Mutua v Kange & 4 others (Civil Appeal (Application) E379 of 2022) [2023] KECA 458 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KECA 458 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E379 OF 2022

HA OMONDI, A ALI-ARONI & JM MATIVO, JJA

APRIL 20, 2023

BETWEEN

KALUNDI MUTUA ..... APPLICANT

AND

SIMON MUTULI KANGE ..... 1ST RESPONDENT

KITANI MUTIA MUSYIML ..... 2ND RESPONDENT

THE LAND ADJUDICATION & SETTLEMENT OFFICER, MWINGI ..... 3RD RESPONDENT

THE DEPUTY COUNTY COMMISSIONER, KYUSO SUB-COUNTY ..... 4TH RESPONDENT

THE ATTORNEY GENERAL ..... 5TH RESPONDENT

(Being an application for injunction restraining the respondents or their agents from in any way interfering with parcels of land numbers Kyuso/Kyuso 'A'/923 to 1058 and Kyuso/Kyuso 'A'25 pending lodging, hearing and determination of an intended appeal from the judgment and decree of the Environment and Land Court of Kenya at Kitui (Kimani, J.) dated 26th April, 2022 in ELC Petition No. 8 of 2021)

RULING

1. By a notice of motion dated May 31, 2022 brought under rules 5(2)(b) and 42 of the *Court of Appeal Rules, 2010*, (now rule 44 of the *Court of Appeal Rules, 2022*), Kalundi Mutua (the applicant) prays

for an order that the respondents or their agents be restrained from entering, trespassing, evicting or interfering or in way dealing with all those parcels of land known as Kyuso/Kyuso

> "A"/923 to Kyuso/Kyuso "A" 1058 and Kyuso/Kyuso "A" 25 pending the hearing and determination of her intended appeal to this court against the judgment and decree issued on April 26, 2022 in Kitui Environment and Land Court petition number 8 of 2021. The applicant also prays for costs of the application. Prayers (1) and (2) of the application are spent.

2. The grounds in support of the application as we glean them from the applicant's supporting affidavit sworn on May 31, 2022 are:

    a. land adjudication in the area was declared in 2009; (b) prior to the adjudication, the 1st respondent had had sold a portion of family land without consent of the family; (c) clan elders determined the dispute in her favour; (d) during the adjudication, she was allocated land parcel number 24 but the 1st respondent's objection to the allocation was upheld; (e) her appeal number 394 of 2011 against the said decision was dismissed on March 22, 2018; (e) parcel number 25 had been allocated to the 2nd respondent's father and her appeal number 386 of 2011 against the said allocation was also dismissed on March 22, 2011; and

    (f) the third respondent failed to supply her with copies of the proceedings until sometimes in September, 2019.

3. Aggrieved by the two decisions, the applicant filed a constitutional petition at the Machakos Environment and Land Court being petition number 24 of 2019 which was subsequently transferred to Kitui and designated number 8 of 2021. However, the petition was dismissed on April 24, 2022. Discontented by the said decision, the applicant filed a notice of appeal on May 6, 2022 and applied for certified copies of court proceedings.

4. The gravamen of the applicant's application before us is that she has an arguable appeal because the 3rd respondent withheld the proceedings and judgment of the appeals from her for a period of over one year thereby denying her the opportunity to challenge the two decisions. It is also her case that the trial court did not consider the said delay as a breach of her constitutional right. She faults the trial court for: (a) failing to appreciate that even though delegated authority cannot be delegated, a critical part of the proceedings were delegated to the elders; (b) failing to consider that the cumulative actions of the 3rd respondent pointed to a biased adjudicator and as such the proceedings should have been nullified; and, (c) that the trial court erred by striking out the 2nd respondent from the proceedings. It is her case that had the 3rd respondent not delegated his authority, he would have arrived at a different conclusion.

5. Further, the applicant averred that the 1st respondent secretly sub- divided the land during the pendency of the case at the ELC with a view to disposing the same and he has been offering the parcels of land for sale. She also deposed that she has been using the land and she has fenced it limiting access, so, it's unlikely that the purported survey was ever done. Further, unless the orders sought are granted, the appeal will be rendered nugatory and she and her children risk eviction. Lastly, she is ready to provide security.

6. The 1st and 2nd respondents' responses in opposition to the application are contained in the respective replying affidavits of Simon Mutuli Kang'e and Daniel Mutua Musyimi, a son to the late Musyimi Kusikira both dated January 30, 2023. On his part, the 1st respondent averred that he purchased the land vide a sale agreement dated November 6, 2005 witnessed by the applicant herein, assumed

possession and has been using the land to date. The 2nd respondent asserted that his late father owned parcel No Kyuso/ Kyuso 'A' 25. Further, the applicant was a witness to the said sale.

7. A reading of both the applicant's and 2nd respondents' affidavits show that it is common ground that during the adjudication process, land parcel No Kyuso/Kyuso 'A' 24 was allocated to the 1st respondent while parcel number Kyuso/Kyuso "A' 25 was allocated to the 2nd respondent's late father. Dissatisfied with the two allocations, the applicant lodged disputes with the adjudication committee. The two disputes were heard and both parcels of land were awarded to the applicant. The 1st respondent and the deceased lodged separate appeal Nos 2 of 2010 for parcel No Kyuso/Kyuso 'A' 24 and appeal No 3 of 2010 for parcel No Kyuso/Kyuso 'A' 25 respectively. The decisions rendered by the Adjudication Committees were reversed and land parcel No Kyuso/Kyuso 'A' 24 was awarded to the 1st respondent while land parcel No Kyuso/Kyuso 'A' 25 was awarded to 2nd respondent's father (Musyimi Kusikira-deceased).

