



REPUBLIC OF KENYA



KENYA LAW
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**Kimani v Swastik Holdings Limited (Civil Application
E002 of 2023) [2023] KECA 616 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 616 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E002 OF 2023
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
MAY 26, 2023**

BETWEEN

ANN NYAGUTHII KIMANI APPLICANT

AND

SWASTIK HOLDINGS LIMITED RESPONDENT

(Being an application for stay of execution of the Judgment of the Environment and Land Court (Mogeni, J.) delivered on 27th February 2023 in ELC No. E369 of 2021)

RULING

1. The respondent herein filed a suit against the applicant seeking a declaration that it is the lawful registered proprietor of that parcel of land known as L R20180/26 IR 68327/75 (suit land); a permanent injunction against the applicant restraining her, her agents, employees, servants, officers or anybody or authority from interfering with the respondent's quiet possession and occupation of the suit land; a declaration that the applicant was a trespasser; and costs of the suit. It was its contention that in 2018, it purchased the suit land from one Rose Mumbi Mbocha, and in 2021, the applicant trespassed into it and started digging trenches with a view to fencing it off. It reported the matter at Spring Valley Police Station, which wrote to the Ministry of Lands for verification of the survey plans and it was confirmed that the applicant's ownership documents were fake.
2. Opposing the suit, the applicant filed her defence, averring that she bought parcel of land known as LR 21080/41 from Jotech Limited in 2001 and had been in possession of it for over 20 years, and that it was the respondent who had encroached on the parcel, prompting stoppage of ongoing construction which had caused her immense loss. It was her contention that parcel No L R21080/26 was non-existent as it occupied the same space as parcel No LR 21080/41 which she owned. She also filed a counterclaim seeking eviction of the respondent, special damages for trespass of Kshs. 7,809,190, and dismissal of the respondent's suit.



3. The matter proceeded to trial with only the respondent testifying. In its judgment, the trial court held that the documentation produced by the applicant did not relate to the suit property, to wit LR No 21080/26 and thus, she could not claim she bought the property when she was issued with parcel documents for a different property, namely LR No 21080/41. The parcel of land being claimed by the applicant was not the parcel of land where the respondent's land was situated and, as such, the respondent was the registered owner of the suit land and was entitled to vacant possession. It held that the respondent was the rightful owner of the suit land; and that the title documents held by the appellant were null and void; and awarded the respondent Kshs. 50,000 for general damages.
4. It is the dissatisfaction with this judgment that prompted the applicant to move to this Court. By a Notice of Motion dated March 3, 2023, brought pursuant to Rule 5(2)(b) of the Court of Appeal Rules, she seeks orders of stay of execution of the judgment dated February 27, 2023 in the ELC (Mogeni, J.), as well as an injunction restraining the respondent, their employees, servants and/or agents from interfering with the applicant's ownership and/or possession of LR . No 21080/41 pending hearing and determination of her intended appeal.
5. The application is supported by the grounds on the face of it and the applicant's affidavit sworn on March 3, 2023, in which she avers that she purchased LR No 21080/41 in 2001, and was registered as the proprietor; and that she has developed the land and put up permanent structures valued at Kshs. 7,809,190. She posits that the intended appeal will be rendered nugatory as the respondent may dispose of the property, even though it has never been in possession. Further that, she has an arguable appeal with high chances of success.
6. The respondent opposes the application vide a replying affidavit sworn on March 29, 2023, by Sathishchandra Rameshbhai Patel, a director of the respondent company. He states that the application is frivolous and lacks merit as the appeal is not arguable; that the respondent proved that the two parcels of land were one and the same land; that and in any case, the applicant failed to avail herself at the trial to adduce evidence in support of her case; that if the application is allowed, the respondent will suffer prejudice, having already commenced construction of its stalled development plans; and that, the appeal will not be rendered nugatory as an award of damages would adequately compensate the appellant should she be successful. In view of the foregoing, the respondent contended that the applicant has failed to demonstrate any sufficient cause to warrant grant of the orders sought, the respondent stated.
7. The application was canvassed by way of written submissions with limited oral highlights. Those of the applicant are dated March 14, 2023 while those of the respondent are dated March 29, 2023. At the hearing, learned counsel Mr Mwaura Shairi appeared for the applicant, while learned counsel Mr Manwa appeared for the respondent.
8. Mr Shairi argued that, from the grounds set out in the draft memorandum of appeal dated March 3, 2023 together with the list of authorities, the applicant had demonstrated that the intended appeal is arguable and that, unless the orders sought are granted, the intended appeal would be rendered nugatory. He hinged this argument on the ground that; the trial court allowed the respondent to take possession of the suit land, and yet the applicant had been in possession of it for over 20 years and had made significant development on it. According to learned counsel, if the applicant is evicted, the respondent may subdivide, or use, the title as security for a loan facility. Further, that if the intended appeal is successful, the applicant will not be able to recover the land in its original form. We were thus urged to allow the application.
9. On his part, Mr Manwa submitted that the trial court held categorically that both LR No 21080/26 and LR . No21080/41 were one and the same parcel of land. The respondent had demonstrated that



