



**Cannon Assurance (K) Ltd v Mwangude & 4 others (Civil Appeal
(Application) 23 of 2020) [2023] KECA 975 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 975 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 23 OF 2020
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

CANNON ASSURANCE (K) LTD APPELLANT

AND

AL HAMADI MWAGUDE 1ST RESPONDENT

FAIZA WANJIKU MAINA 2ND RESPONDENT

MOHAMED OMAR IBRAHIM 3RD RESPONDENT

LAND REGISTRAR 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

(Being an application for orders of injunction and/or inhibition pending the hearing of an intended appeal from the judgement and decree of the Environment and Land Court at Mombasa (Hon. C. Yano) delivered on 9th May, 2019 in ELCC No. 144 of 2009)

RULING

1. This Notice of Motion dated March 18, 2020 is expressed to be brought under Section 3(2), 3A and 3B of the [Appellate Jurisdiction Act](#), Rule 5(2)(b) of the [Court of Appeal Rules](#) and Section 68(1) of the [Land Registration Act, 2012](#) and all the other provisions of the law. By the said Motion, the Applicant seeks, in substance, that pending the hearing and determination of this appeal, the Respondents be restrained from developing, selling, leasing alienating, transferring, charging mortgaging and/or otherwise dealing with all those parcels of land known as Kwale/Diani/203 or the resultant subdivisions thereof being Kwale/Diani/1838, Kwale/Diani/1839, Kwale/Diani/1858, Kwale/Diani/1859, Kwale/Diani/1914, Kwale/Diani/1915, Kwale/Diani/1915, Kwale/Diani/1916, Kwale/Diani/1917, Kwale/Diani/1918, Kwale/Diani/1919, Kwale/Diani/1920, Kwale/Diani/1921.



In the alternative it was sought that during the pendency of the said appeal, the registration of any dealings in respect of said parcels of land be inhibited.

2. In support of the application, it was contended by the Applicant that on May 9, 2019, the Environment and Land Court at Mombasa delivered a judgement in ELCC No 144 of 2009 – Cannon Assurance Kenya Limited v Ali Hamadi Mwangude and Others whereby the court dismissed the Applicant’s suit with costs. Dissatisfied with the said decision, the Applicant lodged its Notice of Appeal and requested for certified copies of the proceedings and has in fact prepared a draft memorandum of appeal copies of which were exhibited.
3. According to the Applicant, its appeal is arguable and has very good prospects of success particularly as the trial Judge failed to consider and/or misapprehended important matters of fact and law presented by the Applicant and thereby arrived at incorrect or wrongful conclusions. It was contended that the learned Judge erred in law and in fact in failing to give any or proper consideration to the testimony and documentary evidence produced by the Applicant’s witnesses and/or failed to make any findings on the various issues raised by the Applicant. The learned Judge was faulted for holding that the Applicant did not give any evidence as to its ownership of the suit property but simply dangled the titles in its name, notwithstanding consistent testimony of several witnesses and the documentary evidence produced in favour of the Applicant in the case. It was further contended that the learned Judge failed to make findings on the issues placed before the court for determination, a duty which he ought to have discharged.
4. It was disclosed that the temporary order of injunction that had been granted by the trial court pending the hearing and determination of the case lapsed upon the delivery of the judgement on May 9, 2019 hence exposing the suit property to being dealt with in any whatever manner the Respondents deemed fit. It was therefore averred that in order to preserve the subject matter of the appeal, it is necessary that the orders sought be granted otherwise the Respondents may proceed to transfer, lease, sell and/or otherwise adversely deal with the aforesaid properties yet their ownership is disputed by the parties. It was averred that in the event that happens, the Applicant is likely to suffer irreparable harm. On the other hand, the Respondents stand to suffer no harm or prejudice should the orders sought be granted.
5. In response to the Application, the 3rd Respondent, Mohamed Omar Ibrahim, swore a replying affidavit on April 20, 2021 in which he deposed that the 1st Respondent lawfully acquired the suit property through the settlement scheme through a charge of Kshs 9,954/- and was issued with a title deed on May 2, 2007. After his acquisition of the land, the 1st Respondent subdivided the suit land into two subdivisions being Kwale/Diani/1838 and Kwale/Diani/1839 and sold Kwale/Diani/1839 to the 3rd Respondent, who was issued with a title deed on September 9, 2008. Thereafter the 3rd Respondent procured a further subdivision of the said Kwale/Diani/1839 into 8 more parcels being Kwale/Diani/1914 – 1921 and was issued with title deeds for the same and that all the said 8 titles are in the name of the 3rd Respondent.
6. We heard this application on May 22, 2023, vide the Court’s virtual platform and on that day Learned Counsel Mr Karega appeared for the Applicant while Mr Karina appeared for the 2nd and 3rd Respondents. We were informed that the rest of the Respondents had not been participating in the proceedings and we confirmed that they were duly served.
7. At the hearing Mr Karega abandoned all the prayers in the application save for prayer 4 on the ground that at the time the application was made the properties in question were registered in the name of the 2nd and 3rd Respondents. In abandoning the other prayers, Mr Karega disclosed that during the pendency of this matter some of the titles arising from the subdivision of the mother titles were disposed of to persons who are not parties to these proceedings (third parties). The said prayer 4 was



seeking the registration of an order inhibiting any dealings in respect of said parcels of land pending the hearing and determination of the appeal.

8. According to Mr Karega, the learned Judge ignored the evidence of PW2 and instead relied on the evidence of the Land Registrar who only produced the contents of the registrar. It was submitted that the inhibition sought would enable the Court maintain the status quo and preserve the subject matter of the appeal. According to Learned Counsel, there was already proof that if the order was not issued there was real danger of more dealings taking place. While admitting the third parties to whom the some of the parcels of lands arising from the subdivision of the mother titles were sold were likely to be affected by the issuance of the orders, it was submitted that the said third parties were aware of the existence of these proceedings. We were urged to issue the orders sought based on the doctrine of *lis pendens* in order not to permit an illegality in the name of ability to pay damages.
9. Mr Karina, on behalf of the 2nd and 3rd Respondents submitted that the Applicant has no arguable appeal in light of the admission that it has no title to the suit properties. In the written submissions, it was contended that the Applicant having not lodged its appeal within the prescribed 60 days from the date of lodging of the Notice of Appeal, the Notice of Appeal was deemed to have been withdrawn and in those circumstances there cannot be an arguable appeal. It was further submitted that, based on the evidence of the Land Registrar that the Applicant has never been registered as a proprietor of the suit parcels of land, the Applicant cannot claim that it stands to suffer any prejudice.
10. Lastly, it was submitted that since the current registered owners of the suit parcels are not before the Court, it would be a violation of their rights to issue the orders sought without an opportunity being afforded to them to be heard.

Analysis and Determination

11. We have considered the application, the affidavits both in support of and in opposition to the application, the submissions made and the authorities cited. Although the application is expressed to be under brought, inter alia under Rule 5(2)(b) of the Rules of this Court's *Rules* as well as and Section 68(1) of the *Land Registration Act, 2012*, the only provision under which such orders can be granted is Rule 5(2)(b) of the *Rules*. Therefore, in granting the orders sought even if under Section 68(1) of the *Land Registration Act, 2012*, it is only upon the satisfaction of the Court that the principles guiding the grant of orders under Rule 5(2)(b) aforesaid that the Court may consider whether or not the orders in Section 68(1) of the *Land Registration Act, 2012*, may be granted.
12. There are two requirements that need to be met by the Applicants herein, so as to obtain the relief sought in this application. The first requirement is that the Applicants need to demonstrate that they have an arguable appeal, and second that the said appeal will be rendered nugatory if the order sought is not granted. See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
13. In urging us to dismiss the application the Respondents submitted that since the Notice of Appeal is deemed to have been withdrawn by operation of law, there cannot be any arguable appeal. With due respect to the Respondents as long as there exist a Notice of Appeal on record, this Court's jurisdiction to grant orders pursuant to Rule 5(2)(b) exists and is not lost by the fact that the Notice of Appeal might in future be found to be competent or non-existent by operation of the law. This was the position in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR where this Court expressed itself as hereunder:

“The applicant filed its notice of appeal against the said decision on May 26, 2005; the Court accordingly has jurisdiction to hear and determine the motion for stay. Mr. Ohagga, learned counsel for the respondents Aquinas Francis Wasike (1st respondent) and Lantech Ltd. (2nd



respondent) tried to argue before us that the notice of appeal filed by the applicant is invalid and that, therefore, the Court cannot grant the order of stay prayed for. We, however, take note of the fact that no application has been made by the respondents for the striking out of the notice of appeal and as the Court has repeatedly pointed out Rule 5 (2) (b) does not provide that "..... where a valid notice of appeal ;" the

Rule simply provides that:-

‘In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74.....’

Rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of Rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under Rule 5(2)(b) is being considered.”

14. Since the Respondents have not applied for and obtained an order deeming the Notice of Appeal as withdrawn, nothing turns on that point.
15. We have considered the grounds in the annexed draft memorandum of appeal particularly the allegation that the learned Judge relied on the evidence of the Land Registrar instead of that of PW2 in arriving at his decision and further that the trial court did not make findings on all the issues raised. We find that the said grounds are arguable.
16. We are in this regard mindful that an arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. This Court in [*Stanley Kang’ethe v Tony Keter & 5 others*](#) (*supra*) elaborated on this issue as follows:
 - “i) On whether the appeal is arguable, it is sufficient if a single *bonafide* arguable ground of appeal is raised. See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004.
 - ii) 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. See *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No 124 of 2008.”
17. As this Court held in [*National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another*](#) (*supra*):

“It is to be remembered that in an application such as this the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide on the issue of whether or not the matters raised are arguable.”
18. On the second limb of whether the Applicant’s appeal will be rendered nugatory if a stay of proceedings is not granted, we were informed that the properties against which an order of inhibition is sought to be registered have since changed hands from the 2nd and 3rd Respondents and are now in the names of third parties who are not before this Court. It was in recognition of this state of affairs that the Applicant abandoned all the prayers which it was seeking against the 2nd and 3rd Respondents save for one for inhibition. That order of inhibition however, as appreciated by Mr Karega, likely to adversely



affect the third-party purchasers without them being heard. An order prohibiting dealings with the land will clearly restrict their actions should they wish to develop the same or even use them as security. Such an order ought not to be granted without them being afforded an opportunity of being heard.

19. In the premises, even if there is a danger of the suit properties being disposed of this Court, in exercising its discretion under rule 5(2)(b) of the Rules of this Court, this Court must take into account the overriding objective in Sections 3A and 3B of the Appellate Jurisdiction Act and in so doing consider the principle of proportionality. In this case to grant the orders in the manner sought is likely to go contrary to the proportionality principle as it is likely to affect persons who are not parties to these proceedings.
20. In the premises, we find the Notice of Motion dated March 18, 2020 unmerited and dismiss the same with costs to the 2nd and 3rd respondents.
21. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

