Kiattu & another v Muhika & 2 others (Civil Application E054 of 2023) [2023] KECA 1031 (KLR) (4 August 2023) (Ruling)

Neutral citation: [2023] KECA 1031 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E054 OF 2023

DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA

AUGUST 4, 2023

BETWEEN

ROBERT MWANIA KIATTU ..... 1ST APPLICANT

LENAH MUTONGOI KIATTU ..... 2ND APPLICANT

AND

AGNES MUGURE KIGATHI ..... 1ST RESPONDENT

PETER NJENGA MUHIKA ..... 2ND RESPONDENT

THE LAND REGISTRAR ..... 3RD RESPONDENT

(Being an application for stay of execution of the Judgment and Decree of the Environment and Land Court at Nairobi (Oguttu, J.) delivered on 31st October, 2022 in ELC Civil Suit No. 410 of 2019)

RULING

1. Before this Court is a Notice of Motion application dated February 21, 2023 brought by the applicants under the provisions of section 3A and 3B of the *Appellate Jurisdiction Act* and rules 5 (2)(b), 31 (1) (b) and (2), 44 and 49 of the rules of this Court. The applicants seek, inter alia, orders restraining the respondents by themselves, their agents, employees and/or servants from occupying, taking possession, transferring or in any way interfering with all that property known as LR No. Nairobi/Block 112/180 Runda Mimosa, Nairobi, (the suit property) pending the hearing and determination of the intended appeal; orders to restrain the Land Registrar (3rd respondent herein) from cancelling the applicants' title over the suit property as per the Certificate of Lease issued on October 7, 1991 pending hearing and determination of the intended appeal. The applicants also crave for leave to adduce additional evidence.

2. The crux of the dispute between the parties herein revolves around the ownership of a parcel of land whose reference/title number has been described variously in different documents. For context

purposes, whereas the parcel of land in question is described as Nairobi/Block/180 in one document, it is described as Nairobi/Block 112/180 in several other documents. The germane question and which the trial court had to grapple with was whether the description referred to one and the same parcel of land, or whether these were two separate and distinct parcels of land altogether.

3. The background of this application is that on June 27, 1990, the applicants entered into a sale agreement with an entity known as Mimosa Plantations Ltd over a parcel of land described in the sale agreement as Nairobi/Block/180. A Certificate of Lease in the joint names of the applicants was subsequently issued on October 71991. The Certificate of Lease was in respect of Nairobi/Block 112/180, which according to the applicants was the property which they purchased from Mimosa Plantations Ltd.

4. The applicants contended that at all material times they were the lawful registered owners of Nairobi/Block 112/180 and had since the date of transfer been paying rates to the City Council of Nairobi. However, sometime in the month of March 2017, they visited the said parcel of land and discovered that a temporary gate and a wooden structure had been erected thereon. Maize had also been planted on the land. They proceeded to conduct an official search at the relevant land registry, which revealed that the suit property had been registered in the names of the 1st and 2nd respondents.

5. The applicants in their suit filed before the trial court, to wit, Nairobi ELC Civil Suit No 410 of 2019, sought a multiplicity of reliefs including a declaration that the applicants were the bonafide registered proprietors of LR No. Nairobi/Block 112/180 Runda Mimosa, Nairobi; a declaration that the Certificate of Lease issued on October 7, 1991 is the valid and genuine title to LR No. Nairobi/Block 112/180; a declaration that any Certificate of Lease issued to the 1st and 2nd respondents is null and void; an order for its cancellation; an order of eviction against the 1st and 2nd respondents; a permanent injunction to restrain the 1st and 2nd respondents, either by themselves or through persons claiming under them, from charging, selling, re-entering, taking possession, remaining thereon, erecting any building or structures on Nairobi/Block 112/180 or in any way interfering with the applicants' quiet possession and enjoyment of Nairobi/Block 112/180; mesne profits; and in the alternative Kshs 35,000,000/= being the current value of the land.

6. The 1st and 2nd respondents opposed the allegations by the applicants through their statement of defence and counterclaim. They contended that on January 24, 2007, they purchased Nairobi/Block 112/180 from one John Willie Kariuki Kanyi, who was the registered owner thereof. The property was thereafter registered in their names and that they had been in occupation and possession thereof from the date of registration.

7. They, just like the applicants, sought a multiplicity of orders in the counterclaim which included a declaration that they were the bonafide purchasers for valuable consideration and the lawful registered proprietors of Nairobi/Block 112/180 Runda Mimosa, Nairobi; a declaration that the Certificate of Lease issued on October 7, 1991 in favour of the applicants in respect of Nairobi/Block 112/180 is invalid, unlawful, null and void; an order directing the Land Registrar to cancel the said title forthwith; a permanent injunction restraining the applicants from entering, taking possession, claiming and/or interfering with their quiet possession and enjoyment of Nairobi/Block 112/180; in the alternative, an order for their compensation for a total sum of Kshs.45,820,015; general damages; and costs of the suit.

