



REPUBLIC OF KENYA



KENYA LAW

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Njiriri & 5 others v County Government of Nairobi & another (Civil Application E442 of 2022) [2023] KECA 419 (KLR) (14 April 2023) (Ruling)

Neutral citation: [2023] KECA 419 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E442 OF 2022
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
APRIL 14, 2023**

BETWEEN

**GEORGE NGACHA NJIRIRI 1ST APPLICANT
KELLYANN WANJIKU NJIRIRI 2ND APPLICANT
SUSAN NJOKI NJIRIRI 3RD APPLICANT
HANNAH WANGARE NJIRIRI 4TH APPLICANT
SAMUEL NGACHA NJIRIRI 5TH APPLICANT
JOSEPH NGACHA NJIRIRI 6TH APPLICANT**

AND

**COUNTY GOVERNMENT OF NAIROBI 1ST RESPONDENT
ROBERT MBATIA 2ND RESPONDENT**

(Being an application for injunction pending appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (S. Okong'o, J.) dated 27th October 2022 in E.L.C. Case No. E187 of 2021)

RULING

1. Before us is the applicants' Notice of Motion dated 25th November 2022 in which they seek an order of injunction to restrain the respondents from dealing with Plot Numbers 34/3A, D, E, F and G (the suit properties) and from interfering with the applicants' peaceful occupation, ownership, use and enjoyment pending hearing and determination of an intended appeal from the ruling and orders of the Environment and Land Court at Nairobi (S. Okong'o, J.) dated 27th October 2022 in Nairobi ELC Case No. E187 of 2021.



2. The applicants' Motion is supported by the annexed affidavit of George Ngacha Njiriri, the 1st applicant, sworn on 25th November 2022, and is anchored on the grounds, inter alia: that the applicants moved the ELC vide a Notice of Motion dated 27th May 2021 seeking temporary injunctive relief pending hearing and determination of their suit against the respondents; that the applicants' Motion was heard together with the respondents' Motion dated 17th June 2021 seeking to have the applicants' suit and Motion aforesaid struck out; that the applicants' Motion was dismissed and the respondents' application allowed and, consequently, the applicants' suit in the ELC struck out; that the applicants were dissatisfied by the ruling of the ELC (S. Okongo, J.) against which they intend to appeal; that they have an arguable appeal; that, unless the injunctive relief sought is granted, the intended appeal (if successful) will be rendered nugatory; and that the applicants stand to suffer breach of their guarded constitutional right to property, and that "an award of damages would not be sufficient to restore them against the loss of their massive investments" should the appeal succeed. They urge us to grant the orders sought pursuant to rule 5(2) (b) of the *Court of Appeal Rules*.
3. In support of the Motion, learned counsel for the applicants, M/s. Gachie Mwanza & Company, filed written submissions and case digest dated 8th December 2022, which Mr. Mwanza highlighted orally citing the cases of *tsv v knut & 3 others* [2015] eKLR on the need to preserve the substratum of the intended appeal; and *Denis Mogambi Mang'are v the AG & 3 Others* [2012] eKLR on the need to maintain the *status quo* to avoid rendering the appeal nugatory.
4. Opposing the applicants' Motion, the respondents filed two replying affidavits, the first being of Abwao Eric Odhiambo, the 1st respondent's solicitor, sworn on 8th February 2023 and, the second, of the 2nd respondent sworn on 8th February 2023. The respondents' case is, essentially: that the Motion is fatally defective for failure to exhibit the order appealed against; that the applicants have failed to demonstrate that the intended appeal would be rendered nugatory if the orders sought are not granted; that the intended appeal is not arguable; that an injunction ought not to be granted to private individuals as against the respondents over public utility piece of land; that any loss suffered by the applicants can be adequately compensated by an award of damages; and that, in the interest of justice, the Motion ought to be dismissed with costs to the respondents.
5. Learned counsel for the respondents, M/s. Musyoki Mogaka & Company, filed written submissions dated 10th February 2023, which Mr. Mukua highlighted orally, citing the cases of *Chege v Suleiman* [1988] eKLR contending that failure to extract, file and serve the order emanating from the impugned ruling makes the application fatally and incurably defective; and *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others* [2014] eKLR, submitting that costs follow the event. He urged us to dismiss the applicants' Motion with costs to the respondents.
6. To merit any orders pursuant to rule 5(2) (b) of the *Court of Appeal Rules*, an applicant must demonstrate that he/she has an arguable appeal; and that the appeal (or intended appeal), if successful, would be rendered nugatory absent stay (*Anne Wanjiku Kibeh v Clement Kungu Waibara & IEBC* [2020] eKLR; and *Yellow Horse Inns Limited v A. A.* Kawir Transporters & 4 Others [2014] eKLR. The term "nugatory" was defined in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA p.227 at p.232 as "worthless, futile or invalid" or "trifling".
7. The two questions that we need answered are: whether the applicants have an arguable appeal; and whether the intended appeal, if successful, would be rendered nugatory if the temporary injunctive relief sought were not granted.
8. The genesis of the dispute is that, by their plaint dated 27th May 2021, the applicants claimed ownership of the suit properties and sought declaratory orders in that regard together with a permanent



