



Mutiso & 3 others v Wangulu Enterprises Limited & 3 others (Civil Application E025 of 2021) [2023] KECA 1060 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KECA 1060 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E025 OF 2021
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
SEPTEMBER 22, 2023**

BETWEEN

**THADDEUS KIMINZA MUTISO 1ST APPLICANT
JANE NJERI MUTISO 2ND APPLICANT
MWICIGI KANIU 3RD APPLICANT
JANE GATHONI MWICIGI 4TH APPLICANT**

AND

**WANGULU ENTERPRISES LIMITED 1ST RESPONDENT
ABDALLA SAID KUGOTWA 2ND RESPONDENT
DISTRICT LAND REGISTRAR KWALE 3RD RESPONDENT
HON.ATTORNEY GENERAL 4TH RESPONDENT**

(Being an Application for stay of execution of the judgment dated 21st July, 2020 pending the hearing and determination of the Intended Appeal from the Judgment and Decree of the High Court of Kenya at Mombasa rendered by the Hon. Justice C.K Yano dated 21st day of July 2020 in ELC Case No. 345 of 2009)

RULING

1. The applicants, Thaddeus Kiminza Mutiso, Jane Njeri Mutiso, Mwicigi Kaniu and Jane Gathoni Mwicigi are seeking to have a temporary stay of execution of the whole of the judgement of the Environment and Land Court [ELC] (C Yano, J) delivered on 21st July 2020, pending hearing and determination of the intended appeal. They also seek any other orders the Court may deem just and finally, costs of the application. The Notice of Motion is dated 31st March 2021, brought pursuant to Rule 5(2) (b) of the [Court of Appeal Rules](#), herein after the Rules. The grounds for the application are



that the applicants have filed an appeal that raises triable issues touching on their dissatisfaction with the decision that they are not innocent purchasers for value. It was pointed out that in the absence of a declaration that the 1st respondent is the owner of the suit property, then the 1st respondent cannot arrogate ownership rights to itself. It was revealed that the 1st respondent has advertised the suit property and intends to dispose of the same.

2. The background to the application stems from a dispute over ownership of all that parcel of land known as title No Galu/Kinondo/1. The 1st Respondent as owner of the suit property instituted proceedings before the ELC Case No 345 of 2009 against the 1st to 4th Applicants and 3rd to 4th Respondents. It was aggrieved by what it termed as the fraudulent cancellation of its name from the register and the issuance of title to the 2nd respondent; that the transfer of the suit land to the 2nd respondent was fraudulent. The 2nd respondent on its part stated that the 1st respondent fraudulently obtained title to the suit property, without the permission of the original owners Hamisi Athman Mwatsengeza, Hamad Alfán Tsumo, Alfán Omar Kugotwa and Kasim Salim Mwamtaji. He maintained that he was an heir to the original owners and never entered into a transaction in respect of the suit property. He revealed that there were previous proceedings touching on the suit property, being Nairobi 2224 of 1983. By way of counterclaim, the 2nd respondent sought that he be declared as owner of the suit property and that the 1st respondent illegally obtained the same.
3. The applicants in their defence maintained that they purchased the suit property for valuable consideration from the 2nd respondent and that a transfer was registered in their names, whereupon they were issued with title deed.
4. The court in the impugned judgment was convinced that the suit land was in the names of the original deceased owners; that the 2nd respondent did not take out letters of administration hence he lacks the locus standi to institute the counterclaim. The court found that the suit property was registered in the names of the 1st respondent and therefore it was not available to the 2nd respondent; that the suit land did not form part of the estate of the deceased. It was found that the 2nd respondent failed to demonstrate how he acquired title in his name; that the registration of title in his names was fraudulent and that he did not acquire a genuine title to the suit property. It was refuted that the applicants were innocent purchasers for value; that because the 2nd respondent acquired his title fraudulently, he had no title to pass to the applicants. The ELC concluded that the 1st respondent proved fraud against the applicants and the 2nd respondent. Judgment was entered in the following terms;
 - a. “That the title of the 2nd respondent, Abdalla Said Kugotwa, to the land known as title No Galu/Kinondo/1 was improperly procured and the same is hereby cancelled.
 - b. That having no title, Abdalla Said Kugotwa could not properly have sold and transferred land parcel known as Title No Galu/Kinondo/1, and the registration of Thaddeus Kiminza Mutiso, Jane Njeri Mutiso, Mwicigi Kaniu and Jane Gathoni Mwicigi, the applicants as proprietors thereof is hereby cancelled.
 - c. That the register of the land parcel known as Title No Galu/Kinondo/1 be rectified so as to remove the entries in favour of the applicants, and the title to revert back to the proprietorship of Wangulu Enterprises Limited.
 - d. The applicants shall jointly and severally pay the plaintiff damages assessed at Kshs1,000,000/- together with interest from the date of this judgment.
 - e. A mandatory injunction is hereby issued compelling the applicants by themselves, their employees, servants and/or agents and all persons claiming any title interest through any of



them to deliver vacant possession of land known as Title No Galu/Kinondo/1 to the 2nd respondent within 60 days of the date of delivery of this judgment and at their cost to remove and/or otherwise demolish any developments, buildings, and/or fittings put up thereon and to carry away any debris resulting from such demolition and/or removal, in default, the 1st respondent shall be at liberty to remove and/or demolish any such developments, buildings and/or fittings at the applicants' cost.

- f. The 2nd respondent's counter-claim is dismissed with costs to the plaintiff.
- g. Costs of the suit together with interest thereon are awarded to the 1st respondent against the applicants jointly and severally."
1. The Applicants were dissatisfied with the impugned decision and filed a notice of appeal dated July 27, 2020. The memorandum of appeal faults the learned ELC Judge for finding fraud on the part of the applicants; for failing to find that they are innocent purchasers for value; for failing to find fraud on the part of the 1st respondent and for awarding general damages to the 1st respondent. It was sought that the impugned decision be set aside.
 2. The application is opposed by the replying affidavit sworn by the 1st respondent's director dated February 6, 2023. He complained that the application was filed 8 months after the judgement of the ELC court; that the application was served 1 year and 8 months after filing; that the inordinate delay in filing and service of the application is unexplained. It was revealed that the 1st respondent is in physical possession of the suit property; that in June 2021 the applicants' names were canceled from the land register and the 1st respondent's name put in their stead. He deposed that the decree of the court has substantially been executed; that there has been a mutation registered on the suit property, thereby changing its nature and character, and therefore there is nothing to stay. He urged that it was a priori, that the intended appeal is overtaken by events. On the issue of general damages, he deposed the 1st respondent had financial muscle to refund.
 3. Counsel to Abdalla Said Kugotwa, the 2nd respondent, Mr. Yusuf Abubakar, filed an affidavit on behalf of his client dated February 24, 2023. In that affidavit, the counsel deposes that after he was explained to the judgment of the ELC herein, the 2nd respondent directed him to file an appeal. He deposed that his client is therefore in support of the application.
 4. The application was heard on March 28, 2023. Present at the virtual hearing was learned counsel, Ms. Amutari for the applicants and Ms. Ngige for the 1st respondent. There was no appearance for Mr. Aboubakar for the 2nd respondent and Mr. Mwandaje for the 3rd and 4th respondent despite service with the hearing notice.
 5. Ms. Amutari relied on the written submissions dated December 7, 2022 which she highlighted. Counsel urged that in 7 days of the date of the hearing of this application, the applicants would serve their appeal. Counsel urged that the dispute in the case was over the suit property which had two titles, and that the ELC did not address that issue. That the 1st respondent has assumed the position of owner which may lead to the applicants' title being cancelled. She urged that the applicants had sentimental value over the suit property, which cannot adequately be compensated.



10. Ms. Ngigi for the 1st Respondent relied on their submissions dated February 6, 2023. Counsel challenged the validity of the appeal, urging that the notice of appeal was filed 8 months after the date of the judgment. Counsel submitted that the nugatory test was not met because the land register was rectified, the applicant's names cancelled, and the ownership of the suit property reverted back to the 2nd Respondent. Cited was the case of *Coastland Properties Ltd v Vipinkumar Nathalala Shah & 2 Others* [2021] eKLR for the proposition that the order sought if granted will be in vain as the appeal has been overtaken by events. She urged the appeal was not arguable as the owners of the suit land were deceased, which the applicants would have known if they exercised due diligence and examined the register. That as the 2nd respondent had no letters of administration there was doubt whether the applicants were innocent purchasers for value; that there was therefore nothing to argue in the intended appeal. Cited was the case of *Tarbana Company Limited v Harcharan Singh Sehmi & 7 Others* [2020] eKLR.

11. We have considered the Motion, the affidavits both in support of and in opposition thereto and the submissions made both in writing and orally before us. The principles that guide consideration of an application of this nature are old hat. It is true that the filing of a Notice of Appeal is a pre-requisite to the grant of stay under Rule 5(2) (b) of the *Court of Appeal Rules*, and was confirmed by this Court in *Halai & Another v Thornton & Turpin* [1963] Ltd [1990] KLR 365. The Applicant has exhibited such notice of appeal against the judgment delivered on July 21, 2020 as annexure 'TDM-1', filed on July 30, 2020, which is within the prescribed period under Rule 77 of the 2022 *Rules*. However, at this point the Court is not dealing with an application to strike out the notice of Appeal. This was the position in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR where this Court expressed itself as hereunder:

"The applicant filed its notice of appeal against the said decision on 26th May, 2005; the Court accordingly has jurisdiction to hear and determine the motion for stay. Mr. Ohagga, learned counsel for the respondents Aquinas Francis Wasike (1st respondent) and Lantech Ltd. (2nd respondent) tried to argue before us that the notice of appeal filed by the applicant is invalid and that, therefore, the Court cannot grant the order of stay prayed for. We, however, take note of the fact that no application has been made by the respondents for the striking out of the notice of appeal and as the Court has repeatedly pointed out Rule 5 (2) (b) does not provide that "

where a valid notice of appeal;" the Rule simply provides that:-

'In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74'

Rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of Rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under Rule 5(2) (b) is being considered."

12. In *Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd*, Civil Appl No Nai 93/02 (UR), sets the applicable principles that guide the determination of an application of stay, or injunction thus: -

"Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-



1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”
13. The applicants have, in their written and oral submissions urged that the ELC in its judgment of July 21, 2020 did not resolve the issue of ownership of the suit property. It has also been argued in the submissions of the 1st respondent that after finding the 2nd respondent had no title to pass to the applicants, and that the purported sale to them was fraudulent, the effect of the judgment reverted the title to the suit property to the 2nd respondent. We are aware that the applicant need not prove a multiplicity of arguable points. This Court in this regard held as follows in *Somak Travels Ltd v Gladys Aganyo* [2016] eKLR:
- “It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this Court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”
14. The appeal is not frivolous. It is arguable.
15. As to whether appeal may be rendered nugatory if the order sought is not granted and the appeal ultimately succeeds. we are guided by the decision in *Stanley Kangethe Kinyanjui v Tonny Keter & Others* [2013] eKLR where the court summarized what should guide the court as follows:
- xii. The term ‘nugatory’ has to be given its full meaning. It does only mean worthless, futile or invalid. It also means trifling.
 - xiii. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.
 - ix. Where it is alleged by the applicant that the appeal will be rendered nugatory on account of the respondent’s impecuniosity, the onus shifts to the latter to rebut by evidence the claim.”
16. The 1st respondent’s argument is that there is nothing to stay as the decree has substantially been executed and the entries in the land register rectified and the 1st respondent taken possession of the suit property. The applicants sought, stay of execution, which can be made on terms. Rule 5(2) (b) of the *Rules* empowers this Court to make any order for the preservation of the substratum of the appeal. We are persuaded that if the property is not preserved the substratum of the appeal will disappear, and the intended appeal will be rendered nugatory. In our view, there is need to preserve it from being disposed before the appeal is heard and finalized.
17. The order that commends itself to us is as follows:
- i. That the *status quo* pertaining as of the date of this ruling be preserved until the Intended Appeal is heard and determined;



ii. Costs will await the outcome of the appeal.

Dated and delivered in Mombasa this 22nd Day of September, 2023.

S. GATEMBU KAIRU, (FCIArb.)

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

