



**Bulle t/a Todonyang Investments Limited v Kenya Commercial Bank Limited & 2 others
(Civil Application E436 of 2022) [2023] KECA 910 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KECA 910 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E436 OF 2022
DK MUSINGA, A ALI-ARONI & JM MATIVO, JJA
JULY 24, 2023**

BETWEEN

**JELLE NOOR BULLE T/A TODONYANG INVESTMENTS
LIMITED APPLICANT**

AND

**KENYA COMMERCIAL BANK LIMITED 1ST RESPONDENT
JAMES ISABIRYE 2ND RESPONDENT
KINGORANI INVESTMENTS LIMITED 3RD RESPONDENT**

*(An application for stay of execution of the Judgment and Order of
the High Court at Nairobi (Sewe, J.) dated 18th February 2020 in
HCCC No. 638 of 2010 consolidated with HCCC No. 187 of 2021.)*

RULING

1. Before this Court is a Notice of Motion dated November 17, 2022 which is brought by the applicant under, inter alia, the provisions of rule 1(2) and 5 (2)(b) of the [Court of Appeal Rules](#). The applicant seeks principally an order that the 2nd and 3rd respondents by themselves, their agents, servants, nominees or otherwise howsoever be restrained from developing, selling, leasing, mortgaging, charging, transferring, assigning, entering upon, trespassing on, or otherwise dealing with the property known as L.R. No. 5130 (Original Number 4973/42) Section 1 Mainland North, pending the hearing and final determination of Civil Appeal Number E289 of 2020.
2. The background to the application is that the applicant was the registered owner of a property known as L.R. No. 5130 (original No. 4973/42) Section 1 Mainland North (hereinafter referred to as ‘the suit property’) located in Nyali, Mombasa County, which was offered to the 1st respondent as a security for a loan advanced to the applicant. The applicant did not service the loan as per his agreement with



the 1st respondent. The applicant sought the consent of the 1st respondent to sell the suit property in order to offset the loan and redeem the property. The applicant contends that the consent was given but later withdrawn by the 1st respondent, precipitating the filing of HCCC No. 638 of 2010 at the High Court in Nairobi. The orders sought by the applicant in that suit were, inter alia, a declaration that the 1st respondent's attempt to stop the applicant's sale of the charged property after it had given its consent was in bad faith and went beyond the legitimate right of a chargee.

3. The 1st respondent through its Defence and Counterclaim denied all the allegations leveled against it by the applicant. It contended that the applicant obtained funds from it using a forged title document and was in breach of the terms of the agreement relating to the loan repayment. It prayed for judgment against the applicant for the sum of Kshs.20,978,509.89/= at an interest rate of 16% and penalty rate of 3% from 19th October 2010 till payment in full; costs and interests.
4. It is contended that during the pendency of HCCC No. 638 of 2010, the 2nd and 3rd respondents at the 1st respondent's instance attempted to take possession of the suit property necessitating the filing of another suit by the applicant, viz, HCCC No. 187 of 2011 at the High Court in Mombasa. The orders sought by the applicant were, inter alia, a declaration that the applicant was the sole bonafide legal owner of the suit property; a declaration that the threat and/or intended eviction and/or interference was a trespass on the applicant's land, illegal and unlawful as well as a breach of the applicant's right to peaceful and quiet possession of the suit property; and a permanent injunction restraining the 2nd and 3rd respondents from interfering with the applicant's quiet possession of the suit property.
5. The two suits were consolidated and heard in the Tax and Commercial Division at Nairobi with HCCC No. 638 of 2010 being the lead file. The trial court rendered its decision on February 18, 2020, wherein it dismissed the suit by the applicant, to wit, Mombasa HCCC No. 187 of 2011 with costs. The 1st respondent's Counterclaim was allowed, and judgment entered in its favour against the applicant in the sum of Kshs.20,978,509.89/= together with interest at the rate of 16% along with a penalty rate of 3% from October 19, 2010 till payment in full, as well as costs. The trial court also issued a permanent injunction restraining the applicant, his employees, agents, and representatives from selling, leasing, charging, sub-letting, dealing with, alienating, meddling in or in any other manner whatsoever transacting in the suit property.
6. The applicant was dissatisfied with the decision of the trial court and has already lodged an appeal before this court, to wit, Civil Appeal No. E289 of 2020 which is pending for hearing and determination. The applicant contends that his appeal is arguable and relies on the grounds set out on the face of the motion, his affidavit in support, as well as the grounds set out in the Memorandum of Appeal dated September 2, 2020. The applicant contends that the learned trial judge erred in law and in fact, inter alia, by clothing herself with jurisdiction to determine matters related to title to land which was a preserve of the Environment and Land Court; by giving orders which were not specifically pleaded by the parties in the pleadings, thereby rewriting the pleadings and occasioning grave injustice to the applicant; by allowing the 1st respondent's counterclaim whereas no evidence was given in support of the counterclaim; and by putting emphasis on hearsay evidence supplied by the respondents who failed to produce adequate evidence to prove fraud to the required standards.
7. On the nugatory aspect, it is contended that although the applicant has an active appeal pending before this court, the 2nd and 3rd respondents and their agents have commenced extensive developments on the suit property against the doctrine of *lis pendens*. It is contended that unless the orders sought are granted, the substratum of the appeal, which is the suit property, will be damaged or lost to third parties, rendering the suit property beyond the applicant's reach. In the premise, in the event the appeal is successful, the same will be nothing but a mere academic exercise.



8. The application is opposed by the 1st respondent through a replying affidavit sworn by Lilian Sogo, its Head Litigation Counsel. She averred that the application is incompetent, having been filed outside the main appeal; and that the application does not disclose an arguable appeal for the reasons that the applicant admits owing the 1st respondent the decretal sum loaned to him and has not paid the same. On the issue of jurisdiction, the 1st respondent contends that it is the applicant who filed the two suits and hence he cannot be heard to challenge the High Court's jurisdiction after he prosecuted his suits unsuccessfully, and that in any case, the issue of jurisdiction was not raised before the trial court as provided for under section 16 of the Civil Procedure Act and it is therefore an afterthought.
9. On the nugatory aspect, it is contended that the applicant's appeal shall not be rendered nugatory for reasons that the applicant never asserted possession of the suit property and never sought for injunctive reliefs in the High Court and therefore, his appeal cannot be rendered nugatory; the applicant filed his appeal two (2) years ago and never sought any injunction orders and therefore, even if he is denied the orders sought, his appeal will not be rendered nugatory; the High Court found that the applicant obtained money from the 1st respondent using a fake title, and therefore, the applicant's appeal cannot be rendered nugatory; the applicant owes the 1st respondent a decretal sum of Kshs.20,978,509.89/ = with interest accruing at the rate of 16% per annum and a penalty rate of 3% per annum from 19th October 2010 till payment in full. This decree has not been satisfied and therefore, the applicant shall lose nothing even if the injunction orders herein are denied; if the applicant pays the 1st respondent the decretal sum, the 1st respondent is a financially solid international institution and can always refund the applicant the money should his appeal succeed; and that there is no evidence that the 2nd and 3rd respondents are selling their property and therefore, the applicant's appeal shall not be rendered nugatory since he never owned or possessed the same.
10. At the hearing of this application, learned counsel Mr. Kivuva appeared for the applicant while learned counsel Mr. Gakungu appeared alongside learned counsel Mr. Mwangi for the 1st respondent. There was no appearance on behalf of the 2nd and 3rd respondents despite service with the hearing notice. Counsel present made brief oral highlights of their respective parties' written submissions, which were a reiteration of the grounds and averments set out hereinabove. It shall serve no useful purpose rehashing the submissions.
11. We have carefully perused the record, submissions by counsel and considered 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 would be rendered nugatory if the orders sought are not granted. See Stanley Kinyanjui Kangethe v Tony Ketter & others [2013] eKLR.
12. The applicant contends that the dispute in both suits related to title to the suit property which was not within the purview of the Tax and Commercial Division of the High Court. The issue whether the Tax and Commercial Division of the High Court arrogated unto itself jurisdiction reserved for the Environment and Land Court is undoubtedly an arguable issue, which can only be interrogated at the hearing of the appeal. On this basis, we are satisfied that the intended appeal is arguable.
13. Turning to the second limb of nugatory aspect, it is trite law that this Court must weigh and balance the competing claims of both parties and that each case must be determined on its own peculiar facts. See Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227.
14. In this case, the applicant has not demonstrated to us that the appeal, if successful, will be rendered nugatory if the orders sought are not granted. The alleged plan of disposing of the suit property is not supported by any evidence and in any case, it is denied by the 1st respondent. Further, the applicant has



not demonstrated to us that he would not be reasonably compensated by way of damages should the stay orders be declined. The 1st respondent is a reputable Bank and it was not alleged that it would be unable to compensate the applicant for any loss suffered if the appeal is successful. The applicant has not therefore demonstrated that the appeal, if successful, shall be rendered nugatory.

15. As the applicant has only been able to satisfy one of the two limbs required in this kind of applications, and since the requirement is that both limbs be satisfied, the application fails and is accordingly dismissed. We order that the costs of this application be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY JULY, 2023.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

