



Muongano wa Wanavijiji Akiba Mashinani Trust v Kihiu & 3 others; Waweru & 4 others (Interested Parties) (Civil Application E250 of 2022) [2023] KECA 1001 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KECA 1001 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E250 OF 2022
HM OKWENGU, JM MATIVO & GWN MACHARIA, JJA
JULY 28, 2023**

BETWEEN

MUUNGANO WA WANAVIJJI AKIBA MASHINANI TRUST APPLICANT

AND

MARY NDUTA KIHU 1ST RESPONDENT

KATHIRA NOOR H BILE 2ND RESPONDENT

JOSEPH MWANGI 3RD RESPONDENT

ROBERT OKWOYO MIRONGA 4TH RESPONDENT

AND

JOHN MBATIA WAWERU INTERESTED PARTY

CECILIA WANJIRU KIB INTERESTED PARTY

JACINTA WAKINA NJUE INTERESTED PARTY

THOMAS D GITHINJI INTERESTED PARTY

GULA FADHILI YUSUF INTERESTED PARTY

(Being an application for Injunction from judgment of the Environment and Land Court at Nairobi (O.A. Angote J.) delivered on 5th May 2022 in ELC No. 1112 of 2013)



RULING

1. The application before us is dated July 15, 2022, brought pursuant to rules 5(2) (b), 41 and 47 of the Court of Appeal Rules, sections 3A and 3B of the Appellate Jurisdiction Act and article 50(1) of the Constitution. It is seeking orders, *inter alia*,:
 - i. that the court do issue an order that the title deeds to the suit properties known as LR 7109/88, Nairobi and LR 7109/89, Nairobi be deposited with the Registrar of the Court of Appeal pending the hearing and determination of the referenced appeal;
 - ii. that further in the alternative the court do grant a temporary proprietary injunction restraining both the respondents and/or their assignees, lessees, agents, servants, representatives, employees or any other person from sale, transfer, gifting, any disposition or dealing with of any of the suit properties known as title numbers LR 7109/88, Nairobi and LR 7109/89, Nairobi in any manner whatsoever pending the hearing and determination of the referenced appeal; and
 - iii. that the court do grant a mandatory injunction to compel the respondents/ plaintiffs to deposit all income generated from all activities upon the suit property pending the hearing and determination of the referenced appeal.”
2. Before we delve into the merit of the application, we think it is appropriate to set out a brief background to the dispute. The genesis of the dispute is that, by a plaint dated September 18, 2013 the respondents filed a claim against the applicant for; -
 - a. Transfer of LR 7109/88, Nairobi and LR 7109/89, Nairobi to Mukuru Makao Bora Trust.
 - b. An order that the defendant discloses and pays to Mukuru Makao Bora Trust interest earned on Kshs 27,212,450/- which it deposited in a fixed deposit account on or about May 28, 2009 and October 16, 2009.
 - c. Costs of the suit.
 - d. Interests on (a) and (c) herein above at court rates.”
3. It was the case of the respondents that they were members of the Board of Trustees of the Trust, having instituted the suit on behalf of the Trust and its two thousand, two hundred and twenty one (2,221) members; that the Trust was initially registered as a Self-Help Group known as Sisal Settlement Savings Self Help Group (“SSSSHG”) with the intention of acquiring two parcels of land, being LR No 7109/88, Nairobi, measuring 7.658 Hectares and LR No 7019/89, Nairobi measuring 1.619 Hectares (“suit properties”). The group was not an entity capable of purchasing property, and they (group members) thus approached the applicant to purchase the suit properties on their behalf for the agreed sum of Kshs 81,000,000.00 which would be deposited into an interest earning fixed deposit account. The applicant took a mortgage loan facility of Kshs 55,000,000.00 on behalf of the group members from Eco Bank Limited; and the suit properties were duly charged on August 31, 2010. Members of the group duly serviced the mortgage by depositing money into the applicant's mortgage account. On November 7, 2012, they duly created and registered the Trust which took over all the assets and



- liabilities of the group and requested the applicant to transfer the suit property into their names, having cleared the loan sums and discharged the property to which applicant gave conditions that had to be met before the transfer. The applicant did not fulfil its part of the obligation despite the respondents having met the conditions set out.
4. The applicant filed a statement of defence, denying all the allegations, and averring that the money deposits made by the group members were insufficient to meet the purchase price of Kshs 81,000,000.00 plus accrued interest, and that it sourced for these monies from third parties which the respondents were required to pay before the titles are transferred to their beneficiaries; that it (applicant) had one voting right in the Board of Trustees of the Trust which entitled it to seek a list of beneficiaries of the project; that the accounts rendered by the respondents were inaccurate; and that it has received numerous requests from beneficiaries asking it not to release the title documents to the respondents.
 5. The matter proceeded to hearing with the respondents and applicant calling one and eight witnesses respectively. The trial court in its judgment held that the Board of Trustees of the Trust authorized the filing of the suit, and thus had the *locus standi* to institute the suit; that it was not in dispute that the suit properties had been discharged and the loan in that respect cleared; that the dispute was whether it was the members of the group who fully cleared the loan or whether the applicant used its own funds to clear it, and if so, whether the respondents should reimburse the applicant the monies paid; and that the applicant's failure to render the mortgage accounts made the court to draw the inference that the failure was prejudicial to it.
 6. The court further held that the applicant also failed to provide evidence that it had sourced monies from third parties to clear the mortgage loan or that the monies used to pay stamp duty and construct the perimeter wall were from a loan advanced to the group. The court was thus satisfied from the evidence on record that the respondents had fulfilled their obligation to the applicant; that the applicant's only obligation was to purchase the property, and from its own testimonies, it had admitted that it owned the suit properties in trust for the beneficiaries of the group members. It had no right to dictate how the properties would be held by the Trust. Hence, the respondents who were the officials of the Trust should be accorded the opportunity to manage the affairs of the Trust.
 7. As regards the assertion of impropriety on the part of the respondents by the interested parties, the court held that this was an internal dispute within the Trust as their names were among the 2221 beneficiaries. It was not therefore, a dispute subject of the suit. The court then rendered its judgment in favor of the respondents by ordering the applicant to unconditionally transfer LR No 7109/88 and LR No 7109/89, Nairobi to the respondents to hold them in trust for the members of the Trust within 30 days. It is the dissatisfaction with this judgment that brought the applicant to this court.
 8. The application is supported an affidavit sworn on July 15, 2022, by Joseph Muturi, a member of the Board of Trustees of the applicant, who avers that the applicant was registered as the proprietor of the suit properties in place of Sisal Settlement Savings Self Help Group (SSSSHG) in 2010, and sometime in 2012, the self-help group decided to register a Trust, being Mukuru Makao Bora Trust (the Trust). It is contended that the Trust never paid any sums of money to the applicant, and as such, the applicant does not own the properties in trust for the Trust; that it was the self-help group that contributed monies towards the purchase of the properties, but a balance of Kshs 23,532,016.32 remained unpaid which balance is admitted by the respondents; that the order to register the suit properties in the respondents' individual names would violate the applicant's obligation as trustees of the Trust; and that the suit properties form a trust held by the applicant on behalf of all the original members of SSSSHG who are the beneficiaries, and who do not recognize the respondents as representatives or trustees for their beneficial interest.



9. For the foregoing reasons, the applicant is only an admitted implied trustee and wishes to hand over the titles to the suit properties to the court. Further, the respondents are collecting monthly income from the suit properties at Kshs 400,000.00 per month and they should be ordered to deposit the sums in the court. It is contended that the intended appeal shall be rendered nugatory in the event the court does not take possession of title deeds to the suit properties; that the remaining members of SSSHG will suffer irreparable loss and unquantifiable harm, suffer violence which will lead to loss of peace and tranquility at the instigation of the respondents; that it (applicant) will suffer further loss of Kshs 23,532,016.32; and it is only fair that the application be allowed.
10. The respondents opposed the application vide a replying affidavit sworn by the 1st respondent, Mary Nduta Kihui, on July 6, 2022. She contended that the application is without merit and is only aimed at delaying the members of the Trust from enjoying the fruits of their judgment as the applicant has been using the suit properties to get donor funds in the pretense that it wants to assist the Trust members. Furthermore, the applicant has no legal right to injunct the respondents on ground that it admitted to holding the suit properties in trust for them. And, since the applicant never claimed proprietary rights over the suit properties, the application is incompetent and ought to be dismissed with costs. In any case, the respondents have no intention whatsoever of disposing of the properties; instead, they intend to develop them, and as such, the intended appeal would not be rendered nugatory if the orders sought are not granted.
11. The 1st interested party, John Mbatia filed a replying affidavit sworn on July 27, 2022 contending that, being a member and beneficiary of the Trust, he was satisfied with the judgment; that he never authorized M/s Kariuki E & Co Advocates to file the notice of appeal dated May 9, 2022 on behalf of the interested parties; that the applicant is not the owner of the suit land and should not be allowed to frustrate the owners but should instead transfer the titles to their rightful owners; and that he will cooperate with the respondents in the terms set out in the trust deed of the Trust. He urged us to dismiss the application.
12. When the matter came up for hearing before us on February 13, 2023, learned counsel, Mr Ong'amo holding brief for Mr Bryant appeared for the applicant, learned counsel, Mr Magee appeared for the respondent and Mr Mbatia appeared in person on behalf of the interested parties.
13. The applicant relied on the written submissions with a caveat that Civil Application No E279 of 2023 should be determined before the instant application and it be granted an order to deposit the title documents in court. Mr Magee opposed the request to first deal with Civil Application No E279 of 2023 as, according to him, it was a gimmick to delay the determination of the instant application. The interested party also opposed the request to deal with Civil Application No E279 of 2023 first. However, all parties wished to rely on their respective written submissions.
14. The applicant's submissions are dated July 27, 2022 and for the respondents are dated August 1, 2022. The submissions are a regurgitation of the averments contained in the affidavits in support of, and opposition to, the application, and so we do not wish to recall them save for the salient issues raised.
15. The applicant argued that the intended appeal is arguable as the trial court erred in finding that the applicant lacked any beneficial interest in the suit properties. It contended that its only concern is to preserve the suit properties and fulfil its obligation to SSSHG, and therefore, if the orders sought are not granted, it will be in breach of its contractual obligation consequent to which SSSHG will lose their hard-earned money. Further that, should the suit property be sold by the respondents, it (applicant) will not be able to compensate the respondents as they are not persons of means; that the respondents are likely to appropriate the suit properties to third parties; that there is also the likelihood that violence



may erupt taking into account the past behavior of the respondents; and that therefore, the balance of convenience lies in granting the orders sought.

16. The respondents submitted that the applicant does not have an arguable appeal, having already admitted that it held the suit properties in trust for the respondents and its 2221 members; that the applicant did not file a counterclaim claiming the balance of the purchase price of Kshs 23,532,016.32; that this court has no jurisdiction to determine issues related to the management of the Trust as a similar application had been dismissed in the trial court and the applicant never appealed the said ruling; that the appeal will not be rendered nugatory as the respondents are capable of paying the amount allegedly claimed by the applicant having regard to the fact that the suit properties have appreciated tenfold and are now worthy Kshs 900,000,000; that they have no intention of disposing of the land; and it is in the interest of justice that the application be dismissed.
17. We have appraised the application, the responses and the submissions. It is a settled rule that to merit any order sought pursuant to rule 5(2) (b) of the *Court of Appeal Rules*, an applicant must demonstrate that he/she has an arguable appeal; and that the appeal (or intended appeal), if successful, would be rendered nugatory absent stay. See *Parliamentary Service Commission v Okiiti & another* (Civil Application E349 of 2021) [2021] KECA 120 (KLR) (22 October 2021) (Ruling)
18. As to whether the intended appeal is arguable, the applicant filed a draft memorandum of appeal in which it raised the following grounds: that the learned trial Judge erred in law and fact, by misadvising himself on the law by finding that the defendants had a duty to the Makao Bora Trust and thus the plaintiffs; that the learned trial Judge erred in law and in fact, by misapplying the law by making an order that the plaintiffs held the suit property in their individual capacity, thus vaporizing the plaintiffs' co-duties as co-trustees with the remaining trustees of the Makao Bora Trust Deed; that the learned trial judge erred in law and, in fact, by misadvising himself on the law by holding that the defendant failed to demonstrate on a balance of probability that the plaintiffs and the other trustees of Makao Bora Trust owed the defendant the

"Sum of Kshs 23,532,016.32, despite the uncontroverted testimony of an expert witness; that the learned trial Judge misadvised himself on the factual evidence and the admissions made by the plaintiffs and interested parties that they had not paid for the suit property in full; that the learned trial Judge misadvised himself on the factual evidence and failed to make explicit findings that: a majority of the financial interest represented in the 2221 Sisal Settlement Self Help Group (hereinafter the "SSSHG") beneficiaries had instructed the defendant to hold the suit property on trust for themselves; that and the interested parties as revealed representatives of the majority portion of the SSSHG 2221 beneficiaries are opposed to the transferring of the suit property to the plaintiffs."

19. As was stated by this court in *Ahmed Musa Ismael vs Kumba Ole Ntamorua & 4 others* [2014] eKLR:

"An arguable appeal need not raise a multiplicity of explorable points, a single one would suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal – it is enough that it is a point on which there can be a bona fide question to be explored and answered within the context of an appellate adjudication"
20. It is uncontested, and indeed by admission of the applicant itself that, it held the suit properties in trust for the Trust. This is also evidenced from the depositions in the affidavit sworn in support of the application. The respondents, on the other hand fulfilled the conditions set out by the applicant prior to the titles being discharged by the financier. What this means is that the applicant cannot now



purport to hold the suit properties' titles for the benefit of the Trust members. Such an assertion to us is self-conflicting. Simply said; the applicant cannot have its cake and eat it.

21. As the trial court held, the issues being raised by the applicant are issues that are between the members of the Trust, who are the respondents and the interested parties, to which the applicant is not privy to. It cannot therefore hold on to suit properties' title documents in perpetuity on account that some members of the Trust are distrusting the respondents. This would be in violation of the very trust it was accorded by the Trust members, to act in utmost faith. Turning around to want to cling on to the title documents is tantamount to a breach of the very trust that was bestowed on it by the Trust members. Moreover, the applicant has no counterclaim upon which the prayer for a mandatory injunction can be anchored. Notwithstanding the multiplicity of the grounds stated on the memorandum of appeal, we are not persuaded that the intended appeal has met the threshold of arguability. We shall say no more lest we embarrass the bench that will eventually be seized of the intended appeal.
22. As to whether the intended appeal, if successful, would be rendered nugatory if the injunctive relief sought is not granted, it is evident that the applicant was only holding the property in trust and does not own the land. The intended appeal would not be rendered nugatory as the judgment of the ELC was for transfer of the land to Mukuru Makao Bora Trust and not to an individual.
23. Accordingly, we find the application without merit. We dismiss it with costs to the respondents.

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

HANNAH M. OKWENGU

.....

JUDGE OF APPEAL

J.M. MATIVO

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

