Njiru (Suing on behalf of Ikambi Clan and substituting the previous representative, the Late Njiru Kugariura) v District Commissioner Mbeere District & 3 others (Civil Application E086 of 2021) [2023] KECA 1053 (KLR) (24 August 2023) (Ruling)

Neutral citation: [2023] KECA 1053 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION E086 OF 2021

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

AUGUST 24, 2023

BETWEEN

HENRY NJUE NJIRU (SUING ON BEHALF OF IKAMBI CLAN AND SUBSTITUTING THE PREVIOUS REPRESENTATIVE, THE LATE NJIRU KUGARIURA) ..... APPLICANT

AND

DISTRICT COMMISSIONER MBEERE DISTRICT ..... 1ST RESPONDENT

MINISTER FOR LANDS ..... 2ND RESPONDENT

THE DIRECTOR, LAND ADJUDICATION AND SETTLEMENT .... 3RD RESPONDENT

ABIUD WILSON NJUE ..... 4TH RESPONDENT

(Being an application for stay/preservatory orders and leave to introduce additional evidence in respect of the judgment of the Environment and Land Court (Y.M Angima, J.) dated 27th July, 2020 in E.L.C. J.R NO. 5 OF 2019)

RULING

1. The background to this application is that on 11th November 1992 the Land Adjudication Officer, in setting apart 26 portions of land for various public utilities and purposes, awarded land Parcel No. 2244 jointly to the 17 clans of Mbeere tribe. The clans were dissatisfied by the failure to award each of them a specific portion, and filed two appeals, Land Appeals No. 146 of 1996 and 171 of 1996, to the Minister for Lands. The Ikambi clan specifically sought an allocation of 269 acres of the parcel. The Minister heard the appeals and made an award.

2. Subsequently, the deceased Njiru Kugariura, a representative of the Ikambi Clan, sought Judicial Review orders in a notice of motion dated 8th February 2000. He sought orders of certiorari to quash the decision of the Minister and to compel the respondents to award the 269 acres of Kiandangwa and 58 acres of Ikunja to the applicant; and an order of prohibition to stop the implementation of the awards by the Minister. Interim orders of stay were issued on 25th January 2008. Ultimately, the Judicial Review application was heard and on 27th July 2020 the Environment and Land Court (ELC) at Embu (Y.M. Angima, J.) delivered a judgment. It was found that the applicant had failed to demonstrate that the Minister had violated the rules of natural justice in the hearing and determination of the two appeals; and that the applicant was merely seeking an appeal against the decision of the Minister which the court had no jurisdiction to deal with.

3. Aggrieved by the impugned judgment, the applicant filed an appeal to this Court. The appeal is Civil Appeal No. 153 of 2020.

4. What is before us is an application by way of notice of motion dated 1st October 2021 brought under Rule 5(2)(b), Rule 29(1)(b) and Rules 41 and 42 of the *Court of Appeal Rules*, 2010 and Article 159 of *the Constitution*, seeking to stay the execution of the judgment delivered by the ELC Court; the stay of execution of the implementation of the award by the Minister in the two appeals; stay of execution of the decree on costs awarded by the ELC Court following their taxation at Kshs.148,163; preservatory orders and maintenance of *status quo* in respect of the subdivision of LR Mbeere/Kirima/2955; and an order for the applicant to be allowed to adduce and file additional evidence.

5. The motion was based on the grounds and the supporting affidavit sworn by Henry Njue Njiru who substituted the deceased as the representative of Ikambi Clan. He was apprehensive that, following the dismissal of the Judicial Review application and the vacation of the interim orders of stay, the respondents were going to proceed to implement the award by the Minister which would deplete or substantively alter the subject of the appeal to the detriment of the Clan. Secondly, following the dismissal of the Judicial Review application with costs, the Deputy Registrar had taxed the costs and a notice to show cause issued. He was seeking stay against the execution for costs. Thirdly, that he had since learnt that the 269 acres (now contained in LR Mbeere/Kirima/2955) had since been subdivided into 62 separate titles. He was seeking to be allowed to tender additional evidence regarding these new subdivisions so that this Court, following hearing of the appeal, will issue orders in respect of the new titles. His case was that the respondents will, if the application is allowed, be at liberty to file response regarding the new evidence, and therefore will not be prejudiced.

