



Loki Developers Limited v Kenya Railways Corporation & another (Civil Application E122 of 2023) [2023] KECA 945 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KECA 945 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E122 OF 2023
K M'INOTI, A ALI-ARONI & GWN MACHARIA, JJA
JULY 28, 2023**

BETWEEN

LOKI DEVELOPERS LIMITED APPELLANT

AND

HON ATTORNEY GENERAL 1ST RESPONDENT

KENYA RAILWAYS CORPORATION 2ND RESPONDENT

(Being an application for stay of proceedings and execution of the Judgment and Decree of the Environment & Land Court at Nairobi (J.A Mogeni, J.) delivered on 24th January 2023 in ELC Suit No. 2191 of 2007)

RULING

1. The application before the Court is a Notice of Motion dated March 31, 2023 brought pursuant to sections 3A and 3(2) of the [Appellate Jurisdiction Act](#) and rules 1(2), 42 and 57(2) of the [Court of Appeal Rules, 2022](#) and articles 20(3)(a) and (b), 48, 159(2)(d), 259(1) and (3) of [Constitution](#), for orders of stay of execution of the Judgment of the Environment and Land Court (ELC) at Nairobi (Mogeni, J) dated January 24, 2023 and all consequential orders.
2. The background to the application is that the 1st respondent filed a suit against the appellant and the 2nd respondent seeking an order directing the 2nd respondent to procure the cancellation of the grant issued to the appellant in respect to the suit land LR No 17870 and an injunction directed at the appellant, restraining it from entering onto the suit land, or transferring, leasing, charging or alienating it.
3. It was the 1st respondent's contention that vide a legal notice issued in 1963, the suit land was vested in the General Manager of the then East African Railways and Harbors' administration. Subsequently, another legal notice was issued in 1986 vesting the suit land in it, and by virtue of the two notices,



- no person had the authority to allocate the suit land. In 2005 the 1st respondent found out that the Commissioner of Lands had purported to allocate the suit land to the applicant.
4. In its defence, the applicant contended that in 1992 it applied to the Commissioner of Lands to be allocated land, who then enquired from the 1st respondent whether the land was within its reserve. The 1st respondent stated in reply that it was not, and it had no objection to the Commissioner of Lands using the land as he deemed fit. Further, that the suit land was not part of the parcel of land included in the aforementioned legal notices of 1963 and 1986, and that it was allotted to the 1st respondent and a title issued on the basis of which it has made substantial developments on the suit land.
 5. The court in its judgment held that the suit land had been reserved for the 1st respondent as early as 1963, and, as such, it was not available for alienation; that the Commissioner of Lands had no authority to alienate it as alienation was a preserve of the President; that the District Physical Planner was not involved in ascertaining that the suit land was available for allocation; that the subsequent allocation of the land to the applicant was illegal and the allotment letter was issued irregularly; that the applicant acquired the title fraudulently, and could not therefore enjoy the protection afforded by section 23 of the *Registration of Titles Act* (repealed); the court ordered the applicant's title be cancelled and, the applicant to vacate from the suit land and bear costs of the suit.
 6. The applicant was aggrieved, which precipitated the instant application. The application is supported by the grounds stated on the face of it and the affidavit sworn by one Sammy Boit Arap Kogo, the director/shareholder of the applicant. He deposes that the trial court's judgement is fatally defective as the 1st respondent was not the registered owner of the suit land, at the time of the institution of the suit, or at the pronouncement of the judgment, and that, under the doctrine of *lis pendens*, the applicant is the rightful owner of the suit land. Further, the applicant contended that having already sold and transferred the land to third parties who are neither sued nor served with the pleadings, it is apprehensive that the 1st respondent would evict innocent third parties who have undertaken massive developments on the property, thus exposing the applicant to multiple suits and claims for compensation. For these reasons, the applicant submitted that it has an arguable appeal which warrants to be ventilated on merit, and that if stay of execution is not granted, the appeal will be rendered nugatory as the developments on the suit land will be demolished and innocent third parties evicted.
 7. The applicant filed a further affidavit sworn 4th April 2023, by the said Sammy Boit Arap Kogo, its director alluding that on 29th and 30th March 2023, the 1st respondent's agents marked for demolition structures on the suit land and gave to all tenants and occupants 14 days within which to vacate. Thus, if the demolition is allowed to proceed, it will occasion loss in excess of Kshs 500,000,000.00.
 8. In opposing the application, the 1st respondent filed a replying affidavit, sworn on April 11, 2023, by Stanley Gitari, its acting General Manager, Legal Services and Corporation Secretary. He states that the issues raised by the applicant should be litigated in a different forum, and by the parties who would be directly affected by the execution of the judgment. He justified this assertion by the fact that the applicant no longer holds title over the suit property; that another party, one Samuel Kanyeki is alleging to be a bonafide purchaser for value and has filed an application in the Environment and Land (ELC) seeking to set aside/review the Judgment and for a stay of execution of the Judgment; that the ruling on the application is due for delivery on 10th May 2023; that the applicant ought to have exited the suit if it believed that it was wrongly sued; that instead of exiting the suit, it fully participated in the proceedings including in adducing evidence; that the appeal raises no arguable issues and would not be rendered nugatory if the orders sought are not granted, and as such, the application ought to be dismissed with costs.



