



REPUBLIC OF KENYA



Shah v Embakasi Youth Jua Kali Self Help Group & 4 others (Civil Appeal (Application) 38 of 2020) [2023] KECA 231 (KLR) (3 March 2023) (Ruling)

Neutral citation: [2023] KECA 231 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 38 OF 2020
HM OKWENGU, HA OMONDI & JM MATIVO, JJA
MARCH 3, 2023**

BETWEEN

MANOJ K SHAH APPLICANT

AND

EMBAKASI YOUTH JUA KALI SELF HELP GROUP 1ST RESPONDENT

NAIROBI CITY COUNTY 2ND RESPONDENT

**MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT 3RD
RESPONDENT**

OFFICE OF INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

(Being an application under Section 3A & 3B of the Appellate Jurisdiction Act and Rules 5(2)(b) of the Court of Appeal Rules for an injunction pending appeal against the Judgment of the Environment and Land Court (K. Bor, J) delivered on 22nd October 2019 in ELC Petition No. 42 of 2018)

RULING

1. By a petition filed in the Environment and Land Court (ELC), the applicant Manoj, K. Shah sought various orders of injunction and declaratory orders as well as mandamus and damages against Embakasi Youth Self Help Group (1st respondent), Ministry of Lands, Housing and Urban Development (2nd respondent), Nairobi City County (3rd respondent), the Office of Inspector General of Police (4th respondent), and the Hon. Attorney General (5th respondent).
2. The applicant claimed to be the owner of various parcels of land situated in Donholm area of Nairobi which parcels of land he purchased from a company known Le Stud Limited. Consequently, he applied



for amalgamation and sub-division of the parcels and he was issued with a sub-division certificate by the 3rd respondent. However, members of the 1st respondent unlawfully invaded, trespassed, and encroached onto his property, breaching his property rights. He reported the matter to the 3rd and 4th respondents but did not receive any assistance. The applicant contended that his right to property was further contravened by the respondents' refusal to enforce injunctive orders which he had earlier obtained from Milimani Chief Magistrates Court.

3. The respondents each opposed the applicant's petition contending that the petition relates to trespass and eviction of squatters from the property, an action which calls for an ordinary suit so that all parties could ventilate their position. The 1st respondent challenged the applicant's alleged ownership of the suit property maintaining that the property was surrendered to the Government, and that it forms part of the riparian reserve adjacent to Nairobi River. The 3rd respondent contended that the applicant was seeking orders that were not enforceable, while the 2nd, 4th, and 5th respondents all maintained that the dispute was between the 1st respondent and the applicant, and should have been brought by way of an ordinary suit.
4. The ELC (Bor, J) in its judgment, found that the dispute was an ownership dispute between the applicant and the 1st respondent, and was more of a claim of trespass to property which should be canvassed by way of an ordinary plaint so that parties are afforded an opportunity to present their evidence. The learned Judge dismissed the petition finding that the applicant had failed to demonstrate violation of his fundamental rights as pleaded in the petition.
5. Being aggrieved by that judgment, the applicant filed a notice of motion dated April 11, 2022, under sections 3A & 3B of the [Appellate Jurisdiction Act](#), and Rule 5(2)(b) of the [Court of Appeal Rules, 2010](#). The orders sought by the applicant pending the hearing of his appeal include: a temporary injunction restraining members of the 1st respondent or any other unknown parties from trespassing, excavating, constructing illegal structures, taking possession, selling, leasing, transferring, or in any other way dealing or interfering with the applicant's parcels of land title No Nairobi block 82/8707-8740 (suit property); a mandatory injunction compelling the 2nd and 3rd respondents through the office of the Nairobi Metropolitan Services to furnish the Court with all approvals, development plans, and applications on the suit property; a mandatory injunction compelling the 2nd and 3rd respondents through the office of the Nairobi Metropolitan offices to demolish all illegal structures and evict all members of the 1st respondent or any other unknown parties on the suit property; and a mandatory injunction compelling the 1st respondent to assist the 2nd and 3rd respondents in enforcing the mandatory injunction for demolishing the illegal structures.
6. The grounds upon which the applicant's motion is based are stated on the face of the motion and an affidavit sworn by the applicant. In brief, the applicant is the owner of the suit property. He has lodged an appeal against the judgment of the ELC and he is concerned that members of the 1st respondent and other unknown parties have continued to trespass and construct illegal structures on his parcel of land and that despite numerous pleas and request to the 2nd and 3rd respondents to demolish the illegal structures and evict the invaders, the 2nd and 3rd respondents have failed to do so. That despite being aware that members of the 1st respondent are prone to violence, the 4th respondent has failed, refused or neglected to provide security. He therefore seeks the interim orders of injunction including mandatory injunction, to preserve the suit property during the pendency of the appeal.
7. The applicant has also filed written submissions in which he urges that his intended appeal will be rendered nugatory if the injunction orders sought are not granted. This is because the suit property comprises of over 30 plots with title in the applicant's name situated within the prime area of Donholm estate; that the plots are worth a colossal amount of money; that the applicant is apprehensive that he



