Saire & 2 others v Land Adjudication Officer, Transmara West & 15 others (Civil Application E003 of 2022) [2023] KECA 460 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KECA 460 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E003 OF 2022

HM OKWENGU, S OLE KANTAI & HA OMONDI, JJA

APRIL 20, 2023

BETWEEN

MATAMPASH OLE SAIRE ..... 1ST INTENDED APPELLANT

SAITATO OLE MAMPULI ..... 2ND INTENDED APPELLANT

IKOLET ..... 3RD INTENDED APPELLANT

AND

LAND ADJUDICATION OFFICER, TRANSMARA WEST .... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT .... 3RD RESPONDENT

OTUNA OLE SANINGO ..... 4TH RESPONDENT

PAREIYO OLE LOITA ..... 5TH RESPONDENT

KOKWET OLE KUNINI ..... 6TH RESPONDENT

TATUR OLE KILOYIAN ..... 7TH RESPONDENT

YIANTO OLE SEYIO ..... 8TH RESPONDENT

DAVID PASEI SIMPIRI ..... 9TH RESPONDENT

SOITANAE OLE KINANTA ..... 10TH RESPONDENT

SOIPEI VINCENT KISIIT ..... 11TH RESPONDENT

OLEIMUTIE OLE MAMAYIO ..... 12TH RESPONDENT

MAKUTIT JOEL MELUBO ..... 13TH RESPONDENT

JOEL LETUYA RAKITA ..... 14TH RESPONDENT

LENKIYIEU OLE NAIDUYA ..... 15TH RESPONDENT

OLEUNUA OLE TONKEI ..... 16TH RESPONDENT

(Being intended appellants/applicants' notice of motion application under sections 3, 3A and 3B of the Appellate Jurisdiction Act and Rules 41 and 42 of the Court of Appeal Rules 2010 seeking injunctive orders and stay of proceedings pending the hearing and determination of the intended appeal from the Ruling of the Environment and Land Court at Kilgoris (Emanuel Washe, J) delivered on 20th December 2021 in ELC JR. No. E001 of 2021)

RULING

1. By a notice of motion dated January 24, 2022, the applicants Matampash ole Saire and Saitato ole Mampuli Ikolet, have moved this Court seeking in the main, an order of temporary injunction restraining the respondents, their servants, successors, and/or assignees from subdividing, allocating, transferring, or in any way dealing with, or interfering with property known as Kimintet E (suit property) situate in Kimintet sub-location of Siria East Location Transmara; and stay of proceedings in Kilgoris ELC JR No E001 of 2021. The application is anchored on grounds stated on the motion and an affidavit sworn by one of the applicants, Matampash ole Saire.

2. In brief, the origin of the dispute resulting in the application before this Court is a publication declaring Kimintet E as an adjudication section within section 5 of the *Land Adjudication Act*. The applicants are opposed to the said publication because, according to them, Kimintet E falls within the geographical area of Kimintet sub-location of Siria East Location of Transmara that was declared an adjudication section on October 29, 1986.

3. The applicants were aggrieved that the 1st respondent on July 7, 2020, purported to appoint a land adjudication committee for the said Kimitent E adjudication section, yet there was another land adjudication committee that had been appointed on March 13, 1989 for Kimitent adjudication section of Siria East location covering the area which the 1st respondent declared an adjudication section.

4. The applicants were concerned that members of their community and themselves were at risk of losing their parcels of land which are within the property in contention, as the second committee that had been appointed by the 1st respondent could proceed to undertake its duties which included the allocation and beaconing of the suit property to the detriment of the applicants and members of their community who had already settled on the suit property.

5. It is against this background that the applicants moved to the Environment and Land Court (ELC), and pursuant to leave granted to them to apply for orders of judicial review, obtained orders that the status quo be maintained by the parties pending the hearing and determination of the matter. The issue of stay was subsequently heard inter partes and on December 20, 2021, a Ruling was delivered by the ELC (Emanuel Washe, J), declining to grant the order of stay of execution as sought in the applicants' chamber summons dated July 29, 2020. This is the Ruling that the applicants intend to challenge on appeal and have filed a notice of appeal for that purpose.

