



**Nairobi Aviation College v Ababu & 3 others (Civil Application
E430 of 2022) [2023] KECA 1140 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1140 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E430 OF 2022
HM OKWENGU, MA WARSAME & JM MATIVO, JJA
SEPTEMBER 22, 2023**

BETWEEN

NAIROBI AVIATION COLLEGE APPLICANT

AND

LILIAN M'MBONE ABABU 1ST RESPONDENT

MIKE OYOO WAGUNDA 2ND RESPONDENT

COOPERATIVE BANK OF KENYA 3RD RESPONDENT

COMMISSIONER FOR LANDS 4TH RESPONDENT

(Being an application under section 3A and 3B of the Appellate Jurisdiction Act Rule 1(2) and 5(2)(b) of the Court of Appeal Rules 2010, and all other enabling provisions of the law)

RULING

1. The parties before us have been embroiled in litigation in the Environment and Land Court (ELC). Lilian M'Mbone Ababu (1st respondent) is the plaintiff in the ELC, whilst Nairobi Aviation College the applicant before us, is the 1st defendant. The 2nd, 3rd, and 4th respondents before us are also the 2nd, 3rd, and 4th defendants in the ELC.
2. On May 23, 2022, the hearing in the ELC proceeded with the 1st respondent closing her case after calling two witnesses. The 2nd respondent's advocate indicated that he had no witnesses before the court, and the court therefore directed that the 2nd respondent's case be closed without calling any evidence. The applicant and the 3rd respondent were absent, and the court similarly declared their case closed. The court then ordered the 1st respondent to file and serve written submissions within 14 days and the applicant and other respondents to also file and serve written submissions.



3. On June 28, 2022, the parties appeared before the trial Judge and the applicant's advocate indicated that it had filed a motion dated May 25, 2022, seeking to reopen the case so that it is allowed to call witnesses. The court directed that the application be disposed of by way of written submissions which the parties were at liberty to file.
4. On July 28, 2022 the court having received written submissions, reserved the matter for ruling. Subsequently, the learned judge delivered a ruling on October 3, 2022 in which he dismissed the applicant's motion dated May 25, 2022.
5. The applicant who is dissatisfied with that Ruling, has filed a notice of appeal dated October 7, 2022, and the motion now before us, seeking to stay proceedings in the ELC, and to have the 1st respondent's case reopened for cross-examination by the applicant,
and also for the applicant to be allowed to testify and to tender evidence.
6. The applicant contends that the learned Judge erred in failing to appreciate the rules of natural justice that demand that no litigant should be condemned unheard, and the right to a fair hearing under Article 50(1) of the Constitution. The applicant is apprehensive that if its application is not heard urgently and the prayers for stay of proceedings granted, the suit in the ELC will be determined and its intended appeal will be rendered nugatory; and this will be prejudicial to it, as the court will pronounce itself on the matter without its testimony or evidence.
7. The application is supported by an affidavit sworn by the applicant's lawyer, Brian Otieno, in which he depones that the intended appeal raises serious questions of law, and has high chances of success. He faults the learned Judge for failing to appreciate that the substratum of the suit is ownership of land which is an emotive issue, and that it is necessary to hear all the parties in order to reach a fair decision.
8. The applicant has also filed written submissions in which it urges that the learned Judge erred in failing to appreciate the provision of Article 159 of the Constitution in regard to substantive justice, and closed the applicant's case due to the applicant's inadvertent non-attendance; that counsel for the applicant mistakenly believed that the hearing of the suit would proceed virtually at 11.15 a.m. and that he rushed to court at 12.00 p.m. only to find that the hearing had proceeded with the 1st respondent's witness being heard, and the applicant's case having been closed for non-attendance.
9. The applicant argued that the court went against section 146(4) of the Evidence Act, and Order 18 rule 10 of the Civil Procedure Rules that empowers the court to recall a witness at any stage; that the learned Judge erred in failing to consider the importance of cross-examination of witnesses; and that the court failed to consider the substratum of the suit which is ownership of land, an emotive issue that directly touches on the constitutional right to own property. The applicant further faulted the court for failing to pronounce itself on its counterclaim, which is a separate suit distinct from the plaint.
10. In addition, the applicant relied on *Reliance Bank Limited v Norlake Investments Limited* [2002] 1 EA 227, regarding the intended appeal being rendered nugatory. It urged that grant of stay of proceedings is a discretionary power where the court needs to be satisfied that the appeal is not frivolous. The applicant submitted that if the ELC proceeds to determine the suit, it will have been denied its sacrosanct right to be heard. It therefore urged the court to grant the orders sought.
11. In response to the motion, Godfrey Makuyu Otenyo the 1st respondent's advocate, has sworn a replying affidavit in which he deposes that the 1st respondent's suit and the applicant's counterclaim were directed to be heard together, and that the applicant blew its opportunity to present its counterclaim when it failed to attend court for hearing; that all the parties were given an opportunity to be heard, but the applicant did not take advantage of the opportunity; that the suit in the ELC was filed about