will suffer great prejudice and irreversible substantial loss should the plots change hands or character, as they will be put out of his reach; that members of the 1st respondent have no known means or sufficient assets to meet the applicant's apprehended loss; and that some of the trespassers are unknown third parties and strangers.

8. The Attorney General who appeared for himself and for the 2nd and 4th respondents, filed written submissions opposing the applicant's motion on the grounds that the superior court dismissed the applicant's petition because the claim was anchored on trespass to property and should have been canvassed by way of an ordinary plaint; and that the orders issued by the ELC were negative orders and not positive orders capable of execution or enforcement, such as to call for an order of stay of execution.
9. The Attorney General relying on *George Ole Sangui & 12 others v Kedong Ranch Limited* [2015] eKLR, submitted that the applicant does not have an arguable appeal as the ELC rightly held that he did not prove that his fundamental rights were breached as pleaded in the petition; and that the applicant has not satisfied the principles that govern the exercise of the Court's discretionary powers under Rule 5(2)(b) of the *Court of Appeal Rules*.
10. The 1st and 3rd respondents did not file any written submissions or any replying affidavit. During the hearing of the appeal which proceeded through the go-to-meeting online platform, learned counsel Mr Wawire was present for the applicant, Mr Olonde for the 1st respondent, Mr Odhiambo for 3rd respondent, and Mr Eredi was holding brief for Ms. Fatuma for the 2, 4th and 5th respondents.
11. Learned counsel Mr Wawire made oral submissions highlighting the applicant's written submissions. He reiterated that the applicant has an arguable appeal and identified the issue of ownership as an arguable issue as it is regarding the enforcement of Article 40 of the *Constitution* which is a fundamental right. On the nugatory aspect, Mr Wawire submitted that the applicant has 30 plots in his name and is apprehensive that the plot may change hands or character or be put out of his reach, and there is no evidence that the members of the 1st respondent can compensate him for such loss.
12. Mr Olonde who appeared for the 1st respondent did not make any submissions, while Mr Eredi fully adopted the written submissions that had been filed by the Attorney General. Mr Odhiambo who was appearing for the 3rd respondent pointed out that although the applicant was seeking a mandatory injunction at interlocutory stage, he has not demonstrated any exceptional circumstances. He further argued that prayers 4 and 5 which seek enforcement of orders by the Nairobi Metropolitan Services were not capable of enforcement because Nairobi Metropolitan Services ceased to exist on September 30, 2022. He argued that the application has been brought to a wrong forum and that Order 5 which seeks the demolition of structures was in actual fact a final order that cannot be granted at interlocutory stage.
13. In *Abmed Musa Isbmael v Kumba ole Ntamurua & 4 Others* [2014] eKLR, this Court stated:

“The principles upon which we exercise our jurisdiction under rule 5(2)(b) of the Court of Appeal Rules are notorious. See, for instance *Dhiman v Shah* [2008] KLR 165, *Bob Morgan Systems Limited & Anor v Jones* [2004] 1KLR 94. An applicant must show that he has an arguable appeal and further that unless we grant the orders sought, his appeal, if successful, will be rendered nugatory. An arguable appeal need not raise a multiplicity of explorable points, a single one would suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal – it is enough that it is a point on which there can be a bona fide question to be explored and answered within the context of an appellate jurisdiction. The second limb, and both must be established, is an indication that stays or injunctions are not automatic. Rather, they are granted to preserve the integrity



of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or sucker by reason of intervening laws, harm or destruction that turns the appeal into a mere academic ritual.

...

As this Court stated in *David Kamau Gakuru v National Industrial Credit Bank Limited*, Civil Appeal No 84 of 2001, an injunction being an equitable remedy cannot be granted to a party who has demonstrated openly by his conduct that he is underserving of the equitable relief”.