it followed the substantive process in acquisition of the property, and presented all documentation in court in this regard. To the contrary, the applicant failed to present her case, and the only proof she had to show that she owned the land was a Certificate of Title, which she also failed to adduce in evidence at the trial. In this regard, she failed to demonstrate that, prima facie, she was entitled to the orders sought. In this regard, reliance was placed on the cases of *Kenya Hotel Properties Limited v Attorney General & 5 others* [SC] (2020) eKLR and *Hadiya Construction & Mineral Limited v Ajabu East Africa Limited* (2018) eKLR .

10. Relying on this Court’s decision in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR , counsel submitted that it was clear that the applicant would suffer no prejudice, nor would the intended appeal be rendered nugatory if the orders sought were not granted. It was asserted that the respondent has commenced and was continuing with construction on the property; that it was already enjoying the fruits of the judgment; and that the applicant relied on speculation and conjecture to posit that the respondent intended to dispose of the land as the evidence pointed a contrary picture. For want of evidence to support her case, we were urged to dismiss the application. Further reliance was placed on the case of *Equipment Agencies Limited v I&M Bank Limited* (2019) eKLR to buttress this submission.
11. In a brief rejoinder, Mr Shairi submitted that the applicant was not aware that the respondent had commenced any construction on the suit property, and that if any approval for construction was obtained by the respondent from the County government, it predated the judgment of the trial court. Counsel insisted that the applicant’s structures on her land had not been demolished. He also emphasized that the two parcels of land are distinct as they are not of equal size.
12. We have considered the Notice of Motion, the supporting affidavit, the replying affidavit as well as the submissions of both parties and the law. It is now well established that for an order of stay to issue, an applicant ought to satisfy two limbs, namely, that the intended appeal is arguable, and that if the orders of stay are not granted, the intended appeal will be rendered nugatory. This was well captured at length by this Court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* (supra), as follows:

“From the long line of decided cases (although none was cited by counsel, perhaps due to their notoriety) on Rule 5(2)(b) aforesaid, the common vein running through them and the jurisprudence underlying these decisions can today be summarized as follows:

- i.
- ii.
- iii.
- iv.
- v. In considering whether an appeal will be rendered nugatory an applicant must satisfy the court on both of the twin principles.
- vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application NoNai 345 of 2004.
- 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. *Joseph Gitahi Gachau & Another v.Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No124 of 2008.



- 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. *Damji Pragji* (supra).
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
 - x. Whether or not an appeal will 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 party aggrieved.
 - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”
13. On whether the appeal at hand is arguable, the applicant has submitted that her draft memorandum of appeal raises arguable issues, being that the learned judge erred in holding that the two parcels were one and the same land; that, the applicant’s title was null and void; and by giving a judgment not supported by pleadings or available documentary evidence.
14. An arguable appeal is not one which must necessarily succeed, but rather, it is one which ought to be argued before the court and which is not frivolous. See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* (supra). We have combed through the draft memorandum of appeal and we do not think that the intended appeal is one which is arguable. The applicant’s grievances appear to stem from the reliance and interpretation of the documentary evidence of the learned Judge. We note that at the hearing of the suit the applicant neither adduced any documentary evidence nor testified. As such, she failed to substantiate her pleadings. Indeed, the intended appeal cannot be the forum at which evidence not adduced at the hearing would be presented to reverse the outcome of what was essentially an undefended suit. At this point and time, the evidence the applicant intends to adduce and rely on appeal was not adduced at the trial court and, hence, it is superseded by the evidence the respondent adduced. We wish to leave it at that lest we venture into the realm of speculation or preempt the outcome of the intended appeal. Consequently, we reach the inevitable conclusion that the intended appeal is not arguable. Once the court finds that an appeal is not arguable, there is no basis of considering whether it will be rendered nugatory. Only an arguable appeal can be rendered nugatory. We should therefore not proceed any further. See *RKE V DAM* [2021] eKLR also *Alex Pungu & 106 Others V Munyua Kimani* [2017] eKLR.
15. In view of the foregoing, we find that the applicant has failed to establish the conjunctive limbs of the twin principle for grant of the orders sought. The application dated March 3, 2023 lacks merit and is hereby dismissed. The costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 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

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

