



Registered Trustees Africa Gospel Church v Kamunge & 2 others (Civil Application E384 of 2022) [2023] KECA 424 (KLR) (14 April 2023) (Ruling)

Neutral citation: [2023] KECA 424 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E384 OF 2022
HM OKWENGU, MA WARSAME & JM MATIVO, JJA
APRIL 14, 2023**

BETWEEN

THE REGISTERED TRUSTEES AFRICA GOSPEL CHURCH APPLICANT

AND

VICTOR MUNGAI KAMUNGE 1ST RESPONDENT

CONTINENTAL DEVELOPERS LIMITED 2ND RESPONDENT

THE LAND REGISTRAR NAIROBI 3RD RESPONDENT

(An application for stay of execution of the Judgment of the ELC at Nairobi (Wabwoto, J.) delivered on 30th August, 2022) in ELC Case No 252 of 2018)

RULING

1. The applicants herein have approached this Court under rule 5(2)(b) of the [Court of Appeal Rules](#) (the Rules) seeking an order of stay of execution pending appeal, which they believe will preserve the substratum of the intended appeal against the judgment dated August 30, 2018 of the Environment and Land Court in ELC case No 252 of 2018.
2. A synopsis of the pertinent facts will place the application before us in context. The 2nd Respondent (Continental Developers Limited) subdivided and sold plot Nairobi Block 82/3477 to Victor Mungai, the 1st respondent. The other adjacent plot; Nairobi Block 82/3477 was reserved and maintained by the 2nd Respondent as a public utility plot reserved as a green area and playing ground for children in the area.
3. According to the 2nd respondent, the Applicant, The Registered Trustees Africa Gospel Church grabbed the two plots before their respective titles were issued and amalgamated both plots into one plot being Nairobi Block 82/5893(the suit property) to conceal the identity and particulars of the initial plots in a desperate bid to avoid tracing and recovery.



4. On its part, the applicant maintained it had approached one of the directors of the 2nd respondent seeking to purchase the property for purposes of setting up a church and nursery school and was pleasantly informed that the two properties had in fact been set aside for the purposes of setting up a school and that the suit property had been surrendered to Nairobi City Council for allocation to an individual with qualifications to run a school.
5. The applicant applied for allocation and the City Council through the Commissioner of Lands subsequently allotted the two properties to the 2nd respondent for the development of the nursery school. Thereafter, the 2nd respondent amalgamated the two properties and changed its user to include religious activities.
6. The inevitable conflict of ownership of the suit property prompted the respondents to file suit at the Environment and Land Court (ELC) being ELC No 252 of 2018 praying for several orders.
7. Wabwoto J who was seized of the matter, found that the circumstances of the case reeked of illegal and unprocedural allocation of private property and that there was no evidence of any amalgamation process or how the 2nd respondent had acquired the amalgamated title. Finding that the allegation of fraud had been proven against the applicant he rendered himself as follows:

“The suit property’s history is that it had been private ownership since 1990. It ceased being government land and was therefore not available for allocation to the 1st defendant.”

8. In conclusion he issued the following orders:-
 - a. A declaration that the applicant has no valid proprietary interest, claim or right over the suit property
 - b. An order directed at the Land Registrar for cancellation of the title over the suit property held by the applicant.
 - c. upon cancellation of the title of the suit property, the initial plot being Nairobi Block 82/3476 being a public utility plot be reserved and be leased as a nursery school and children playground while plot Nairobi/Block 82/3477 be transferred to the 1st respondent
 - d. A permanent injunction be issued restraining the applicant, its members from remaining therein, occupying, alienating, transferring, leasing, charging, developing, depositing construction material, or interfering with the suit property
 - e. Should the applicant fail to voluntarily comply with order (d) above, within 90 days from today an eviction order shall be issued and the same shall be executed in compliance with the due process of the applicable laws.

It is that decision that the applicant intends to appeal against and to stay the resulting orders

9. Turning to the application at hand, it is premised on the grounds that firstly, the intended appeal is arguable on several grounds including that the learned Judge found that the time of discovery of the fraud was not pleaded yet he failed to find that the suit was time barred, that the 1st respondent had conceded that the parties had not signed a sale agreement in contravention with the law and that no evidence had been tendered to show that the applicant was liable for the illegal allocation of land.
10. Secondly, it was posited that the appeal would be rendered nugatory in the event the orders sought were not granted because there was a real likelihood that the respondents would execute the judgment, evict



the applicant and be at liberty to dispose of the suit which hosts a nursery, a place of worship and a newly constructed sanctuary worth kshs 400,000,000/=.

11. In opposing the application, Benard King'ori, the 2nd respondent's When the matter came up for hearing before us, Miss Tusime for the applicant submitted that particulars of fraud have not been proved, that the certificate of lease had not been challenged in any manner upon amalgamation and that damages would not be adequate in the event the judgment was executed.
12. Mr Kimondo for the 1&2nd respondents contended that the appeal was frivolous. He posited that while the property was private, the applicant amalgamated two distinct plots 4 years before the letter of allotment. He also postulated that the said appeal would not be rendered nugatory should the stay not be granted
13. We have considered the arguments put forth on behalf of the parties as well as the scope of our jurisdiction under rule 5(2)(b) of the Rules. Before acceding to an application under the rule 5(2)(b), we have to satisfy ourselves of two principles. Firstly, that the applicants have demonstrated that they have an arguable appeal or an appeal that is not frivolous, and secondly, that if the orders sought are not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. See *Reliance Bank Ltd (in liquidation) v Norlake Investments Ltd* [2002] 1 EA 227.
14. It is also settled that the applicants are required to satisfy the twin principles. See [Peter Paul Mburu Ndururi v James Macharia Njore](#) [2009] eKLR.
15. Taking into account the parameters of our discretion in the application before us as well as being careful not to make final determination on the merit of the intended appeal, we are not convinced that the said appeal is arguable. We say so because the issue of amalgamation must have a basis in that there must be a parent title either through an original title of subdivision and that was not contested.
16. Further, the applicant did not adequately explain how they acquired the title or address the issue of fraud given that there was evidence that the property was private property and was not available for allocation. Again, there was no single document attached on the allegation of amalgamation and the allocation was contested by the registrar Nairobi. Meanwhile, the respondents offered a succinct history of the two titles.
17. As for the second limb, we are not satisfied that the applicant has demonstrated that the intended appeal would be rendered nugatory unless the stay sought is granted. This is because the applicant's apprehension is based on a presumption that the property will be sold and their newly build sanctuary worth kshs 400,000,000/= will be destroyed.
18. Certainly, the Court cannot exercise its discretion based on mere fear or suspicion of what a party thinks might happen. Further concrete evidence has been placed before the court of the likelihood of this happening or that the value of any property cannot be compensated by damages. Our understanding of the essence of orders issued under rule 5(2)(b) is to halt the occurrence of something which will indisputably happen in the absence of such orders. Accordingly, the applicant has failed to establish the twin principles that would warrant us to exercise our discretion in his favour. Therefore, we find that the application lacks merit and is hereby dismissed with costs

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

HANNAH OKWENGU

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JUDGE OF APPEAL



M. WARSAME

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JUDGE OF APPEAL

J.M MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