6. The 4th respondent, Abiud Wilson Njue filed a response to oppose the application, which he stated was lacking in merits and ought to be dismissed. Regarding stay of execution of the taxed costs, he stated that after the applicant had been approached to pay and had failed, a warrant of arrest had since been issued. In any case, he deponed, the Judicial Review application had been dismissed, and was therefore a negative order, which was not capable of execution. As for the quest for preservation orders and the maintenance of status quo, the 4th respondent deponed that the resultant titles in LR Mbeere/Kirima/2955 had been issued to various persons who had not been made parties to the appeal, and in respect of whom no orders would be issued without them being afforded a hearing. On the request by the applicant to be allowed to lead additional evidence, the 4th respondent swore that this would be a completely new claim not related to the claim that was before the ELC. Lastly, the 4th respondent deponed that he was a farmer with property whose value was higher than the costs in question, and therefore it could not be said that if execution for costs were to be allowed to proceed the applicant would not be refunded, if the appeal were to succeed.

7. Both the applicant's and the 4th respondents learned counsel filed written submissions on the application. Both counsel agreed that the applicant was required to demonstrate that he had an arguable appeal, and that unless stay was granted, his appeal, if successful, would be rendered nugatory. The applicant's learned counsel relied on the decision in *Republic v Kenya Anti-Corruption Commission & 2 Others* [2009]eKLR in which it was observed as follows:-

> " The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court, first, that the appeal, or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the results or the success could be rendered nugatory."

The applicant's counsel submitted that it had been demonstrated that if stay is not granted, and the order of the preservation of the subject matter not issued, the respondents will proceed to execute the judgment of the ELC and that the suit property will be at the risk of disposal and transfer, and therefore the appeal would be rendered nugatory."

8. On the question of being granted leave to adduce additional evidence, counsel cited the decision in *Mzee Wanje & 93 Others v A.K. Saikwa & 2 Others* [1982 – 88] IKAR 462 in which the Court expressed itself on the principles upon which an appellate court in a civil case will exercise its discretion in deciding whether or not to receive further evidence. Based on the principles, counsel submitted, the applicant had shown that the new titles were not available during the proceedings in the ELC, and that this additional evidence would enable this Court to issue orders that were capable of being effectively enforced.

9. Learned counsel for the 4th respondent submitted that, the Judicial Review application having been dismissed by the ELC, the applicant cannot seek to stay such an order. Reliance was placed on this Court's decision in Registered Trustee, Kenya Railways Staff Retirement *Benefits Settlement v Milimo, Muthoni & Co. Advocates*, Civil appeal (Application) No. E383 of 2021 [2022] KGA 491 (KLR) at Nairobi in which it was held that –

> " Negative orders cannot be stayed. We reiterate the sentiments of the Predecessor of this Court in its decision in *Western College of Arts and Applied Sciences v Oranga & Others* [1976-80) IKLR where the Court held that:-
>
> > "But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs
> >
> > ....."

Counsel further relied on *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah* [2008]eKLR and *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016]eKLR to emphasise that, in the instant matter, the ELC did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was a negative order incapable of execution save in respect of costs only, which would not ordinarily attract an order of stay.

10. On the question of issuing preservatory order and the maintenance of status quo, the 4th respondent's counsel submitted that such orders would be prejudicial to members of the Mururi Clan who were allocated the respective parcels following the subdivision of LR Mbeere/Kirima/2955, and who were not parties to the proceedings. Their right to a fair hearing under Article 50 of *the Constitution* and

their right to property under Article 40 of *the Constitution* would be compromised if the request were to be allowed without affording them a hearing, it was submitted.

11. Regarding the application to introduce additional evidence, learned counsel submitted that the said evidence did not relate to the claim that was before the ELC; that it was an entirely new claim. He submitted that the inclusion of the title documents would be against the rules of natural justice as it would prejudice the registered proprietors who would not be able to defend their titles in the appeal.

12. Lastly, it was submitted that the applicant had not provided security for costs that have now become due, and that the 4th respondent was a person of means capable of refunding the costs in the event that the appeal is successful.

13. We have anxiously considered the application, the grounds and supporting affidavit, the replying affidavit, the rival submissions, cited authorities and the law. We are alive to the jurisdiction of this Court under Rule 5(2)(b) of this Court's Rules. This Court has a discretionary power that is guided by the interests of justice in any given case. In the exercise of the discretion, the Court has to be satisfied that the appeal is arguable, and that if the orders sought are not granted, and the appeal succeeds, the same may be rendered nugatory. In *Trust Bank Limited & another v Investech Bank Limited & 3 Others* [2000]eKLR, this is what this Court stated:-

> " The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case."