6. The applicants have now moved to this Court seeking injunctive orders as well as stay of the proceedings of the ELC, to enable them protect their interest and pursue their right of appeal. The applicants believe that their grounds of appeal as set out in the memorandum of appeal have high probability of success, and that it is in the interest of justice and the public in general that the application be allowed.

7. The 16th respondent, Oleunua ole Tonkei (Tonkei) has filed a replying affidavit opposing the applicants' motion. Tonkei deposes that Kimitent area was adjudicated through an adjudication and demarcation process in different sections being A, B, C, and D. However, the adjudication process was not concluded as some areas had not been declared adjudicated areas, and the suit property fell within this category. Each of the adjudication sections had a committee appointed to be in charge of the allocation of parcels to the individuals within the section declared, and the applicants were the vice chairman and a member of the committee appointed in 1989 in regard to Kimitent B. Long after the completion of the adjudication process at Kimitent A, B, C, and D, the government declared an adjudication process at Kimitent E and F areas, which were adjoining Kimitent A, B, C, and D and this is what the applicants are challenging.

8. Tonkei deposed that the 4th to 16th respondents who were the committee members appointed in respect to Kimitent E and F, lodged an application in the suit filed by the applicants and were joined as interested parties. The issue of stay was heard inter partes, and the impugned Ruling was delivered by the High Court. Tonkei maintained that the applicants did not file any notice of appeal against the Ruling within the required seven days nor did they serve any notice of appeal within seven days. He urged that the applicants' motion was devoid of merit.

9. Moris Otieno (Morris) the Land and Settlement Officer Transmara East and West sub counties, also filed a replying affidavit in which he refuted the applicants' claims that he acted ultra vires and contrary to the law in declaring Kimitent E land adjudication section. Morris deposed that the district adjudication land officer has a latitude to subdivide a declared section into registrable sections to expedite the adjudication process. He dismissed the applicants' concerns explaining that once the adjudication register is complete all members would be invited to inspect the register and to raise any objection in accordance with section 26 of the *Land Adjudication Act*. He faulted the applicants for failing to exhaust all the mechanisms provided in the *Land Adjudication Act* before seeking redress from the Court.

10. The Attorney General filed written submissions on his behalf and on behalf of 1st and 3rd respondents. The Attorney General submitted that the applicants' motion did not meet the threshold for the grant of the orders sought. The Attorney General relied on *Giella v Cassman Brown* [1973] EA 358 and *Nguruman Limited v Jan Bonde Nielson & 2 Others*, Civil Appeal No 77 of 2012 [2014] eKLR, on the principles for granting an injunction. The Attorney General argued that the applicants had not demonstrated that their interest on the suit property had crystallized to enable the Court to grant the orders sought.

11. The Attorney General submitted that the *Land Adjudication Act* provides a scheme in which the property rights of the residents of Kimintet are legalized and part 2 of the Act provides for appointment of an adjudication officer, an adjudication committee and an arbitration board, who are given specific powers and responsibility to hear disputes and objections in the process of land adjudication; that the decision of the 1st respondent to appoint committee members was done procedurally and in compliance with the law; that the applicants have not demonstrated the injury they will suffer, if the orders sought are not granted; and that the orders sought are premature because the process is still at the adjudication stage and the *Land Adjudication Act* provides for a system of objections and appeals within the adjudication process, which the applicants and the residents of Kimitent E adjudication section can invoke to raise their grievances.

12. The Attorney General argued that the balance of convenience tilts in favour of the residents of Kimitent E who are meant to benefit from the adjudication; that the applicants are only pursuing their selfish interest at the expense of members of the community; and that the applicants have not

demonstrated that they have an arguable appeal with high chances of success or that if the order of stay is not granted, the intended appeal will be rendered nugatory. The Attorney General therefore urged t that the application be dismissed.