8. It is also common ground that the applicant was dissatisfied by both decisions and she lodged separate objections with the office of the 4th respondent. After hearing the disputes, the 4th respondent dismissed the applicant's objections. Her appeals to the Minister being appeal Nos 394 of 2011 and 386 of 2011 were both dismissed on March 23, 2018 after which the restrictions placed on the two parcels were removed.

9. The 3rd, 4th and 5th respondents did not file any responses to theapplication nor did they participate in the proceedings.

10. Dissatisfied with the decisions rendered by the 4th respondent, the applicant filed petition number 24 of 2018 in the Environment and Land Court in Machakos which was later transferred to Kitui and assigned number 8 of 2021. The said petition was dismissed by Kimani J, with costs on April 26, 2022. Aggrieved by the dismissal, the applicant filed a notice of appeal signifying her intention to challenge the decision in this court. She also filed the application which is the subject of this ruling.

11. In support of the application, the applicant's counsel submitted that the intended appeal is arguable, and that even one arguable ground suffices to warrant the orders sought. Counsel submitted that the applicant's right to a fair hearing before the 3rd respondent was violated because she was treated unfairly as she was not supplied with the proceedings. Counsel argued that a fair hearing extends beyond the decision. Counsel faulted the 3rd respondent for failing to visit the disputed parcels of land and for delegating his duties to elders. He cited *Abdallah Shikanda Hassan & 9 others v District Land Registrar- Kakamega & 2 others* (2016) eKLR in which this court reiterated the constitutional and administrative law principal encapsulated in maxim, delegatus non potest delegare.

12. On the nugatory aspect, counsel submitted that the two parcels of land are the only parcels of land owned by the applicant where she lives with her children, and that the 1st respondent has since the delivery of the judgment subdivided the land and is in the process of selling the same and he has commenced the process of evicting her from the land. Counsel invited this court to be guided by *Kimutai Lelei v Hosea Bittok* (2020) eKLR.

13. The 1st and 2nd respondent's counsel submitted that the application is frivolous, vexatious and bad in law and cited *Dawkins v Prince Edward of Save Weimber* (1976) I QBD 499 which described a frivolous proceeding as one lacking substance, or it is fanciful, or where a party is trifling with the court; or when to put up a defence would be wasting the court's time; or when it is not capable of reasoned argument. Counsel also argued that granting the injunction sought would cause greater hardship to them and relied on *Charter House Investments Ltd v Simon K. Sang & 3 others* (2010) eKLR in support of the proposition that a court ought to balance the convenience of the parties and possible injuries

to them and to third parties before granting injunction orders. Further, counsel submitted that the applicant has not met the tests to merit the orders. Lastly, the 1st and 2nd respondents counsel submitted that it has not been demonstrated that the intended appeal if successful will be rendered nugatory.

14. The application before us is brought under rule 5(2)(b) of the *Court of Appeal Rules, 2022* which provides:

> 5(2) (b) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.

15. Neither the *Appellate Jurisdiction Act* nor the *Court of Appeal Rules, 2022* indicate the factors this court should consider when determining whether to issue an order of stay or injunctive relief. The issuance of a stay or injunctions under rule 5 (2) (b) is left to the court's discretion and will depend on the facts of each particular case. However, legal standards govern the exercise of that discretion. Exercise of court's discretion does not depend on its inclination, but on its judgment guided by sound legal principles, which an applicant must demonstrate to merit the orders.

16. The applicable principles that guide the court in the discharge of its mandate under the above rule and which we fully adopt were crystallized by this court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* (2013) eKLR. An applicant seeking relief premised on the above rule must demonstrate that the appeal or the intended appeal is arguable and second, that the appeal will be rendered nugatory should it ultimately succeed after the substratum of the appeal is no more or out of reach of the successful appellant.

17. 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..."

18. 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:

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."

19. Regarding the first prerequisite, the applicant relies on the grounds in support of her application enumerated in her supporting affidavit and buttressed by the submissions urged before us which we have already highlighted above. We are alive to the fact that at this stage we are not required to delve into the merits of the intended appeal because that is the duty of the court which will hear the appeal. We are also aware that an arguable appeal is not necessary one that will succeed. We have evaluated the grounds cited in support of the intended appeal. We note the applicant's two appeals were determined by the Minister in accordance with section 29 (1) of the *Land Adjudication Act* which provides:

29. Appeal

(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

a. delivering to the Minister an appeal in writing specifying the grounds of appeal; and

b. sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

20. The above provision provides in peremptory terms that the Ministers decision shall be final. We propose not to say more lest we embarrass the bench, which will hear the appeal. It will suffice for us to state that we are not satisfied that the applicant has met the first pre-requisite.

21. The applicant having failed to satisfy the first test, we find and hold that it will serve no purpose for us to discuss the nugatory test because an applicant under rule 5 (2) (b) is required to satisfy both tests. Accordingly, we dismiss the applicant's application dated May 31, 2022 with costs to the 1st and 2nd respondents.

Dated and delivered at Nairobi this 20th day of April, 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