



Kigonyo & another v Kiambu Dandora Farmers Co. Ltd & 4 others (Civil Application E080 of 2023) [2023] KECA 829 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KECA 829 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E080 OF 2023
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
JULY 7, 2023**

BETWEEN

JOSEPH CHEGE KIGONYO 1ST APPLICANT

GICHE LIMITED 2ND APPLICANT

AND

KIAMBU DANDORA FARMERS CO. LTD 1ST RESPONDENT

**THE CABINET SECRETARY, MINISTRY OF INTERIOR AND CO-
ORDINATION OF NATIONAL GOVERNMENT 2ND RESPONDENT**

THE INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

**DEPUTY COUNTY COMMISSIONER, EMBAKASI SUB-COUNTY 4TH
RESPONDENT**

HON. ATTORNEY GENERAL 5TH RESPONDENT

(Being an application for stay of further proceedings pending appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Nairobi (E. Wabwoto, J.) dated 8th September 2022 in E.L.C Suit No. E092 of 2022)

RULING

1. The genesis of the Motion before us is the suit filed by the applicants, Joseph Chege Gikonyo and Giche Limited, against the respondents in the Environment and Land Court at Nairobi in ELC Suit No E092 of 2020 seeking orders to prohibit trespass onto thirteen (13) parcels of land situate in the Embakasi District of Nairobi City County (the suit properties), particulars whereof are more specifically set out in Ground 1 of the grounds on which the Motion is anchored.



2. The gist of their claim in the suit was that they were the legal and beneficial owners of the suit properties, having purchased them from a third party, Amboseli Court Limited, 'on diverse dates'; and that since the month of June 2020, the 1st respondent, Kiambu Dandora Farmers Company Limited, in the company of officers and agents drawn from the 2nd, 3rd and 4th respondents intermittently invaded the suit properties and threatened to evict the applicants.
3. In its defence and counterclaim, the 1st respondent averred that it was the registered proprietor of LR No 11379/3 measuring 818 Acres, which includes the suit properties; that they hold the parent title, and have never surrendered it for subdivision or amalgamation with any other property; that their title was issued on April 8, 1970; and that Amboseli Court Limited from whom the applicants claim to have purchased the suit properties have never owned them. They prayed for: cancellation of titles to the suit properties; a declaration that they are the absolute and beneficial owners of the suit properties; a permanent injunction restraining the applicants from dealing with LR No 11379/3; costs of the suit; and interest.
4. The suit proceeded to hearing and the 1st applicant testified on May 24, 2022 and closed the applicants' case. The defence hearing commenced but, before further hearing of the defence case, the applicants filed the undermentioned Motion leading to the impugned ruling.
5. By a Notice of Motion dated July 13, 2022 supported by the 1st applicant's affidavit sworn on July 31, 2022, and made on a whopping 11 grounds set out on the face of the Motion, and which we need not replicate, the applicants requested the ELC to grant them leave to file further evidence and documents in support of their case. They also sought further directions on further hearing of the suit, and prayed that costs of the application be in the cause.
6. Gathering from the impugned ruling dated September 8, 2022, and in the face of the scanty record as put to us, the respondents opposed the applicants' Motion.
7. In its ruling, the ELC (EK Wabwoto, J) dismissed the applicants' Motion and observed that 'the court cannot allow the production of additional evidence by a party who had closed his case and has equally not sought for re-opening of the same. The matter is now at the defence hearing.' He directed that the suit proceeds to further defence hearing on October 12, 2022.
8. Aggrieved by the decision of the learned Judge, the applicants moved to this Court on appeal on 8 grounds, faulting the learned Judge for: holding that the applicants ought to have sought an order to re-open their case; failing to consider the relevance and weight of the evidence sought to be adduced; failing to exercise her discretion judiciously; and for overemphasising procedural technicalities at the expense of substantive justice.
9. Pending hearing and determination of their intended appeal, the applicants' have moved the Court vide their Notice of Motion dated February 28, 2023 pursuant to rule 5(2) (b) of the [Court of Appeal Rules](#) seeking stay of further proceedings in the ELC, and costs of the application.
10. The applicants' Motion is supported by the 1st applicant's annexed affidavit sworn on February 28, 2023, which essentially depones to the grounds on which the Motion is anchored, namely: that they have an arguable appeal with a high chance of success; that the documents sought to be admitted as evidence in the trial court are directly relevant to the questions in dispute, and will assist in the determination of all issues in dispute; that the applicants' rights over the suit properties will be rendered nugatory in the event the suit in the ELC proceeds to hearing excluding the documents sought to be produced; and that the application before the trial court was unopposed.