- 10 years ago and the court cannot ignore other principles in Article 159(2) of the Constitution, that requires the suit to be disposed of without unreasonable delay; that the actual possession of the suit land is in the hands of the applicant; and the applicant will therefore not suffer any prejudice as the suit land is not in danger of being wasted.
12. The 1st respondent also filed written submissions in which she pointed out that apart from the principle in Rule 159(2)(d) of the Constitution that requires justice to be administered without due regard to procedural technicalities, the court has the responsibility of applying Article 159(2)(a)(b)(c) & (e) that requires justice to be done to all irrespective of status, justice not to be delayed, and the purpose and principles of the Constitution to be protected; and that the applicant was actually given an opportunity to be heard.
 13. Relying on David Morton Silverstein vs Atsango Chesoni [2002] eKLR, the 1st respondent urged that the applicant had failed to demonstrate that its intended appeal is arguable or that the same shall be rendered nugatory if the ELC proceeds to deliver its judgment.
 14. None of the other parties filed any submissions, nor were they present at the hearing of the motion. Learned counsel Mr. Mango who was present for the applicant, highlighted and reiterated the submissions that had been filed for the applicant. Mr. Otenyo also appeared for the 1st respondent and similarly reiterated the submissions filed for the 1st respondent.
 15. We have carefully considered the applicant's motion, the affidavit in support and in reply, as well as the contending submissions. The application being one for stay of proceedings under Rule 5(2)(b) of the Court of Appeal Rules, the principles upon which such an application can be considered are clear. An applicant must satisfy the Court that he/she has an arguable appeal, and that if the orders sought are not granted, the intended appeal will be rendered nugatory. (See Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR); Katangi Developers Limited v Prafula Enterprises Limited & another [2018] eKLR).
 16. The applicant seeks to stay proceedings to enable it appeal against the order of the court rejecting its application to re-open the 1st respondent's case, and also to allow the applicant to cross-examine the witnesses that were called by the 1st respondent. In the ruling subject of the intended appeal, the trial Judge in the ELC declined to exercise his discretion in favour of the applicant, finding that the conduct and behavior that was exhibited and displayed by the applicant and its advocate, showed that there was a clear and calculated effort to delay, obstruct, or otherwise defeat the due process of the court and, therefore, dismissed the applicant's motion.
 17. The first question we wish to consider is whether the applicant has an arguable appeal. The appeal relates to the exercise of discretion by the trial Judge. The applicant has raised an issue regarding the exercise of the court's discretion in declining to have the witnesses recalled. It cannot be said that this issue is frivolous. As was stated in Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 others [2014] eKLR one arguable issue is sufficient to demonstrate that an appeal is arguable. we are therefore satisfied that the applicant has an arguable appeal.
 18. The second issue is whether absent the order of stay of proceedings, the applicant's appeal will be rendered nugatory. In Reliance Bank Limited v Norlake Investments Limited (supra), this Court explained what is nugatory as follows:

“...what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile, or invalid. It also means trifling.”



19. In the circumstances before us, the applicant is apprehensive that if the ELC proceeds to determine the matter before it, the intended appeal will have been rendered worthless. In considering whether the applicant’s appeal will be rendered worthless, we find the position taken in the case of David Morton Silverstein vs Atsango Chesoni (*supra*) to be in point.

“What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined, and if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary but an appropriate order for costs can be made to remedy that. However, the appeal in this court would not have been rendered nugatory.”

20. Applying the above to the circumstances before us, should the applicant succeed in its appeal, the matter will be remitted back to the ELC for the witnesses to be cross-examined. It is the proceedings in the ELC after the impugned ruling of the trial Judge that would be rendered otiose, and not the appeal which would really have succeeded in its mission. We find that the applicant has not satisfied the court that its intended appeal will be rendered nugatory.

21. In order to succeed, the applicant has to prove both limbs of arguability and the nugatory aspect of its intended appeal. As the applicant has failed to meet the requirement in regard to the nugatory aspect, its application must fail. It is accordingly dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

