



REPUBLIC OF KENYA



Bor v Angata Bargoi Farmers Co-operative Society Limited & another (Civil Application E058 of 2022) [2023] KECA 409 (KLR) (14 April 2023) (Ruling)

Neutral citation: [2023] KECA 409 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E058 OF 2022
F SICHALE, LA ACHODE & WK KORIR, JJA
APRIL 14, 2023**

BETWEEN

JONATHAN KIPLANGAT BOR APPLICANT

AND

**ANGATA BARGOI FARMERS CO-OPERATIVE SOCIETY LIMITED 1ST
RESPONDENT**

SINOHYDRO CORPORATION LTD 2ND RESPONDENT

(Being an application under Rule 5(2)(b), 42(1), and 47(1) of the Court of Appeal Rules (2010), seeking stay of execution against the judgment and decree of the Environment and Lands Court (ELC) at Kilgoris by Hon Mohammed Washe J. delivered on 21st September 2021) In ELC No. 29 of 2021 (Formerly Narok ELC No. 12 of 2019)

RULING

1. The applicant approached this Court vide a notice of motion application dated September 27, 2022, anchored on Rules 5(2)(b), 42(1), and 47(1) of the [Court of Appeal rules](#) and all other enabling provisions of law, seeking for orders *inter-alia* that;
 - i. ...
 - ii. ...
 - iii. There be a stay of execution of the judgment rendered on September 21, 2022, in ELC No 29 of 2021 by Emmanuel Washe J, the decree emanating therefrom as well as any further proceedings in the Environment and Land Court pending the lodging and hearing and determination of the intended appeal.



2. This application was birthed out of a suit that the 1st respondent brought against the applicant and the 2nd respondent, being Civil Suit No ELC 29 of 2021 in the Environment and Lands Court at Kilgoris. In it the 1st respondent sought a declaration that it was the lawful bona fide and registered proprietor of the property known as LR No Transmara/Moyoi/2 (hereinafter referred to as the suit property). The 1st respondent also sought the eviction of the applicant herein and the 2nd respondent from the suit property and an injunction restraining them from entering, trespassing, laying claim to, excavating murrum, building and or constructing thereon, fencing, and/or interfering with the suit property.
3. The 1st respondent's claim was that it was the beneficial owner and had been in possession and occupation of the suit property since its registration and that therefore, the presence of the applicant and 2nd respondent in the suit property amounted to trespass. The 1st respondent admitted that there had been boundary disputes between the parcels of land located in Angata Baragoi adjudication section and those in Moyoi adjudication section, but that the disputes were resolved through the cancellation of some titles.
4. In opposition, the 2nd respondent herein filed a statement of defense and counterclaim denying that it unlawfully entered the suit property and began excavation. The 2nd respondent contended that it began excavations on the property known as LR No Transmara/Angata Baragoi/588 which belongs to the applicant and was lawfully leased from the applicant on January 4, 2019. It argued that it had limited its excavation to a radius of 3.7 acres within the property known as LR No Transmara/Angata Baragoi/588 and had not trespassed on the suit property at all.
5. The applicant herein was enjoined in the suit later claiming that he is the beneficial owner of LR No Transmara/Angata Baragoi/588 which he had leased to the 2nd respondent. He also filed a statement of defense and a counterclaim contending that the property known as LR No Transmara/Angata Baragoi/588 is located in Angata Bargoi and not in Moyoi as was claimed by the 1st respondent. It was also his contention that during the adjudication of the property, the 1st respondent's portion spilled over to that of the applicant, and the 1st respondent unlawfully took out the title for it.
6. Upon hearing the parties Washe J. held that the 1st respondent is the lawful bona fide and registered owner of the suit property and that title to the property known as LR No Transmara/Angata Baragoi/588 was irregularly issued to the applicant. The applicant was ordered to surrender title LR No Transmara/Angata Baragoi/588 to the sub-county land registrar within 30 days for cancellation and to vacate the suit property within the said 30 days.
7. Aggrieved by the judgment, the applicant filed a memorandum of appeal raising 31 grounds for appeal. In sum, the applicant alleges that the 1st respondent is not the bona fide owner of the suit property as the title of the suit property bears a different name and was not in existence at the time the property was registered. Further, the property known as LR No Transmara/Angata Baragoi/588 is situated in Angata Baragoi and not in Moyoi and has never been owned by the 1st respondent. It is his contention that the 1st respondent's allegations are not supported by the evidence on record.
8. The application before us is based on the grounds that through the impugned judgment, the applicant is required to cancel his title and to yield vacant possession of title LR No Transmara/Angata Baragoi/588, failure to which eviction orders will issue. Further, that the applicant is dissatisfied with the judgment of the court and has an arguable appeal, which if allowed, will be rendered nugatory if the order sought is not granted. The applicant also alleges that the respondent is rushing to enforce the judgment to frustrate his efforts for appeal, the success of which would prejudice his constitutional rights. Lastly, the applicant contends that the orders sought will not be prejudicial against the 1st respondent.