13. The 14th to 16th respondents also filed written submissions in which they raised 3 issues. First, whether the notice of appeal was served within the stipulated time. Second, whether the applicants have established a sufficient basis to warrant the grant of the application, and third, whether the application is in the interest of justice or geared to abusing the due process of the Court.

14. In regard to the first issue, the 4th to 16th respondents submitted that the applicants are seeking to benefit from an exercise of an equitable discretion of the Court and, therefore, they must satisfy the Court that there is a basis for the exercise of such discretion; that the applicants were obliged to file a notice of appeal within 14 days after the ruling was made; and that although the applicants lodged the said notice within this period, it was served on the 4th to 16th respondents on the February 15, 2022, which was long after the 7 days within which the notice was required to be served. The 4th to 16th respondents therefore argued that the applicants' notice of motion could not be supported, in the absence of a compliant notice of appeal.

15. As regards the second and third issues, the 4th to 16th respondents submitted that the applicants had to establish a sufficient cause or basis for the issuance of the orders of stay of proceedings and an order of injunction, which they were seeking; that although the question whether to grant a stay of proceedings is discretionary, the discretion must be exercised judicially and the Court must consider whether it is in the interest of justice to grant the same; that the aspect of the appeal being rendered nugatory must be hinged on whether the appeal is arguable or not, and not whether the appeal will succeed on merit; that the applicants have no arguable appeal because the notice upon which they rely is defective as it was not served within the required time.

16. The 4th to 16th respondents added that the applicants have squandered several chances that they have had to prosecute the judicial review application, as they have failed to set the same down for hearing; that the applicant have come to this Court with unclean hands as the notice of appeal is frivolous, since it was not served within the required time and that the granting of the applicants' motion will only prejudice the constitutional imperatives of timely and expeditious disposal of the suit.

17. We start with a procedural issue. The 4th to 16th respondents have challenged the validity of the applicants' notice of appeal and argued that the application is defective as it is based on an intended appeal that is anchored on a defective notice of appeal. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR, the issue of the validity of the notice of appeal arose in an application brought under Rule 5(2)(b) of the *Court of Appeal Rules*, and the Court had this to say:

> " .....as the Court has repeatedly pointed out Rule 5 (2)
>
> (b) does not provide that "..... where a valid notice of appeal .....;" the Rule simply provides that:-
>
> > "In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74..... Rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of Rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a

notice of appeal when an application under Rule 5 (2) (b) is being considered."

18. Likewise, the issue of the validity of the notice of appeal raised by the 4th to 16th respondents is not for determination in the application before us. It suffices that there is a notice of appeal that was filed by the applicants. We therefore reject that line of argument.

19. The applicants seek orders of injunction pending appeal. In *Charterhouse Bank Limited V Central Bank of Kenya & 2 others* [2007] eKLR, this Court dealing with an application for an interlocutory injunction pending an appeal addressed the law to be applied as follows:

> " The principles upon which this Court exercises its unfettered discretion to grant a stay of execution, stay of proceedings or an order of injunction are settled. The applicant should satisfy the court that the appeal or the intended appeal is not frivolous, that is to say, that, the appeal or intended appeal is arguable and, secondly, that unless the application is granted the results of the appeal, if successful would be rendered nugatory. The purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory. (See Madhupaper International Limited v Kerr [1985] KLR 840; JK Industries v Kenya Commercial Bank Ltd & Another [1987] KLR 506; Githunguri v Jimba Credit Corporation Ltd (No 2) [1988] KLR 838)."

20. Applying these principles, the issue that we must determine is whether the applicants have satisfied this Court, that first, they have an arguable appeal, and that is an appeal that is not frivolous.

Secondly, that the intended appeal will be rendered nugatory if the interlocutory orders sought are not granted.

21. The applicants intended appeal is against the ruling delivered by the ELC (Washe J), wherein the learned Judge declined to issue an order of stay sought by the applicants. The following extracts gives the reasoning of the learned Judge.

