and the grounds on which the intended appeal is anchored, we reach the inescapable conclusion that the intended appeal is not arguable. Accordingly, we need not address ourselves to the second limb of the twin principle for grant of orders under rule 5(2) (b) of this Court’s *rules*. Accordingly, we find nothing to warrant stay of proceedings in the trial court pending the intended appeal.

28. Finally, it would be remiss of us not to pronounce ourselves on this court’s discretionary power to stay proceedings in the superior court pending appeal. We take to mind that it is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case. As stated by this court in *David Morton Silverstein v Atsango Chesoni* [2002] eKLR -

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court’s own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts.”



29. We are in agreement with the proposition by the High Court at Meru (Gikonyo J) in *Kenya Wildlife Service vs. James Mutembei* [2019] eKLR, that:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”

30. *Halsbury’s Laws of England, 4th Edition. Vol. 37* has this to say at p 330 and p 332

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.

... ..

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

... ..

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.

31. To our mind, the applicant has not made a case for Stay of proceedings in the ELC pending his intended appeal. We need not overemphasize the fact that such an order is a grave judicial action which will seriously interfere with the 1st respondent’s right to prosecute its case. Moreover, the proceedings sought to be stayed will provide ample opportunity for all parties to present their respective cases without delay, and on the basis of the substantive merits thereof.

32. In addition to the foregoing, the applicant has not shown to the satisfaction of the court that special circumstances exist to warrant stay of proceedings in the ELC. Neither has he demonstrated that the proceedings in issue are frivolous, vexatious or harassing, are manifestly groundless, or that the 1st respondent’s case discloses no cause of action.

33. In conclusion, we find that the applicant has failed to satisfy the requirements for grant of the orders sought pursuant to rule 5(2) (b) of this Court’s *Rules*. Accordingly, the applicant’s notice of motion dated November 21, 2022 fails and is hereby dismissed with costs to the 1st respondent. Orders accordingly.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

DR. K. I. LAIBUTA



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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

