Kariuki & 4 others v Ngatho & 3 others (Civil Application 96 of 2014) [2023] KECA 744 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KECA 744 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 96 OF 2014

DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA

JUNE 22, 2023

BETWEEN

VENANSIO MBATARU KARIUKI ..... 1ST APPLICANT

MICHAEL MBIRA NGIGI ..... 2ND APPLICANT

FRANCIS KARIUKI MACHARIA ..... 3RD APPLICANT

GEORGE MURIGU GITHUKU ..... 4TH APPLICANT

SAMMY THUMBI NYAMBARI ..... 5TH APPLICANT

AND

LILIAN NJUGUNA NGATHO ..... 1ST RESPONDENT

ELIZABETH MURUNGARI NJOROGE ..... 2ND RESPONDENT

MOKI SAVINGS COOPERATIVE SOCIETY LIMITED ..... 3RD RESPONDENT

LUCY WANJIRU KIRUHI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF HANNAH MUKAMI KIRUHI - DECEASED) ..... 4TH RESPONDENT

(Being an application for stay of execution of the Judgment and Decree of the High Court at Nairobi (J.B. Ojwang, J.) delivered on 30th July 2010 and for an order of injunction against the 1st and 2nd respondents, pending the hearing and determination of the appeal against the Ruling and Order of the High Court at Nairobi (Nyamweya, J.) delivered on 31st January 2014 in HCCC No. 745 of 2001 (O.S).)

RULING

1. Before this Court is a Notice of Motion dated April 28, 2014 brought by the applicants pursuant to the provisions of rule 5(2) (b) of the *Rules of this Court*. The applicants seek two main orders: that pending hearing and determination of their intended appeal, this Court do grant stay of execution of

the ruling delivered by the trial court (J B Ojwang, J) (as he then was), on July 30, 2010 in HCCC No 745 of 2001 (OS); and that this Court does further and/or in the alternative issue an order of injunction to restrain the 1st and 2nd respondents from taking possession of, selling, charging, disposing of or evicting them from the parcels of land known as LR No 22925/131, 22925/131, 22925/133, 22925/138, 22925/139, 22925/116, 22925/118, 22925/85, 22925/144 and 22925/149 ("the suit premises") pending the hearing and determination of the intended appeal.

2. The background of this application is that all the applicants herein are owners of various parcels of land that are subdivisions of a parcel of land known as LR No 5964/1. The 1st and 2nd respondents filed suit against the 3rd and 4th respondents at the High Court, to wit, HCCC No 745 of 2001, contesting ownership of LR No 5964/1. The High Court, vide a judgment dated July 30, 2010, entered judgment in favour of the 1st and 2nd respondents and declared all the titles emanating from parcel LR No 5964/1 null and void and ordered their cancellation.

3. The applicants argued that they were not parties to the suit by the respondents and only learnt of the proceedings after judgment had been rendered by the trial court. They, together with other persons who had purchased the subdivisions of LR No 5964/1, filed various applications in HCCC No 745 of 2001 seeking, inter alia, a review and/or setting aside of the judgment dated July 30, 2010 as well as orders of joinder as parties to the said suit.

4. They contended that they purchased their respective parcels of land from one Hannah Mukami Kiruhi, the 4th respondent (now deceased) in the year 2001 and 2004 respectively. Their argument was that they were innocent purchasers for value without notice of defect in the title; that they later came to learn about the judgment and the court order registered against their titles; that they had substantially developed the plots, and that the orders in force were highly prejudicial and injurious to them; that the 3rd and 4th respondents withheld from them material facts by not notifying the trial court of the existence of new titles and, as a result, they were condemned unheard; and that they had demonstrated sufficient interest to be joined in the suit.

5. The 2nd respondent swore replying affidavits opposing the different applications. She deponed, inter alia, that the transfers in favour of the applicants were registered when the suit was pending in court and were therefore null and void for offending the principle of lis pendens; that there was a stay order issued in Nairobi Misc Application No 662 of 2000 that stayed the issuance of titles in respect of LR No 5964/1; that the said Hannah Mukami Kiruhi had no good title to pass to the applicants; that the judgment entered by the trial court had never been appealed against, and that the decree was already executed, and hence joinder to the suit at that stage was inconceivable; and that the applicants continued to develop the different parcels of land in defiance of the court order and despite their notification of the pending suits and resultant orders by way of advertisements of Caveat Emptor notices, and through notices which were conspicuously displayed on the suit property.

6. The trial court (Nyamweya, J) (as she then was), vide a ruling delivered on January 31, 2014, held that the Caveat Emptor advertisements placed in The Daily Nation newspapers were sufficient notice to the applicants that the original title from which they derived their respective titles had a defect or was subject to litigation; that the fact of third parties being on the suit properties was known to the 3rd and 4th respondents, who had sub-divided the original parcel and sold them to the applicants, knowing that the suit and other suits were in court; that it was incumbent upon the 3rd and 4th respondents to join the third parties and/or inform them about the suit; and that the applicants' claim in the circumstances was against the 3rd and 4th respondents.

7. The learned judge also held that the issue of the applicants having purchased the land was raised during the hearing of the suit and conclusively addressed in the judgment where the court held that

the 3rd respondent had no authority to transfer title to the 4th respondent as she had no good title and that, consequently, the subsequent titles derived from the original title including the titles held by the applicants were invalid.

8. On whether there was sufficient cause to review or set aside the judgment, the learned judge found that it would be inequitable to reopen the hearing of the dispute that had been in court since 1991. She declined to grant the prayer for review or setting aside of the judgment. On the issue of joinder, the trial court held that there was no suit pending before court and the applicants could not be joined as parties at that stage. All the applications by the applicants were found to be unmerited and dismissed.

9. The applicants were dissatisfied with the decision of the trial court and lodged a notice of appeal on February 10, 2014, evincing their intention to appeal against the said decision.

10. The applicants contend in their motion and the affidavit in support sworn by the 1st applicant that their intended appeal is not frivolous, and that it raises fundamental questions of law. The grounds of appeal enumerated in the draft Memorandum of Appeal which is annexed to the affidavit of the 1st applicant are, *inter alia*, that the learned judge erred in law and in fact by concluding that the issues related to the applicants were addressed in the judgment; concluding that the applicants were

> "Given sufficient notice in the various caveat emptor notices, and yet no notice was placed concerning HCCC 745 of 2001; ignoring the holding of the judgment that the fate of third parties could not be addressed at that point because there was no evidence of their existence; finding that there was no sufficient cause shown for review; and in not appreciating that the 3rd and 4th respondents could not have joined the applicants before court when the case against them was of fraudulent transfer of land."

11. On the nugatory aspect, it is contended that unless stay is granted, the intended appeal will be rendered nugatory since the applicants have invested heavily in the suit premises and stand to suffer substantial loss. Further, that they have fully developed the suit premises, and that some have taken bank loans and offered title to the suit premises as security. Therefore, should titles to the suit premises be cancelled and the applicants be evicted, the banks will recall the loans, thus occasioning great prejudice upon them.

12. The application is opposed by the 1st and 2nd respondents through a replying affidavit sworn by the 2nd respondent. She contends, *inter alia*, that the applicants should not be allowed to seek a stay of the judgment when they never filed a notice of appeal as required; that the applicants have not met the threshold of grant of stay of execution and injunction pending appeal; that the applicants should be compelled to deposit security equivalent to the current market value of the suit premises which is approximately Kshs 1.6 billion as nothing would prevent the applicants from selling the suit premises during the pendency of the appeal if the orders are not registered against all their titles; and that the applicants have failed to attach a certified copy of the order they are appealing against and, as such, the application should be struck out on that ground alone.

13. At the hearing of this application, there was no appearance by any of the parties despite service of hearing notice upon all of them. However, the applicants as well as the 1st and 2nd respondents had filed their respective written submissions for this Court's consideration.

14. We have perused the applicant's written submissions dated January 20, 2015 and note that they are a reiteration of the grounds set out in the motion and in the affidavit in support. The applicants contend that they have satisfied the twin test for grant of orders sought as laid in various decisions of this Court, such as *Kenya Airports Authority vs Mitu-Bell Welfare Society & Another* [2014] eKLR.

15. A similar position obtains in respect of the 1st and 2nd respondents' written submissions dated May 5, 2015. They are to a large extent a reiteration of the averments contained in the replying affidavit, save to state that they contend that the applicants are the authors of their own misfortunes as they were well aware of the suit before the trial court, contrary to the allegation that they only came to learn of the suit after judgment had been entered. It is also contended that litigation must inevitably come to an end at some point; that the applicants have filed many applications before the trial court, all of which have been dismissed.

16. We have considered the application, the written submissions by the parties and the applicable law. It is trite law that, in an application of this nature, an applicant must demonstrate that the appeal or intended appeal is arguable, which is to say that the same is not frivolous. The applicant must also show that the appeal, if successful, would be rendered nugatory if the orders sought are not granted. See *Stanley Kinyanjui Kangethe vs Tony Ketter & Others* [2013] eKLR. In determining whether the intended appeal is arguable or not, we are cognizant of the fact that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. See *Joseph Gitahi Gachau & Another vs Pioneer Holdings (A) Ltd & 2 Others*, Civil Application No 124 of 2008. A single *bona fide* arguable ground of appeal is sufficient to satisfy this requirement. See *Damji Pragji Mandavia vs Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004.

17. The applicants contend that they were not aware of HCCC No 745 of 2001 between the respondents herein through which orders for the cancellation of their respective titles were issued. The trial court in a ruling on an application for review and set aside held that Caveat Emptor notices were advertised in the newspaper which allegation is denied by the applicants. They contend that the advertisements made related to other suits, and that HCCC No 745 of 2001 was never advertised in the press. The question as to whether the applicants had notice of HCCC No 745 of 2001 and/or whether they were condemned unheard is, in our view, an arguable issue, which can only be determined on appeal. We are satisfied that the applicants have demonstrated that their intended appeal is arguable. We need not say much on arguability at this stage, lest we embarrass the bench that shall eventually hear the appeal.

18. On the nugatory aspect, the applicants contend that they have made significant developments on the suit premises, and that some have taken bank loans and offered titles to the suit premises as security. The trial court having ordered for the cancellation of the resultant titles from LR No 5964/1, there would be nothing to stop the 1st and 2nd respondents from taking possession thereof and disposing of the suit premises or using or developing the suit premises in a way that may alter or change their character. Should that happen, then the applicants' appeal, if successful, will be no more than an academic exercise as the situation may be irreversible, and an award of damages may not be adequate.

19. We are therefore satisfied that the applicants have satisfied both limbs for grant of relief under rule 5(2) (b) of the *Court's Rules*. Accordingly, the Notice of Motion dated April 28, 2014 is hereby allowed. The costs of this application shall be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY JUNE, 2023.

D. K. MUSINGA, (P.)

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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