



**Ramji Meghji Gudka Limited v Otuoma & 2 others (Civil Application
E088 of 2022) [2023] KECA 784 (KLR) (23 June 2023) (Reasons)**

Neutral citation: [2023] KECA 784 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E088 OF 2022
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JUNE 23, 2023**

BETWEEN

RAMJI MEGHJI GUDKA LIMITED APPLICANT

AND

GODFREY OTUOMA 1ST RESPONDENT

KISII COUNTY GOVERNMENT 2ND RESPONDENT

**EXECUTIVE COMMITTEE MEMBER LANDS, KISII COUNTY
GOVERNMENT 3RD RESPONDENT**

*(Application for stay of proceedings pending the hearing and determination of
the intended appeal against the ruling and order of the Environment and Land
Court at Kisii (Onyango, J.) dated 26th April, 2022 in ELC Case No. 477 OF 2014)*

REASONS

1. On 21st February 2023, we delivered our decision in this matter, dismissing the application herein. The following are the reasons for that decision.
2. The applicant, Ramji Meghji Gudka Limited, by the motion dated July 4, 2022 under rule 5(2)(b) of the [Court of Appeal Rules](#) 2010 sought in the main, an order that;

“3. The Honourable court be pleased to grant an order of stay of proceedings and/or further proceedings in respect of and/or arising from Kisii Elc No. 477 Of 2014, Ramji Meghji Gudka Limited v Godfrey Otuoma & 2 Others, pending the hearing and determination of the intended appeal to this Honourable Court against the ruling and order of the court (Hon. Justice J. M. Onyango, Judge) made on the 26th day of April 2022.”



3. The motion is premised on grounds appearing on its face and a supporting affidavit sworn on 4th July 2022 by Ashwin Ramji Gudka, the Managing Director of the applicant company.
4. The applicant's case is that it lodged a suit vide Kisii ELC No. 477 of 2014 (the suit) against the respondents on 16th December 2014 in respect of offensive activities being carried out by the respondents on LR No. Kisii Municipality/Block II/222 (the suit property). Subsequently it also lodged an application dated 4th February 2019 seeking orders of temporary injunction restraining the respondents from further interfering with the suit property. It also sought a mandatory injunction directing them to evacuate tents and temporary structures erected on the suit property. Before the application dated 4th February 2019 could be heard, the applicant claimed, the respondents commenced constructing a permanent structure on the suit property. That action prompted it to lodge another application dated 27th May 2020 seeking orders of interim injunction and, consolidation of the said application with the one dated 4th February 2019.
5. The applicant contended that even though the court granted it an interim order of injunction restraining the respondents from interfering with the suit property, the respondents continued with excavation and construction of a permanent structure thereon causing it to lodge an application dated 24th June 2020 citing the respondents for disobedience of a court order. During the pendency of that application, however, the applicant stated, the respondents proceeded to construct a permanent building on the suit property. Again, the applicant lodged yet another application dated 15th July 2020 seeking the court's intervention to stop the construction. The court ordered for the status quo to be maintained and, when the matter was heard, it directed the Land Registrar, County Surveyor and the Director of Physical Planning to visit the suit property for purposes of ascertaining on which parcel of land the construction was taking place and at whose instructions.
6. The applicant still lodged another case, being Kisii ELC Petition No. 4 of 2021 (the petition) against the Director of Survey and 5 others contending that its rights under articles 35, 47(2) and 27 of the Constitution had been infringed by their failure to furnish it with a Survey Plan/F/R 330/11, a document it deemed important for purposes of the exercise of determining which parcel of land the construction was being done on. The applicant asserted that despite the distinct nature of the petition, the court ordered its consolidation with the suit. Consequently, the applicant lodged an application dated July 5, 2021 seeking the review and/or setting aside of the order consolidating the suit and the petition, and stay of proceedings in the suit pending the hearing and determination of the petition. That application was dismissed by the learned Onyango, J.
7. Aggrieved by that decision, the appellant lodged a notice of appeal and thereafter filed the instant application arguing that if the proceedings in the consolidated suits continue, its intended appeal which in its view is arguable, will be rendered nugatory.
8. The application was opposed through a replying affidavit sworn on 10th February 2023 by Cleophas Okioi, the Chief Officer of the Department of Lands, Physical Planning and Urban Development in the County Government of Kisii, the 2nd respondent. It was averred that the application is frivolous, much like the numerous applications previously made by the applicant. To the 2nd respondent, the learned trial judge was right in marking those applications as withdrawn. Moreover, the applicant did not demonstrate that he has an arguable appeal and neither did he show how the intended appeal will be rendered nugatory if the Court does not grant stay of proceedings. The 2nd respondent deposed that consolidation of the two suits was proper as it saves judicial time.



9. At the hearing of the application, Mr. Mulisa and Mr. Mosota, respective learned counsel for the parties relied on the filed affidavits to canvas the rival positions. On record were also filed submissions by the applicant's counsel which he sought to rely on.
10. Mr. Mulisa submitted that even though consolidation of the suit and the petition had already occurred, he still wished to proceed with the application. The intended appeal is arguable because the learned judge erred in consolidating the two matters without interrogating the facts in issue and the reliefs sought in both. Had the learned judge done so, the applicant argues, he would have appreciated that the respondents and the reliefs sought in the two cases were different.
11. On the nugatory aspect, it is contended that it is necessary that the petition be heard first before the suit so as to obtain the survey plan that would aid in the exercise to be conducted upon visitation of the suit property. Thus, if stay of proceedings is not granted, the applicant asserts, the intended appeal will be rendered nugatory. Moreover, there would be an injustice as the application dated June 24, 2020, which sought to cite the respondents for disobedience of court orders will be defeated as the survey plan, necessary for the implementation of court orders, has been concealed.
12. An application such as is before us seeks the exercise of the Court's discretion. The principles upon which we exercise such discretion are well-settled. First, the applicant must persuade the Court that he has an arguable appeal, meaning one that raises a *bona fide* point worthy of judicial consideration, though it need not be one that must necessarily succeed. The applicant must also show that if the stay sought is not granted, the appeal will be rendered nugatory or trifling and of no effect, serving no purpose, by reason of the apprehended harm or loss having been suffered in the interim. It behoves an applicant to satisfy the court on both limbs. See [*Reliance Bank Limited v Norlake Investments Limited* \[2002\] 1 EA 232](#).
13. Regarding the arguability of the appeal, we noted that there was no memorandum of appeal or a draft on record for us to appreciate the grounds intended to be raised on appeal, and thus determine whether the intended appeal is arguable. And while we are cognizant that it is not for us to decide the intended appeal, and indeed whatever view we take cannot bind the bench that will hear the intended appeal, we are not persuaded on the material before us, that the applicant's intended appeal is arguable. From the submissions made before us, it is apparent that the applicant is aggrieved by the consolidation of the two matters. He claims that the reliefs sought and the parties involved are different. We think that the learned judge while considering this issue exercised her discretion judicially and judiciously. She did an extensive analysis of the facts in issue and concluded that what was unsettled in both the petition and the suit was the survey plan which the applicant sought to obtain, through the petition, in order to prosecute the suit. Since the subject matter in both matters was the same, the learned judge determined that to facilitate the just, expeditious and proportionate disposal of the dispute, consolidation of the two cases was proper. He reasoned thus, correctly in our view;
14. The Applicant conceded that the subject matter in the two suits was the same but argued that the prayers were different. It is however intriguing that the Applicant wants to have the order consolidating this suit and the Petition set aside after which the instant suit should be stayed so that the Applicant can get the authenticated Survey Plan (through the Petition) which will aid the Applicant in prosecuting the instant suit. This goes to prove that the two suits relate to the same subject matter and the prayers in the Petition though different from the ones in the instant suit have a bearing on the instant suit.
15. In view of the foregoing and having regard to the overriding objective of the [*Environment and Land Court Act*, 2011](#) which is to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act, I am disinclined to exercise my discretion in favour of the Applicant



as the multiple applications will only serve to delay the hearing of the main suit. The application is therefore dismissed with costs to the Respondents.”

16. As the applicant has failed to persuade us on the arguability of the intended appeal, we need not trouble ourselves on whether it would be rendered nugatory, as that would be an exercise in futility.

The foregoing is the basis for our decision.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF JUNE, 2023

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