14. In *Reliance Bank Limited v Norlake Investments Limited* [2002] 1 EA 227 this Court stated:

“... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

...

The two principles the Court has developed help the Court to discern the will of the law under Rule 5(2)(b) of the Court’s Rules, and in discerning the will of the law, the Court in the exercise of its discretion, must take into account all the relevant circumstances presented in a particular case”.

15. Taking into account these authorities, the issue that arises for our determination is whether the applicant has established that he has an arguable appeal, and whether he has demonstrated the need for the orders of injunction that have been sought in order to preserve the substratum of the appeal so that the appeal is not rendered a mere academic exercise.
16. The applicant has provided a copy of a record of appeal in which he has included a memorandum of appeal that raises five grounds. From the grounds of appeal, the following issues can be discerned: whether the applicant’s petition was anchored on the protection of his fundamental rights as set out under Articles 40 and 245 of the *Constitution*; whether the ELC properly appreciated the substratum of the applicant’s petition; whether the National Police Service in its obligation to maintain law and order had an obligation to protect the applicant’s fundamental rights and enforce the injunctive orders given in his favour; whether the applicant’s claim could only be canvassed by way of ordinary plaint; and whether the applicant failed to prove breach of violation of his fundamental rights.
17. From the above, it is clear that the applicant has identified several issues. As stated in *Abmed Musa Ishmael v Kumba ole Ntamurua & 4 others* (supra), a single issue that is capable of full ventilation on appeal is sufficient, and the arguable issue must not necessarily be one that will succeed on full consideration of the appeal. We are satisfied that the applicant has met this threshold.
18. In *Kenya Breweries Limited & anor v Washington O. Okeyo* [2002] eKLR, this Court cited with approval, Vol. 24 Halsbury’s Laws of England at page 498, and applied *locabail-international-finance-ltd-v-agroexport-ca-1986/ Locabail International Finance Limited v Agro Export & others* [1986] 1 All ER 901, in which it was stated:

“A mandatory injunction ought not to be granted on interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act, which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction,



the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”.

19. We are also in agreement with the statement of the law as stated by Bosire, J (as he then was) in *Kabundi v Trust Bank Ltd* [1993] eKLR that:

“The law is that a mandatory injunction should not be granted to affect the rights of innocent third parties. (Priscilla Wambui Danson – v – Nairobi City Commission NAI HCCC No 837 of 1984, or where the defendant is not capable of complying with the order (The Despina Pentikos [1975] EA 38). It is a jurisdiction which should be exercised only in special circumstances. The special circumstances must as always, depend on the facts and circumstances of each case.”

20. In the present situation, the applicant has sought interlocutory orders of injunction pending the hearing of his appeal, including a mandatory injunction compelling the 2nd and 3rd respondents to demolish all illegal structures and evict the members of the 1st respondent or any unknown party on the suit property, as well as a mandatory injunction compelling the 1st respondent to assist the 2nd and 3rd respondents in demolishing the illegal structures, the question is whether there are special circumstances and whether this is a clear case where the matter ought to be decided at once.
21. The High Court has dismissed the applicant’s suit, and so it cannot be said that the claim before the Court is simple and straightforward, nor have any special circumstances been demonstrated as to justify the issuance of the mandatory injunction including eviction at this interlocutory stage. The litigation was brought to Court as a suit seeking orders arising from alleged violation of the applicant’s right to property, and refusal by government agencies to enforce that right. However, the High Court ruled that the dispute was actually one concerning trespass to land. The applicant has title to the suit property. He has not demonstrated any danger of the suit property being transferred or interfered with in a way that cannot be reversed. We are not therefore persuaded that in the circumstances of this case, orders of interlocutory injunction or mandatory injunction as sought by the applicant, would be justified at this stage as the applicant has failed to satisfy the Court that his intended appeal will be rendered nugatory if the orders sought are not granted.
22. As the applicant was required to establish both the limb of arguability and the nugatory aspect, he has not satisfied the requirement of Rule 5(2)(b) of the *Court of Appeal Rules*. His motion fails and is accordingly dismissed. In the circumstances of this application, we do not find it appropriate to make any orders on costs. Each party shall therefore meet its own costs.

Dated and delivered at Nairobi this 3rd day of March, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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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