14. On the first principle, regarding whether or not the appeal is arguable, it is enough for the applicant to demonstrate that the appeal has at least one arguable ground (See *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* [2013]eKLR). An arguable appeal does not mean an appeal that will necessarily succeed. It is an appeal which ought to be argued fully before the court; an appeal that is not frivolous. In determining whether the appeal has an arguable ground, the court should at this stage desist from making definitive or final findings of either fact or law, as such findings have to be left to the court that will ultimately hear the appeal.

15. We have carefully considered the grounds as set out in the notice of motion and in the memorandum of appeal. One of the grounds is that the ELC failed to consider the applicant's evidence in dismissing the Judicial Review application. On this alone, we find that the appeal is arguable.

16. The applicant sought the stay of execution of the impugned judgment but framed prayers 2 and 3 as being against the ruling dated 18th February 2021, which taxed the costs of the dismissed suit at Kshs.148,163. The ELC dismissed the applicant's suit with costs. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the ELC was in the nature of a negative order that was incapable of execution, save in respect of costs. On the basis of the authorities of this Court as cited by learned counsel for the 4th respondent, we are unable to grant stay.

17. The property subject of the appeal was parcel No. 2244 which was subsequently registered as LR No. Mbeere/Kirima/2955. What is sought to be preserved are the parcels resulting from the subdivision of the parcel. It was subdivided into 62 new titles which were each registered in the name of a different owner. The court orders for preservation or maintenance of *status quo* have therefore been overtaken

by events, and cannot be granted. We also do not want to expand the scope of the reliefs beyond the matters that were decided by the ELC (See *Republic v Anti Corruption Commission* (above).

18. On the final issue of admission of additional evidence, we consider that Rule 31(1)(b) of this Court's Rules provides that the Court has power, in its discretion and for sufficient reasons, to take additional evidence or direct that additional evidence be taken by the trial court. We are also aware that the power has to be used sparingly, and only where it is shown that the additional evidence could not have been obtained with reasonable diligence for use at the trial, and that it was of such weight that it was likely in the end to influence the court's decision. (*Mzee Wanje & 93 Others v A.K. Saikwa & 2 Others* (*supra*))

19. In Kenya, the Supreme Court in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* [2018]eKLR laid down the following principles for allowing additional evidence:

> "79. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:
>
> a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
>
> b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
>
> c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
>
> d. where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
>
> e. the evidence must be credible in the sense that it is capable of belief;
>
> f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
>
> g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
>
> h. where the additional evidence discloses a strong prima facie case of wilful deception of the Court;
>
> i. the Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
>
> j. a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
>
> k. the court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence,

on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other."

20. We have considered the facts of the application to be able to determine whether the applicant has met the threshold for allowing additional evidence. Of significance, we have considered whether the evidence was relevant to the matter before the Court; whether the applicant would reasonably have been aware of the evidence and could have procured it to be used during the trial before the superior court; whether the additional evidence is being sought to fill the gaps in the applicant's case; and whether, on proportional consideration, the additional evidence may unduly prejudice the respondents, or other parties not in the appeal and who might be affected by any decision in the matter.

21. What was before the ELC was not an appeal against the merits of the decision by the Minister for Lands regarding which party was entitled to the parcel in question. The notice of motion before the ELC was concerned with the process leading to the making of the decision by the Minister. The Judicial Review was concerned with whether the decision by the Minister was made with jurisdiction, was legal, was rational and was procedurally proper (See *Pastoli v Kabale District Local Government Council & Others* [2018] E.A300). Yes, the court had granted stay against the disposal of the subject matter. If the respondents went against the stay to subdivide the parcel and pass over the respective titles it was open to the applicant to complain to the Court that there had been contempt against its orders. But, when was the subdivision and issuance of fresh titles done? Was it in the course of the hearing of the motion before the ELC? If it was during the hearing, why did the applicant not seek to include the evidence in the motion? Our considered view on the matter is that the applicant is seeking to introduce evidence that may have been available, evidence that was not used in the trial, evidence that is not relevant for the purpose of hearing and determining the appeal, and evidence that would prejudice other parties not in the appeal. We consequently will not allow his request to adduce additional evidence.

22. The result is that the notice of motion by the applicant lacks merit. The same is dismissed with costs as against the 4th respondent.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF AUGUST 2023

J. MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar