



Wandia & 2 others v Mukiri (The personal representative of the Estate of Regina Mweru Njuku (Deceased) & another (Civil Application E084 of 2023) [2023] KECA 617 (KLR) (26 May 2023) (Ruling)

Neutral citation: [2023] KECA 617 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E084 OF 2023
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
MAY 26, 2023**

BETWEEN

**JANE WANDIA 1ST APPLICANT
MICHAEL MWANGI KARANJA 2ND APPLICANT
ALEX NGOTHO 3RD APPLICANT**

AND

**MARK ANTONY MUKIRI (THE PERSONAL REPRESENTATIVE OF THE ESTATE OF REGINA MWERU NJUKU (DECEASED)) 1ST RESPONDENT
COUNTY GOVERNMENT OF NAIROBI 2ND RESPONDENT**

(Being an application for an injunction pending the lodging, hearing and determination of an intended appeal from the Judgment of the Environment and Land Court (J. A. Mogeni, J.) delivered on 14th February 2023 in ELC No. E1049 of 2014)

RULING

1. The 1st respondent filed a suit against the applicants seeking a permanent injunction against the applicants; general damages; a declaration that he was the rightful owner of the suit property, namely Nairobi/Block 133/260; a declaration that the issuance of Lease to the applicants was unprocedural, illegal and consequently null and void; an order issued to the 1st applicant cancelling the Lease and costs of the suit.
2. It was his contention that by a Letter of Allotment dated October 4, 1995, the Nairobi City Council allocated him the suit property of which he took possession, submitted and obtained approvals for development plans from the City Council of Nairobi; that he had been in possession since 1995 and had been paying rent and other attendant outgoings; that, sometime in 2014, the applicants entered



- into the suit land and demolished some buildings on it, which actions were illegal; and that he later came to learn that the applicants had been issued with a Certificate of Lease for the same property.
3. In their defence, the applicants denied all the allegations, averring that the 1st respondent had never been in possession of, and had no ownership rights, over the suit property; and that the same belonged to the 1st applicant, having been issued with a Certificate of Lease. Likewise, the 2nd respondent denied all the allegations leveled against it by the applicants.
 4. The matter proceeded to trial, with the 1st respondent calling two witnesses and the applicants one witness. In its Judgment dated February 14, 2023, the trial court held that Plot No C41 and parcel No Nairobi/Block 133/260 were one and the same land, and that there was no evidence that they were different plots; and that the 1st applicant did not tender any evidence to show that she obtained the Certificate of Lease, or that she had ever made payments to the City Council as a pointer to ownership of the land. The converse was that the 1st respondent could give a detailed account of how the deceased came to own the suit land, having bought it from another person in 1995, who paid all the survey fees. The validity of the documents tendered was never challenged. It was also contended that the 1st applicant's title was acquired unprocedurally and, therefore, was not a legal title. Having found the 1st respondent was the rightful owner and not the 1st applicant, the court proceeded to enter judgment for the 1st respondent as prayed in the Plaint.
 5. Aggrieved, the applicants seek to appeal the judgment of the trial court. Meanwhile, by way of Notice of Motion dated March 10, 2023 brought under rule 5(2)(b) of the [Court of Appeal Rules](#), they seek orders of an injunction restraining the 1st respondent, his agents, servants/employees from encroaching, occupying, trespassing, developing, dumping any building materials and/or dealing with in any manner whatsoever or interfering with the applicants' peaceful occupation, ownership, use and enjoyment of Plot No C41 also known as Nairobi/Block 133/260 pending the filing, hearing and determination of the intended appeal.
 6. The application is supported by the grounds on the face of it and an affidavit of the 1st applicant sworn on March 10, 2023. He contends that the court was wrong in its application of the law and facts. She states that, if the orders sought are not granted, the intended appeal will be rendered nugatory as there are no injunctive orders restraining the 1st respondent from executing the trial court's judgement; that the intended appeal is arguable and raises serious grounds of appeal; that they (the applicants) stand to suffer breach of their guarded constitutional rights to ownership of property and to fair administrative action; and that, if they are successful on appeal, an award of damages will not be sufficient to compensate them for the loss against massive investment which they have made as the lawful and legal owners of the suit property.
 7. The application is opposed by the 1st respondent vide a replying affidavit sworn by himself on March 24, 2023. He contends that the application does not satisfy the conditions for grant of the orders sought, in that the applicants have never been in possession of the suit property; that he has all along been in possession of the suit property as evidenced by the trial court's judgment and, as such, the intended appeal will not be rendered nugatory if the orders sought are not granted; and nor is it arguable. He termed the application as baseless, mischievous and an abuse of the court process which ought to be dismissed in the first instance.
 8. There was no response to the application by the 2nd respondent.
 9. The application was canvassed by way of written submissions with limited oral highlights. The applicants' submissions are dated March 20, 2023 while those of the 1st respondent are dated April 6, 2023. During the hearing, learned counsel, Mr. Omondi held brief for Mr Gachie for the 1st applicant



while learned counsel, Mr Charles Njuguna appeared for the 1st respondent and Ms Nazi held brief for Mr Kithi for the 2nd respondent.