8. After a full trial, the court delivered its decision on October 31, 2022. The court held that the property purchased by the applicants vide the sale agreement dated June 27, 1990 (Nairobi/Block/180) was different from the property the applicants were claiming through their pleadings (LR No Nairobi/Block 112/180). The court noted that the applicants had not produced any addendum or corrigendum to show that the description of the property which was being sold to the applicants was ever adjusted

and/or varied. According to the learned judge, the sale agreement in respect of Nairobi/Block/180 could not confer or bestow any proprietary interests to the applicants with respect to LR No Nairobi/ Block 112/180.

9. On the question of who the lawful registered owner of L R No Nairobi/Block 112/180 was, the court held that John Willie Kariuki Kanyi who sold the property in question to the 1st and 2nd respondents held a valid title thereto. He therefore had capacity to sell and dispose of the said parcel of land. The trial court was convinced that the 1st and 2nd respondents acquired lawful and valid rights in respect of LR No Nairobi/Block 112/180 by virtue of being bonafide purchasers for value, which rights deserved protection under the law.

10. The trial court proceeded to dismiss the applicants' claim over LR No Nairobi/Block 112/180 and held that the 1st and 2nd respondents had on the other hand proved their counterclaim to the required standard and granted them the orders they had sought.

11. Being aggrieved by that decision, the applicants intend to lodge an appeal before this Court. In the draft memorandum of appeal annexed to the affidavit sworn in support of the application by the 1st applicant, the applicants state, inter alia, that the learned judge erred in law and in fact by finding that they were not the lawful proprietors of LR No. Nairobi/Block 112/180 Runda Mimosa, Nairobi; finding that the property LR No Nairobi/Block 112/180 Runda Mimosa, Nairobi is different and distinct from the property known as Nairobi/Block/180 Runda Mimosa, Nairobi as cited in the sale agreement dated June 27, 1990; finding that the Certificate of Lease issued to the applicants on October 7, 1991 was not proof of the applicants' proprietary rights over LR No Nairobi/ Block 112/180; and failing to appreciate that the sale agreement dated June 27, 1990 and the Certificate of Lease issued on October 7, 1991 both refer to one and the same property, LR No Nairobi/Block 112/180 Runda Mimosa, Nairobi.

12. The applicants urged this Court to find that their intended appeal is arguable and that it raises weighty and substantive issues of law.

13. On the nugatory aspect, the applicants contend that the 1st and 2nd respondents have already extracted a decree arising from the judgment and are in the process of taking possession of the parcel of land in question. They are apprehensive that the 1st and 2nd respondent shall interfere with the suit land or sell it before the conclusion of the intended appeal, which will occasion them irreparable injury. It is further contended that the 3rd respondent might proceed to cancel the applicants' title over the suit land as directed by the trial court. Therefore, in the event the orders sought are not granted, the applicants' intended appeal, if successful, will be rendered nugatory, they argued.

14. With regard to the prayer for leave to adduce additional evidence, the applicants state that they intend to produce the Green Card search from the land registry, together with the original lease issued on August 1, 1990 to demonstrate the historical ownership of Nairobi/Block 112/180, which will demonstrate the movement of ownership from Mimosa Plantations Limited to the applicants. They contend that the additional evidence is not intended to fill any gaps of their case before the trial court but that it is necessary so that the Court can be fully apprised of the background and context of the matter to ensure a just and fair determination thereof. They further contended that the 1st and 2nd respondents will not be prejudiced by the inclusion of the additional evidence.

15. The application is opposed by the 1st and 2nd respondents through a replying affidavit sworn by the 1st respondent. He stated that the applicants do not have an arguable appeal as their title and that of the 1st and 2nd respondents are entirely different. It is averred that the applicants through their pleadings filed before the trial court were laying claim on LR No. Nairobi/Block 112/180, whereas they had

entered into an agreement for the sale and purchase of Nairobi/Block/180. According to the 1st and 2nd respondents, the applicants did not make any amendments to their pleadings and there is nothing to show that LR No Nairobi/Block 112/180 and Nairobi/Block/180 refer to one and the same property.

16. On nugatory aspect, it is contended that the applicants' title is non-existent in the records of the 3rd respondent and therefore there is no title and/or interest available for cancellation as alleged in the application; that the applicants have never been in occupation or possession of LR No. Nairobi/Block 112/180 since the year 1991; that there is no evidence produced to support the applicants' claim that the 1st and 2nd respondents intend to transfer the suit property which they have had in possession for a period of over 15 years. In the circumstances, the 1st and 2nd respondents contend that the intended appeal will not be rendered nugatory if the orders sought are not granted.

17. With regard to the prayer for leave to adduce additional evidence, the respondents contend that the evidence sought to be produced was always available and could have been adduced before the trial court had the applicants been diligent enough; that the applicants are trying to fill in gaps in their case; and that if leave is granted as sought, the same would occasion great prejudice to them.

18. At the hearing of this application, learned counsel Mr Dachi appeared for the applicants, while learned counsel Mr S K Kivuva held brief for Mr Kang'ethe for the 1st and 2nd respondents. There was no appearance for the 3rd respondent. Both counsel relied heavily on their respective written submissions that cover the issues as summarised herein above. We shall therefore not rehash their oral arguments.

19. The principles that guide this Court in determination of an application under rule 5 (2)(b) of this Court's Rules are well settled and have been set out in a plethora of the Court's decisions. They have been well summarised in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR. The twin test is that an applicant must demonstrate that the appeal or intended appeal is arguable; and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory.

20. We have considered the application, the written and oral submissions by all the parties. In determining whether the intended appeal is arguable or not, we are cognizant of the fact that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. See *Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others*, Civil Application No. 124 of 2008. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See *Damji Pragji Mandavia vs Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.

21. The applicant argues, inter alia, that the learned judge erred by finding that the property known as LR No Nairobi/Block 112/180 Runda Mimosa, Nairobi is different and distinct from the property known as Nairobi/Block/180. Indeed, this was one of the grounds upon which the learned judge held that the applicants were not the legal registered owners of the property in question. The question as to whether LR No Nairobi/Block 112/180 and Nairobi/Block/180 is one and the same property or are two distinct properties, in our view, constitutes an arguable issue. In the circumstances, we are satisfied that the applicants have demonstrated that their intended appeal is arguable. We need not say much on arguability at this stage, lest we embarrass the bench that shall eventually hear the appeal.

22. Turning to the nugatory aspect, the applicants contend that the 1st and 2nd respondents might interfere with the suit land or sell it before the conclusion of the intended appeal, which will occasion them

irreparable harm and render the intended appeal nugatory. In Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others (*supra*) this Court stated that:

> " ix) The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
>
> x) 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 will reasonably compensate the party aggrieved."

23. We agree with the arguments advanced by the applicants that in the absence of orders of stay of execution, the 1st and 2nd respondents are likely to interfere with the suit property and could even dispose of it by way of sale. However, if this were to take place, and in the event the intended appeal is successful, we are of the view that the applicants can recover the purchase price of the suit land and could as well be reasonably and sufficiently compensated by way of damages. We are therefore not satisfied that if we decline to grant the orders of stay of execution the intended appeal will be rendered nugatory.

24. Turning to the prayer for leave to adduce additional evidence, the same is brought pursuant to the provisions of rule 32 (1)(b) of the Court of Appeal Rules in which it is provided that:

> "(1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power-
>
> a. ...; and
>
> b. in its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court."

25. It follows, therefore, that additional evidence can only be introduced on appeal at the discretion of the Court and "for sufficient reason." This Court in *Dorothy Nelima Wafula vs. Hellen Nekesa Nielsen & Paul Fredrick Nelson* [2017] eKLR observed as follows as to what constitutes "sufficient reason":

> " Though what constitutes "Sufficient reason" is not explained in the rule, through Judicial practice, the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a party seeking to present additional evidence on appeal ... Before this Court can permit additional evidence under rule 29 (now rule 31), it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing, two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not incontrovertible." [Emphasis added]

26. The applicants did not demonstrate to us the reasonable steps or efforts they took to produce before the trial court a copy of the Green Card or the original lease issued to Mimosa Plantations Ltd on August 1, 1990. Their allegations that they had unsuccessfully made efforts to acquire the same from the land registry in the absence of documentation to that effect remains just that, mere allegations. The only reasonable conclusion we can make in the circumstances is that had the applicants been diligent enough, they could have acquired the said documents for production before the trial court. The applicants, by including this prayer in the application intend to fill in gaps in their case; they want to have a second bite at the cherry. We certainly cannot countenance their attempts. In any case, and

without appearing to pre-empt the finding of the bench that shall eventually hear the intended appeal, the evidence as adduced before the trial court could not, in our view, have inhibited that court or indeed this Court on appeal from returning a finding on merit, one way or the other.

Accordingly, we are not satisfied that the applicants ought to be granted leave to adduce additional evidence.

27. In the upshot, as the applicants have only been able to satisfy one limb of the two limbs required in applications brought under rule 5 (2)(b) of the Rules of this Court, and since the requirement is that both limbs be satisfied, the application fails. The application for leave to adduce additional evidence is unmerited. Consequently, the applicants' Notice of Motion dated February 21, 2023 is without merit and is hereby dismissed with costs to the 1st and 2nd respondents.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY AUGUST, 2023.

D. K. MUSINGA, (P.)

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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