injunction to restrain the respondents from, inter alia, dealing in or interfering with their occupation of the suit properties. Their plaint and Motion aforesaid were struck out by virtue of the impugned ruling dated 27th October 2022 on, among other grounds, that their suit was res judicata; that the suit was an abuse of the court process; and that a previous suit filed by the applicants over the same properties had been dismissed.

9. In their memorandum of appeal dated 25th November 2022, the applicants fault the learned Judge for, among other things: finding that the suit properties had not been developed, the same having been reserved as open public space for packing; relying on extraneous matters; misinterpreting the facts; finding that a prima facie case had not been established; holding that their suit was res judicata, and an abuse of the court process; and finding that the applicants ought to have appealed the decision of the lower court that dismissed their previous case instead of filing a fresh suit in the ELC.
10. A cursory look at the applicants' memorandum of appeal reveals that the applicants have raised issues that cannot be dismissed as merely idle. They are, in our view, arguable and deserving of the Court's inquiry. Moreover, even one of such grounds would be sufficient to anchor an application under rule 5(2) (b) of this *Court's Rules* (see *Yellow Horse Inns Ltd* (supra)).
11. As to whether the intended appeal, if successful, would be rendered nugatory if the injunctive relief sought were not granted, we think that it would. We take to mind the fact that the suit properties comprise land allegedly reserved for a bus terminus; that the competing claims are that the applicants are in occupation thereof while the respondents claim that, at present, the plots are collectively in use as a bus terminus, and that none of the applicants have developed any of them as claimed. To disturb the status quo would, in our view, pose the risk of rendering the intended appeal (if successful) nugatory. The balance of convenience dictates that it be maintained so as to preserve the substratum of the intended appeal. This Court in *Mugab v Kunga* [1988] KLR 748 held that "in land matters status quo orders should always be issued for purposes of preserving the subject matter."
12. The Court of Appeal for East Africa in *Devani v Bhadresha and Another* [1971] EACA 27 held:

"In determining whether the matter should be maintained in status quo it is well established that regard must be had to the balance of convenience and the extent to which any damage to the plaintiff can be cured by payment of damages, rather than by granting an injunction."
13. The High Court at Nairobi in *Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & Another* [2020] eKLR, the purpose of a status quo order was explained as follows:

"... ... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision."
14. Finally, we wish to observe that the respondents' contention that the applicants' Motion is fatally and incurably defective for the reason that it is not accompanied by the impugned order, comes a little too early in time. The requirement to attach a decree or order relates to the substantive appeal, and not to an application under rule 5(2) (b) of the *Rules* of this Court (see the Supreme Court decision in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* [2015] eKLR where the Court held that a record of appeal would be incompetent if not accompanied by the impugned order or decree).
15. Having considered the applicants' Motion, the grounds on which it is anchored, the affidavits in support and in reply, the written and oral submissions of learned counsel for the applicants and for



the respondents, and the cited authorities, we reach the inescapable conclusion that the applicants have satisfied the twin principles for grant of the injunctive relief sought pursuant to rule 5(2) (b) of the Court of Appeal Rules. In effect, the Notice of Motion dated 25th November 2022 succeeds and, consequently, we hereby order and direct that, pending hearing and determination of the intended appeal, the status quo be maintained and, for the avoidance of doubt:

- a) there be no further construction or development on the suit properties;
- b) the respondents are hereby restrained from evicting the applicants or any of them from the suit properties;
- c) the 1st respondent is hereby restrained from charging or transferring the proprietary interest of the suit properties; and
- d) the costs of this application shall abide the outcome of the intended appeal.

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

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