9. The application was canvassed by way of written submissions with limited oral highlights. Those of the applicant are dated April 6, 2023 while those for the 1st and 2nd respondents are dated April 14, 2023 and April 17, 2023 respectively. At the hearing, learned counsel Mr Arwa appeared for the applicant, Ms. Kathanji appeared for the 1st respondent and Mr Matunda appeared for the 2nd respondent.
10. Mr Arwa submitted that the intended appeal is arguable on grounds that it was filed against a person who is not the registered owner of the suit property and against whom no order can issue; that the findings of the impugned judgment were erroneous as they relate to a different property other than the suit land; and that the learned judge directed that the register of the suit property be rectified whereas the property had ceased to exist by virtue of sub-division, thus no register exists for purposes of rectification. It was his submission that the appeal would be rendered nugatory if the orders sought are not granted as the 1st respondent has moved to evict all persons living on the land and to demolish the developments, which is attested by a 14-day notice to vacate before demolition.
11. On query from the Court as to why the registered owners were not parties to the suit and why they were not served on appeal, counsel clarified that during the pendency of the suit, he had pointed out that the suit property was not registered in the name of the applicant; that he had pleaded with the plaintiff to enjoin the registered owners but it failed to do so; and that the registered owners have since filed an application in the ELC seeking a review of the impugned Judgment.
12. Ms. Kathanji in her submissions, admitted that the alleged current owners of the suit property have indeed filed an application in the ELC seeking a stay of execution and review of the Judgment and that the ruling was due for delivery on May 10, 2023. She submitted that the appeal was not arguable for the fact that the applicant has admitted that it is no longer the owner of the suit property, thus it should not be the party seeking stay; that the loss of Kshs 500,000,000.00 the applicant claims it will suffer is loss that the respondents can compensate by way of damages; and that therefore the application has no merit and should be dismissed.
13. Mr Matunda associated himself with the submissions of the 1st respondent.
14. In rebuttal, Mr Arwa submitted that since the impugned Judgment was rendered against the applicant, if it (applicant) does not appeal it, the parties to whom it sold the land would pursue it if execution of the judgment were to be realized. Furthermore, it is only the applicant who can explain the genesis of the process of allotment of the suit property.
15. We have considered the Notice of Motion, the supporting affidavit, the replying affidavit, the submissions of all the parties and the law. This being a rule 5(2)(b) application, it turns on consideration of the issues set out by this Court in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR, being firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous. Secondly, an applicant has to demonstrate that unless an order of stay of execution is granted, the appeal or intended appeal would be rendered nugatory. See *Anne Wanjiku Kibeh v Clement Kungu Waibara & IEBC* [2020] eKLR.
16. An arguable appeal is simply one that raises a bona fide arguable point that deserves to be considered and determined by the Court. In other words, an arguable appeal is one that is not frivolous. To establish an arguable appeal, the applicant does not have to present a multiplicity of grounds. Even a single bona fide ground will suffice. From a cursory look at the application and the submissions by the applicant, to our minds, whether fraud was actually pleaded and proved by the 1st respondent, whether the fraud that was allegedly proved was in relation to the suit property and whether the Commissioner



of Lands acted ultra vires, are clearly arguable points that cannot be deemed as frivolous. As was held by this Court in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR:

“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.”

17. On the nugatory aspect, the applicant submitted that there was a real threat of the appeal being rendered nugatory as the 1st respondent is seeking to evict the innocent third parties and demolish the massive developments undertaken, which are valued at over more Kshs 500,000,000. The assertion that the third parties are being evicted and the applicant is currently seeking to undertake demolition of the infrastructure thereon was not denied by the 1st respondent. However, the 1st respondent rebutted that even if demolition were to be carried out, it was able to compensate the applicant for any losses incurred in the event that the appeal is successful. It is trite that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed, if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved. While it is not in contention that the applicant will suffer loss and third parties will suffer economic prejudice, the 1st respondent has categorically stated that it will be able to compensate any affected party by way of damages, which is not disputed.
18. In totality, we find that the applicant has failed to meet the threshold for the second limb, and therefore has failed to establish the twin principles for consideration in an application under rule 5(2) (b) of this Court’s *Rules* for grant of an order of stay of execution. Accordingly, the applicant’s Motion is hereby dismissed with costs being in the appeal.

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

K. M’INOTI

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JUDGE OF APPEAL

ALI-ARONI

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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