11. In support of the Motion, learned counsel for the applicants, M/s Macharia Nderitu & Company, filed written submissions, list of authorities and case digest dated March 27, 2023. Counsel cited 4 judicial authorities, including the cases of *Nairobi City Council vs. Tom Ojienda & Associates [2022] KECA 1326 (KLR)*; *Kwale International Sugar Company Limited vs EPCO Builders Limited & 2 Others [2020] eKLR*; and *Ezekiel Mule Musembi vs H Young & Company (EA) Limited [2019] eKLR*, all highlighting the principles applicable for grant of an order for stay of further proceedings under rule 5(2) (b). They urged us to allow the application as prayed.
12. The applicants' Motion is opposed. In his replying affidavit sworn on April 6, 2023, Joseph Mwangi Karanja (a director of the 1st respondent company) states: that the suit in the ELC is at the stage of defence hearing; that they have called the first of four defence witnesses; and that the documents sought to be produced are an afterthought.
13. In their written submissions and list of authorities dated April 6, 2023, learned counsel for the respondents, M/s MAW Advocates LLP cited 3 judicial authorities, namely *Nyaboke vs NCBA Bank Kenya PLC & Another [2021] KECA 323 (KLR)*; *Anfakari Limited & 3 Others vs Fidelity Commercial Bank Ltd [2022] KECA 448 (KLR)*; and *Robinson Kuto & 3 Others vs Jackson Kariuki Kabungura & 5 Others [2018] eKLR*, all for the principle 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 would reasonably compensate the aggrieved party. They urged us to dismiss the applicants' Motion.
14. As this Court has pronounced itself time and again, for an applicant to merit stay orders pursuant to rule 5(2) (b) of the Court of Appeal Rules pending appeal, he or she must demonstrate to the satisfaction of the Court that he or she has an arguable appeal; and that the appeal (or intended appeal as the case may be), if successful, would be rendered nugatory absent stay. The two requirements constitute what is commonly referred to as the twin principles that must be satisfied before such orders can avail (see *Anne Wanjiku Kibeh vs Clement Kungu Waibara and IEBC [2020] eKLR*; and *Yellow Horse Inns Limited vs AA Kawir Transporters & 4 Others [2014] eKLR*).
15. A cursory look at the record as put to us clearly demonstrates the unprocedural manner in which the applicants sought to obtain leave to introduce evidential documents midstream long after close of their case, and in the midst of the defence hearing. Curiously, they make no attempt to secure an order to re-open their case. That is hardly the way trials are conducted in our judicial system. In our considered view, the grounds advanced for the intended appeal do not deserve the Court's inquiry. We do not find a single ground of appeal that would sufficient to satisfy the first limb of the twin principle as was contemplated in the case of *University of Nairobi vs. Ricatti Business of East Africa [2020] eKLR*. Simply put, the applicants have no arguable appeal.
16. Having so concluded, we hasten to observe that no useful purpose would be served by pronouncing ourselves on the second limb of the twin principle for grant of orders under rule 5(2) (b). Neither would it be necessary to examine the principles applicable for grant of orders staying proceedings in the trial court pending appeal or intended appeal.
17. Having carefully examined the impugned ruling, the applicant's Motion dated February 28, 2023, the grounds on which it is anchored, the affidavits in support and in reply thereto, the rival submissions of learned counsel for the parties, and the cited authorities, we form the view that the applicants' Motion fails and is hereby dismissed with costs to the 1st respondent.

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

D. K. MUSINGA, (P)



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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

NG'ENYE-MACHARIA

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JUDGE OF APPEAL

*I certify that this is a true copy of the original
signed*

DEPUTY REGISTRAR