9. The application is supported by an affidavit sworn by the applicant on the same date contending that he is aggrieved by the judgment of the court in which he is required to yield the vacant possession of the title of the LR No Transmara/Angata Baragoi/588. He also depones that he has filed a memorandum of appeal detailing the grounds of his intended appeal and a notice of appeal against the judgment and decree emanating therefrom. He contends that his intended appeal is arguable and there is a real danger of the respondents enforcing the decree of the trial court, prejudicing his right of appeal. Lastly, the applicant states that the respondents will not be prejudiced if the orders sought are granted.
10. In opposition, Francis Oloitoyaye Sinoni, the chairman of the 1st respondent filed a replying affidavit sworn on October 18, 2022. He avers that the 1st respondent is the lawfully registered proprietor of the property known as LR No Transmara/Moyoi/2, which they are in occupation of and which the applicant contends to be LR No Transmara/Angata Baragoi/588. He also avers that the 2nd respondent trespassed upon a substantial part of the property on or about the February 18, 2019. Francis contends that through the judgment of the trial court, the applicant was granted a stay of execution for 30 days after the judgment and that therefore the current application having been filed before the lapse of the 30 days is an abuse of the court process.
11. It is also his contention that the title to the suit property is not and has never been registered in the name of the applicant and hence the applicant does not have the capacity to ventilate on the property. The 1st respondent urges that the applicant has no arguable appeal as the grounds he is relying on being frivolous and vexatious and that the applicant has failed to demonstrate that he would suffer loss if the order for stay of execution is not granted. As to whether the appeal would be rendered nugatory, Francis urges that the applicant is only required to vacate possession of the portion of land superimposed over the physical area demarcated in the suit and thus would not suffer any substantial loss.
12. The application was canvassed by way of written submission. M/S Kiprotich Roberts & Co Advocates, counsel for the applicant, filed submissions dated November 1, 2022. Citing the case of *Multimedia University & Another v Professor Gitike N Naituli* (2014) eKLR, counsel submitted that the applicant has satisfied the twin principles of arguability and nugatory aspect to entitle him to the relief sought. Counsel urges that the applicant's title to the property known as LR No Transmara/Angata Baragoi/588 risks cancellation if the orders sought are not granted. Counsel also argues that the applicant's application is arguable as it raises valid issues. To buttress this position counsel cited the case of *Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union* where the Court noted that;

“He (the applicant) need not show that such appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision. it is trite that the applicant need not show several issues... at least one issue suffices for purposes of an application under Rule 5(2)(b).”
13. M/S Ogotu, Mboya, and Ochwal Advocates appearing for the 1st respondent filed submissions dated November 11, 2022 and urged that the applicant's intended appeal is not arguable. They contend that the ground of the locus standi of the 1st respondent was raised by the applicant in Kilgoris ELC No 38 of 2021 (formerly Narok ELC No 370 of 2017) and that the issue was resolved in favor of the 1st respondent, with the judge acknowledging that it had *locus standi*. Counsel also contend that, ‘The learned Judge erred in law and fact in failing to appreciate his calling as a judge and facilitating bogus individuals masquerading as officials of non- existence cooperative society to own land that belongs to the Appellants herein...’ is not arguable because the applicant did not apply for the recusal of the trial judge at the time. Further, counsel urges that the intended appeal is frivolous because the applicant did



