



Corporate Insurance Company Limited v Hurlingham Park Limited (Civil Application E030 of 2023) [2023] KECA 523 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KECA 523 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E030 OF 2023
K M'INOTI, HA OMONDI & KI LAIBUTA, JJA
MAY 12, 2023**

BETWEEN

CORPORATE INSURANCE COMPANY LIMITED APPLICANT

AND

HURLINGHAM PARK LIMITED RESPONDENT

(Being an application for stay of execution of the Judgment and Decree of the Environment and Land Court of Kenya at Nairobi (Mogeni, J.) dated 12th July 2022 in Milimani ELC 327 of 2018)

RULING

1. The Notice of Motion dated February 3, 2023 and supported by the affidavit of even date sworn by Anna Ndulu Kavulunze is brought pursuant to rule 5(2) (b) of the *Court of Appeal Rules*, and seeks orders to stay execution of the judgment and decree of the Environment and Land Court delivered on July 12, 2022 in ELC 327 of 2018 pending the hearing and determination of an appeal; and that costs abide the outcome of the appeal.
2. The respondent opposes the application through a replying affidavit dated February 19, 2023 sworn by its property manager, Martin Okumu, on grounds that a similar application was made and dismissed before the trial court, and that the orders of the trial court, being in the nature of negative orders, there is nothing to stay. The respondent further argues that in any event, the applicant has not demonstrated how the appeal would be rendered nugatory if the orders sought are not issued.
3. The background to this matter is that the applicant and the respondent own neighbouring parcels of land, and, the respondent, intending to create an entrance into its property, embarked on construction works which the applicant lamented, altered the original design of its property and interfered with the driveway. The applicant filed suit seeking a permanent injunction to restrain the respondent and its agents from alienating or interfering with its proprietary rights, including the right to quiet possession;



- and a mandatory injunction directing the respondent to restore the damaged portions of the access road and the hedge to the status it was in prior the acts complained of.
4. The respondent filed a defence contesting the claim, together with a counterclaim, seeking a declaration that the access area was a public road available for use of the adjoining properties; and a permanent injunction to restrain the applicant from interfering with access area. The respondent also sought special and aggravated damages for unwarranted interference.
 5. The trial court delivered judgment on July 12, 2022 and dismissed the applicant's suit for lack of merit. The court further allowed the respondent's counterclaim and declared that the road created as a result of resurvey was a public road. It also issued an order of permanent injunction restraining the applicant from interfering with the respondent's use of the access road; and awarded the respondent special damages of Kshs 141,000.00 with interest from the date of judgment and general and aggravated damages of Kshs 500,000.00 for the unlawful and unwarranted interference with the respondent's works and costs of the suit and interest thereon at court rates.
 6. Aggrieved by the outcome, the applicant filed an appeal, and sought stay of execution before the trial court, but was dismissed on October 31, 2022. This prompted the present application in which the applicant contends that it has an arguable appeal as it holds the original title to date; that the declaration of the suit property as a public road ousts its title; and that the trial court erred by finding that the applicant had already surrendered the road portion in total contradiction of the surrender process which requires the appellant to return its original/mother title for reduction of size of the suit property.
 7. The applicant further argued that if the appeal succeeds, it will be rendered nugatory because it is faced with imminent intrusion and trespass onto its property, and that, the respondent is in the process of erecting a gate-house on its wall and has put up a gate through the applicant's property with the intention of trespassing. Further, that the respondent has an independent access into its property which it uses to date, and shall not be prejudiced in any way should the orders sought be granted. Also contested are the special and aggravated damages, which the applicant described as being excessive and awarded without any proper basis.
 8. The respondent opposed the application. Drawing from the decision in *Trust Bank Ltd and Anor v Investech Bank Limited and 3 others [2000] eKLR*, which sets out the principles to be met in an application under rule 5(2) (b), the respondent maintains that the applicant does not have an arguable appeal, pointing out that since the trial court's order was partially a negative one dismissing the suit, it is not capable of being stayed or executed (see *George ole Sangui & 12 Others v Kedong Ranch Limited [2015] eKLR*).
 9. In addition, the appeal would not be rendered nugatory as the use of the suit property pending the hearing and determination of the appeal, does not oust the applicant's alleged title in the event that the appeal succeed; that the respondent has already built a gate house on its own premises and not on the applicants premises; that the respondent has reopened the gate that accesses into the suit property, and its usage of the said road does not constitute intrusion and/or trespass, and nor will it destroy the suit property; and that what is sought to be stayed is reversible as the contested portion will simply revert to its earlier state. Reference is made to the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR* which held, among other things, that whether an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen is reversible.
 10. In relation to the other limb of the trial court's judgment requiring the applicant to pay damages totalling to Kshs 641,000.00 plus interest, the respondent submits that the applicant has not demonstrated what hardship it will suffer, and in any event, the respondent is a solvent company, capable of repaying the monetary decree should the appeal succeed.



11. As to whether the applicant has satisfied the requirements for granting an order for stay of execution, we take note of this Court's repeated sentiments, that whether it be an application for injunction, stay of execution or stay of proceedings, the applicable principles are the same. To succeed in an application under rule 5(2) (b) the applicant has to establish that:
 - i. The appeal is arguable; and
 - ii. That the appeal is likely to be rendered nugatory if the stay is not granted and appeal succeeds.
12. Is the appeal arguable? In the case of *Wasike v Swala [1984] KLR 591*, this Court held that an arguable appeal is not one that would necessarily succeed, but one that merits consideration by the court. Also see *Stanley Kangethe Kinyanjui v Tony Ketter & Others (supra)*. An arguable appeal is one that is not idle and/or frivolous.
13. Our perusal of the pleadings herein persuades us that the intended appeal raises an arguable issue as to whether requisite processes had been followed before the portion of land in question could be declared a public road, an issue which this Court ought to adjudicate upon with finality. As has been previously stated by this Court, an arguable appeal is not one that must necessarily succeed, but one which merits consideration by the Court. Consequently, in the circumstances of this case, we are satisfied that the applicant has an arguable appeal.
14. On the issue as to whether the appeal would be rendered nugatory, this Court has held in the case of *Reliance Bank Limited v Norlake Investment Limited [2002]1 EA 227* that the factors which may render an appeal nugatory are to be considered within the circumstances of each case and, in so doing, the Court is bound to consider the conflicting claims of both sides.
15. In the case of *African Safari Club Limited vs Safe Rentals Limited [2010] eKLR*, this Court held:

' With the above scenario of almost equal hardship by the parties, it is incumbent upon the Court to pursue the overriding objective to act fairly and justly to put the hardships of both parties on scale. We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.'
16. In short, the Court is to decide which party's hardship is greater. With that in mind, if the applicant's prayer for stay of execution is denied and the appeal eventually succeeds, the respondent has stated its financial capability, which remains uncontroverted, that it is solvent and capable to paying back the decretal amount. We are persuaded that the applicant can be adequately compensated by an award of damages.
17. The applicant contends that the appeal will be rendered nugatory because the suit land will be out of reach, and that its continued use will amount to intrusion and trespass. It is the view of this Court that an order for an award of damages would adequately compensate the applicant for its troubles should the appeal succeed.
18. This Court also echoes the sentiments of the respondent that the applicant's suit and application in the Superior Court having been dismissed, there is nothing to stay as the parties were not ordered to do anything or refrain from doing anything, and that the order issued by the Superior Court was in the nature of a negative order incapable of execution. See *Western College of Arts and Applied Sciences v EP Oranga & 3 Others [1976] eKLR*. Whereas this holds true, it is only partially true in this instance, as there is the other limb, a positive order which requires the applicant to pay damages. That, nonetheless,



is deflated by the fact that the appeal would not be rendered nugatory, for reasons we have already mentioned.

19. We find that the applicant has shown that indeed it has an arguable appeal, but on the other hand has failed to demonstrate that the appeal would be rendered nugatory. Having failed to satisfy both limbs of the test in a rule 5(2) (b) application, this application must fail.
20. Accordingly, the applicant's Notice of Motion dated February 3, 2023 is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

K. M'INOTI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