10. Mr Omondi argued that the applicants had established a prima facie case warranting the suit premises to be preserved pending determination of the intended appeal. According to him, the 1st applicant has a Certificate of Title in her name while the 1st respondent only holds an Allotment Letter. He contended that, while the suit was pending in the ELC, parties consented to maintain the status quo but that, after judgment was rendered, the 1st respondent moved into the suit property and commenced construction works using the applicants' construction materials that were on site. Counsel relied on the Supreme Court decision in *Teachers Service Commission Vs Kenya National union of Teachers & 3 others* [2015] eKLR highlighting the scope of the Court's jurisdiction under rule 5(2)(b).
11. Ms Nazi made no submission and left us to exercise our discretion on the matter.
12. In response, Mr Njuguna submitted that, the 1st applicant has never been in possession of the suit premises whereas the 1st respondent has been in possession since 1995. Thus, by seeking an injunction to stop the 1st respondent from entering the premises and interfering with her (1st applicant's) quiet possession was akin to overturning the decision of ELC and determining the appeal altogether. Submitting that the Court has wide discretionary powers in granting injunctive orders, regard was had to the case of *Stanley Kangethe Kinyanjui Vs. Tony Ketter & 5 others* [2013] eKLR and for the proposition that, for an appeal to be arguable, it is sufficient if a single bona fide ground of appeal is raised (see *Meso Multipurpose Society Limited Vs Luore Nyairo Company Limited & 2 others* [2020] eKLR).
13. Counsel submitted that the appeal would not be rendered nugatory since, if the appeal succeeded, the 1st respondent would just vacate the property. Counsel emphasized that the 1st applicant was seeking an injunction as opposed to a stay, and had not met the threshold for grant of the relief sought. On prejudice, it was submitted that a grant of the orders would be greatly prejudicial since the 1st respondent was not only in possession, but had commenced development of the suit property.
14. In a brief rejoinder, Mr Omondi refuted that any construction was ongoing and as the parties had consented to maintain the *status quo*, justice demanded that the same obtains until the intended appeal is heard and determined.
15. We have considered the application, the respective rival submissions as well as the law. The principles upon which this Court grants relief under rule 5(2)(b) of this *Court's rules* are well settled. To succeed in her application, the applicant must demonstrate, first, that she has an arguable appeal and, secondly, that if the orders she seeks are not granted, her appeal will be rendered nugatory. It is further settled that an arguable appeal is not one that must necessarily succeed, but one that raises at least one bona fide point that calls for a response from the respondent and is worthy of consideration by the Court (see *Stanley Kangethe Kinyanjui Vs Tony Ketter & 5 Others* [2013] eKLR).
16. On whether the intended appeal is arguable, the applicant has submitted that she holds a Certificate of Title to the suit premises whilst the 1st respondent only holds an Allotment Letter. We understood her to mean that a Certificate of Title is superior to an Allotment Letter in demonstrating bona fide ownership of land. An arguable appeal is not one which must succeed, but rather, it is one which ought to be argued before the court and which is not frivolous. (See *Kenya Tea Growers Association & Another Vs Kenya Planters & Agricultural Workers Union* CA No Nai 72 of 2001).
17. It is trite that a registered proprietor enjoys the statutory protection of title as long as he/she can show that the title was acquired procedurally. To the applicant therefore, she cannot take it for granted



that simply because she has a Certificate of Title, then she has a right over the property. This was the reasoning of this Court at Nyeri in *Munyu Maina Vs Hiram Gathia Maina* [2013] eKLR where it was held that:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register”.

18. We are of the view that the intended appeal is arguable owing to the fact that the root and/genesis of the title documents held by the parties is an issue that ought to be considered by this Court. However, we refrain from expounding on this issue as, to our mind, it falls for determination in the main appeal.
19. On whether the appeal will be rendered nugatory if a temporary injunction is not granted, we need to consider if the order sought to be stayed can be reversed once executed. Even where the decree cannot be reversed once executed, an order of stay or injunctive relief will not issue where it is found that damages can adequately compensate the party seeking stay or restraining orders.
20. Addressing the limb, the applicant stated that she has been in possession of the suit land all along. However, this assertion has been vehemently denied by the 1st respondent who avers that he has been in possession since 1995, and has since developed the land and construction is still ongoing. When Mr. Omondi was put to task by the Court, he contradicted himself as he alleged that the 1st respondent is currently developing the land with construction materials that the applicant had deposited on it.
21. There can be no two ways about it, the applicant either has possession of the suit premises or the 1st respondent does and is currently developing it. We are inclined to believe Mr. Njuguna’s version of the status on the ground that it is indeed the 1st respondent who is in possession of the suit premises. We say so because, when Mr Omondi upon being further queried by the Court, conceded that the 1st respondent is developing the suit premises. This vindicated Mr Njuguna’s submission in this respect. What this implies is that there is nothing to be stopped. The 1st respondent already has possession of the suit premises. Consequently, the appeal will not be rendered nugatory if the injunction orders are not granted. Furthermore, any loss the applicant may incur can be compensated by an award of damages and the converse has not been shown by the applicant.
22. In the upshot, we do find that the applicant has failed to establish the twin limbs for grant of the orders sought. The application 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