> " It is clear in the mind of this honourable court that the ex parte applicants' position that the operating gazette notice is the one referenced LA/9/4/13/139 dated October 29, 1986 and marked as annexture MOS-1 is not the correct position.
>
> The ex parte applicants' annextures MOS-2 dated March 13, 1989 clearly indicates that the appointed land adjudication committee relates to the area known as Kimitent B adjudication section.
>
> In essence, the decision to adjudicate the area known as Kimitent area through various adjudication sections, meaning Kimitent A, B, C, D, and now E and F, was done way back in the year 1986 and has been duly implemented by the respondents in their duty for the good of the public in acquiring rights over land, which is a precious commodity in our nation.
>
> In the re-known case of *R(H) v Ashworth Special Hospital Authority* [2003] 1 WLR 127, Dyson, LJ held as follows:
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> > 'The essence of stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings'.

In this present case, the honourable court is of the view that the ex parte applicants have not demonstrated sufficient cause as to why the decision contained in the Gazette Notice referenced as LA/TM/9/2/10 should be stayed and/or suspended.

The honourable court therefore declines to issue a stay on the gazette notice referenced as LA/TM/9/2/10 dated February 6, 2020.

On the appointment of the land adjudication committee Kimitent E adjudication section, the honourable court is of the view that the ex parte applicants' appointment contained in annexture MOS-2 referenced LA/9/2/45 and dated March 13, 1989 refers to the land adjudication committee of Kimitent B adjudication section only.

The ex parte applicants' membership and/or authority was specific on the adjudication section and was not general for the entire Kimitent adjudication area.

The ex parte applicants would have only convinced this honourable court to grant them a stay if they had produced evidence to the effect that the same land adjudication committee appointed under the letter dated March 13, 1989 and referenced as LA/9/2/45 is the same one that undertook the same roles in Kimitent A, B, C, and D adjudication sections which are now complete.

So far, no such evidence has been produced and therefore this honourable court does not find any reasons to suspend the decision and/or functions of the Land Adjudication Committee appointed on the July 7, 2020 under the letter referenced as LA/TM/9/2/12 to deal with Kimitent E adjudication

section established on the February 6, 2020 in the gazette referenced as LA/TM/9/2/10."

22. The applicants have availed a draft memorandum of appeal in which they have raised nine grounds, faulting the learned Judge for inter alia; relying on documents that had been filed in the main judicial review application; failing to take into consideration the points in law and fact that were raised in the applicants' submissions; narrowly framing and considering the main issues before him; misdirecting himself and shifting the burden of proof; and arriving at the impugned decision contrary to the facts, circumstances and the principles applicable to the case.

23. As was stated by this Court in *Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others* [2014] eKLR:

> "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 adjudication"

24. Given the ruling of the trial court and the threshold for the requirement for arguability of the appeal as set out in the preceding case, it is evident that the grounds raised in the memorandum of appeal are sufficient to engage the Court in determining the appeal, and therefore the requirement for arguability has been satisfied.

25. As for the nugatory aspect, it is apparent that this matter concerns the process of land adjudication. That process is governed by the *Land Adjudication Act* Cap 284. Any dispute concerning the adjudication can be adequately addressed through the processes provided in the Act, and can also be addressed through an award of damages. The orders sought by the applicants are actually interim orders that would effectively stop the adjudication process pending the hearing of the judicial review application. Granting the orders will prejudice the respondents by suspending not only the

adjudication process but also delaying the judicial review proceedings, while the applicants have an alternative route of objecting to the process under the provisions of the *Land Adjudication Act*. Moreover, the applicants have not demonstrated any irretrievable loss or damage that they would suffer such as to render their appeal a worthless exercise if successful. Nor has the applicant demonstrated any public interest element that would swing the pendulum in their favour.

26. For these reasons, we are not persuaded that this is an appropriate case in which the Court should issue an order of injunction that would interfere with the process of adjudication, or an order of stay of the judicial review proceedings. Accordingly, we dismiss the applicants' motion. Costs shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

HELLEN OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR