



Butt & another v Kenya Revenue Authority & 2 others (Civil Application E145 of 2023) [2023] KECA 835 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KECA 835 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E145 OF 2023
HA OMONDI, KI LAIBUTA & GWN MACHARIA, JJA
JULY 7, 2023**

BETWEEN

MOHAMMED SHEHAZAN BUTT 1ST APPLICANT

YASSAR BUTT 2ND APPLICANT

AND

KENYA REVENUE AUTHORITY 1ST RESPONDENT

COMMISSIONER OF LANDS 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

(Being an application for stay of execution from the judgment and decree of the Environment and Land Court at Nairobi (Komingoi, J.) dated 9th February 2023 in ELC No. 67 of 2018(OS))

RULING

1. The applicants' Notice of Motion dated March 27, 2023, brought pursuant to rule 5(2) (b) of the [Court of Appeal Rules](#), seeks orders that, pending hearing and determination of the appeal, there be a stay of execution of the orders made on October 15, 2022. They also pray that costs be in the cause. The application is supported by an affidavit of even date sworn by Mohammed Shezan Butt, who deposes that, as a purchaser for value, he bought the suit property at an auction, but that the title to the same had been misplaced. Following the sale, the applicants then moved the court for vesting orders in HCCC ELC No 1200 of 2014, which were issued on October 22, 2014 directing that the property be registered in his favour. However, upon presentation of the order for registration, he learnt that there was a caveat registered against the suit property, He then moved to court via Civil Suit No 67 of 2018 (OS), seeking that the purported caveat be declared null and void, and that the applicants be registered as the owners of the suit property.



2. The 1st respondent opposed the application contending that, upon audit of Comecons Africa Limited for a period spanning nearly 30 years, it turned out that there was a sum of over Kshs 900,000,000 owing in taxes; that the taxpayer was thus issued with a demand notice for additional taxes, but that they failed to pay or object to the assessed tax arrears; that they did not honour the request; that the suit property was registered in the name of the taxpayer, and was advertised for sale by auction in the local dailies; the 1st respondent then registered its interest on the suit property by placing a caveat; thereon and by issuing a notification of sale of the suit property to recover the taxes owing.
3. Upon hearing the parties, the trial court identified three main issues for determination, namely whether the 1st respondent was legally justified to place a caveat on the suit property; whether the applicants conducted due diligence before purchasing the property; and whether the applicants were entitled to the orders sought. Dismissing the suit the trial Judge held that, under the law as it existed then, the 1st respondent was justified in placing the caveat; that, by the time of purchase of the property, the caveat had been in place for about 10 months; that, if the applicants had conducted due diligence before the purchase, they would have discovered that the property was encumbered; and that the applicants ought to have disclosed to the court the status of the property when they applied for vesting orders. According to the learned Judge, the applicants were the authors of their own misfortune, and that the solution lay in them paying the tax arrears due so as to have the caveat lifted.
4. The applicants are aggrieved by the decision of the trial court and have filed what is termed as an arguable appeal because it challenges the validity of the caveat, which is described as stale since it lacked all material content requirements.
5. The applicants also submit that refusal to grant the orders sought will render the appeal nugatory, as the 1st respondent wants to realize and sell the property to recover the taxes claimed against Comecons Africa Ltd and, in the event that; the sale takes place, the subject matter of the appeal (LR 209/8381) will have been lost. Consequently the appeal will be an exercise in futility.
6. The applicants further point out that this Court ought to take into consideration whether they can be compensated by way of damages. According to them, ideally, the person who should pay damages to the applicants is Dubai Bank which folded business long time and is no longer in existence. In the circumstances, the applicants would have no entity to pursue for damages. They contend that, unless stay is granted, the applicants run the risk of losing the monies invested in acquiring the suit property.
7. By a replying affidavit sworn on May 8, 2023 by Victor Minor, who works at the 1st respondent's Corporate Tax Account Management Division, the 1st respondent contends that there is nothing arguable in the appeal, that the 1st respondent properly secured its interest in the suit property by placing a caveat; and that, in any event, the applicants are not the registered owners of the suit property, and have no locus to object to the sale of said property.
8. The 1st respondent's case is that it is not disputed that the 1st respondent has the power to sell the applicant's property in order to recover the taxes due from the registered owner of the suit property; that the taxes owed by the tax-payer have been outstanding for almost 30 years and that the effect of granting the orders sought is a delay in collection of taxes, aggravating the challenges faced by the government to fund its budget.
9. The 1st respondent relies on order 46 rule 1(1) and (2) of the *Civil Procedure Rules*, and cites the decision in *James Wangalwa & Another v Alice Naliaka Cheseto* [2012] eKLR where the Court held the view that the mere fact that the process of execution has been put in motion or is likely to be put in motion does not by itself amount to substantial loss even if the attached property were to be sold.



It further contends that the applicants have not demonstrated what substantial loss they will suffer if the orders sought are not granted.

10. In considering whether the applicant has satisfied the requirements necessary for granting an order for stay of execution, we recognize that this Court has pointed out in several decisions that whether it be an application for injunction, stay of execution or stay of proceedings, the applicable principles are the same. To succeed in an application under rule 5(2) (b) the applicant has to establish that:
 - i. The appeal is arguable,
 - ii. the appeal is likely to be rendered nugatory if stay is not granted and the appeal succeeds.
11. In the case of *Wasike vs. Swala* [1984] KLR 591 this Court held that an arguable appeal is not one that would necessarily succeed, but one that merits consideration. In *Attorney General v Okiya Omtatah & Anor* [2019] eKLR, this Court held:

“the principles for our consideration in exercise of our unfettered discretion under Rule 5(2) (b) to grant an order of stay is well settled. Firstly, the applicant must satisfy that it has an arguable appeal. However, this is not to say that the appeal will necessarily succeed but suffice it that the appeal is not idle or frivolous.”
12. This Court in *Co-operative Bank of Kenya Ltd v Banking Insurance and Finance Union Kenya* [2014] eKLR stated that:

“it is sufficient that the issues raised are arguable.” Additionally, in Kisumu Civil Appeal 74 of 2016 George O Gache & Anor v Judith Akinyi Bonyo & Others this Court stated:

“at this stage the Court is not expected to inquire into the merits of the case and whether or not the appeal will succeed. It is sufficient that the applicant has met the threshold as existence of a single bona fide issue is sufficient.”
13. On the issue as to whether the appeal is arguable, it is apparent that the applicants are admittedly not the registered owners of the suit property. Accordingly, we find that the applicants have not demonstrated that they have an arguable appeal. It is indubitable that the applicants have no proprietary rights over the suit property and, accordingly, their intended appeal is not arguable.
14. The applicants having failed to establish that they have an arguable appeal, we need not pronounce ourselves on the issue as to whether the appeal would be rendered nugatory absent stay. In conclusion, the applicants have failed to satisfy the twin principle for grant of stay of execution pursuant to rule 5(2) (b) of this *Court’s Rules*. Consequently, the applicants’ Motion dated March 27, 2023 lacks merit and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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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