not raise the issue of adverse possession in the trial court. Regarding the location of the suit property, counsel submit that the applicant failed to controvert the expert evidence produced in court and is therefore estopped from raising it on appeal. Counsel cited the cases of *Governors Ballon Safaris Ltd v Skyskip Company Ltd & Another* CA No 32 of 2015 and National Industrial Credit Bank Ltd v. Aquinas Francis Wasile & Another Nairobi CA 238 of 2005 in support of this assertion.

14. On whether the intended appeal would be rendered nugatory, counsel submits that the applicant had not established this principle. He cites the cases of National Industrial Credit Bank Limited and Governors Bollon Safaris Ltd (supra) in support of

this assertion. Counsel contends that the applicant merely states that the appeal will be rendered nugatory but does not show how it will be rendered so and neither does he explain the hardship he will suffer. Counsel also cites the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* Nairobi CA No 97 of 1986 and submits that the applicant has not produced any evidence to show that he is in occupation of the suit property and thus cannot show that the intended appeal will be rendered nugatory.

15. The principles applicable to an application brought under Rule 5(2)(b) of this Court's Rules are now well settled. First, the applicant must show that they have an arguable appeal, and a single bona fide arguable ground is sufficient. In the case of the *University of Nairobi v. Ricatti Business of East Africa* (2020) eKLR, the Court rendered itself thus:

“We remind ourselves that on whether the appeal is arguable, the applicant need not establish a multiplicity of grounds and it is sufficient if a single bona fide arguable ground of appeal is raised.”

The arguable ground need also not be one that must succeed but one which should be fully argued before the Court. (see *Nicholas Ombija v. Kenya Commercial Bank* (2009) eKLR)

16. The applicant argues inter alia that the learned judge erred by holding that the 1st respondent was the lawful and bona fide owner of the alleged suit property without verifiable evidence to prove the claim. He also claims that there was no evidence that the property known as LR No Transmara/Angata Baragoi/588 had been

dissolved and the same renamed LR No Transmara/Moyoi/2. The arguments advanced by the applicant, in our view, are not idle or frivolous. We are therefore, satisfied that the applicant has demonstrated that the intended appeal is arguable. We take caution not to get into the substantive appeal at this stage lest we should embarrass the bench that will be seized of the substantive appeal.

17. Secondly, the applicant must show that the appeal would be rendered nugatory if successful, unless the stay is granted. this Court in *George Otieno Gache & Another v. Judith Akinyi Bonyo & 5 Others* (2017) eKLR held as follows on this issue:

“Thus, in determining whether an appeal will be rendered nugatory or not, the Court must consider what is sought to be stayed and whether if allowed to happen the situation is reversible; or if it is not reversible whether damages will reasonably compensate the aggrieved party.”

To determine whether an appeal would be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible or if it is not reversible, whether damages will reasonably compensate the aggrieved party. We are obliged to consider the conflicting claims of the



parties in order to make a conclusion based on merit in line with what this Court sitting in *Mbembe v. Kamere* (2021) KECA 226 KLR observed, stating that:

“In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits.”

18. We note that there is on record an order for cancellation of the applicant’s title and eviction from the parcel of land. It is our view that if the entries in the land register are canceled and the applicant is evicted, the appeal if allowed, will be rendered nugatory. We thus find that this is a proper case where the status quo of the property should be maintained pending the hearing and determination of the appeal.
19. Accordingly, we find that the applicant has satisfied the twin principles on arguability and the nugatory aspect and allow the application as prayed, save for costs that shall flow from the appeal.

DATED AND DELIVERED AT NAKURU THIS 14TH DAY OF APRIL, 2023

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

