Physical Planning Officer Kericho County & 4 others v Langat (Civil Application E069 of 2022) [2023] KECA 1151 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KECA 1151 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E069 OF 2022

F SICHALE, FA OCHIENG & WK KORIR, JJA

SEPTEMBER 22, 2023

BETWEEN

PHYSICAL PLANNING OFFICER KERICHO COUNTY ..... 1ST APPLICANT

DISTRICT SURVEYOR, KERICHO COUNTY ..... 2ND APPLICANT

DISTRICT LANDS OFFICER, KERICHO COUNTY ..... 3RD APPLICANT

DIRECTOR, PHYSICAL PLANNING ..... 4TH APPLICANT

DIRECTOR OF SURVEY ..... 5TH APPLICANT

AND

DAVE KIPKORIR LANGAT ..... RESPONDENT

(Being an application for stay of further proceedings pending the hearing and determination of the intended appeal against the Ruling of the Environment and Land Court at Kericho, (M.C. Oundo, J.) dated 2nd December, 2021 in ELC Petition No. 1 of 2013)

RULING

1. Before us is an application dated 24th October, 2021 in which the applicants pray for an order of stay of execution and stay of further proceedings in of the ruling of the Environment and Land Court (M. C. Oundo, J.) pending the hearing and determination of this application and the intended appeal.

2. The application is brought under Rule 5(2)(b) of the *Court of Appeal Rules*. The application is based on the grounds that: the respondent filed an application for contempt before the ELC. He cited the applicants for contempt of the judgment delivered on 5th May, 2015. In a ruling dated 2nd December, 2021 the applicants were held in contempt of court. Their sentence was scheduled for 2nd November, 2022 and they were apprehensive that they would be sentenced to a term in prison in violation of their constitutional right to liberty. They contend that the parcel of land subdivided to Talai Community

did not include the land contested by the respondent. They are of the view that the findings of the court were impractical and they had been overtaken by events. They contend that they have an arguable appeal with high chances of success, and the said appeal will be rendered nugatory if the proceedings in the ELC are allowed to proceed and they are either committed to jail or fined. The applicants are apprehensive that if the proceedings are not stayed, their property may be attached and sold to satisfy the payment of fine or they may be sentenced to a term in prison, which cannot be compensated by damages if the appeal succeeds. The applicants aver that they are public servants and imprisonment or any other adverse orders would affect the performance of their public duties and disenfranchise the public. They were of the view that the respondent will not be prejudiced in any way if the orders sought are granted.

3. The application is further supported by the affidavit of Timothy Mwangi, the Deputy Director of Physical Planning on behalf of the applicants. He reiterated the grounds on the face of the application save that the suit property was surveyed as L.R No. 631/1191 and authenticated by the director of survey in 1988. The existing survey plans, FR 190/106 affected by PDP No. R22/2011/01 were not cancelled.

4. In his replying affidavit, the respondent contended that it was not the place of Timothy Mwangi to depone to matters relating to stay of execution of contempt due to the quasi-criminal and personal nature of the proceedings. The respondent pointed out that a similar application had been dismissed by the ELC on 28th July, 2022 and no appeal had been preferred. He stated that the applicants having been found in contempt need to purge the contempt and they have made no effort to do so. He contends that a draft memorandum of appeal was not annexed to the application and therefore it is not clear whether the applicants have an arguable appeal or not. To his mind the intended appeal is frivolous as the applicants are contesting the ruling which found them in contempt yet they have not shown any evidence that they attempted to comply with the judgment of the court. Further, that the applicants have not informed the court about the difficulties or the challenges they faced in implementing the court order.

5. The respondent further stated that the applicants had not demonstrated how the intended appeal will be rendered nugatory if they are sentenced to jail. He maintained that damages will be an adequate remedy if the intended appeal succeeds. That the applicants will suffer no prejudice or hardship.

6. At the hearing, Mr. Eredi, learned counsel appeared for the applicants while Mr.Arusei, learned counsel appeared for the respondent. Counsel relied on their respective written submissions which they briefly highlighted.

7. The applicants maintained that the appeal was arguable. The court ordered the applicants to cancel some titles. The suit property was 2284/4 PDP, the same has not been cancelled. The property is different from 2220/11/2 PDP. There was evidence that the PDP is different. The applicants are unable to implement the judgment, and if they are sentenced before the appeal is heard, the appeal will be rendered nugatory.

8. Relying on the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR, the applicants submitted that they did not willfully disobey the judgment of the court but that the implementation of the judgment became impossible due to prevailing circumstances as was explained in the affidavit. In their considered view, they met the threshold of demonstrating that they have an arguable appeal. They pointed out that the order barred them from altering and dealing with or registering any parcels in the area under the original PDP reference No. R22/2022/01 yet all these actions occurred prior to the filing of the petition and no order has been issued to the contrary. The applicants also drew the court's

attention to the eviction suit filed by the respondent, and their application for review of the judgment dated 14th May, 2015. All these, in their considered opinion, demonstrate that the appeal was arguable.

9. As regards the nugatory aspect, the applicants are apprehensive that there is a likelihood of a custodial sentence being meted against them, and there is no guarantee that they may be fined. They are of the view that, whereas fines are refundable, it will be difficult to reverse imprisonment and no amount of compensation suffices to compensate the applicants for the time spent in prison. To buttress this submission, the applicants relied on the Supreme Court decision in the case of *Justus Kariuki Mate & Ano. v Martin Nyaga Wambora & Another* [2014] eKLR.

10. It was the applicants' submission that if stay is not granted, it may alter the substratum of the appeal which should be to give the applicants a chance to be heard and ventilate their issues in the appeal. The applicants relied on the decision in the case of *RWW v EKW* [2019] eKLR to augment their submission. The applicants are apprehensive that if the stay of proceedings was declined, the sentence would be a permanent blot on their reputations even if the appellate court were to subsequently quash their convictions.

11. The applicants further submitted that the difficulty in implementing the judgement arose from the fact that part of the development plan No. R22/84/4 has never been re-amended, and it is the land where the Talai community is situated. They are of the view that it is in the public interest that the issues are canvassed to avoid the eviction of an entire community.

12. In opposing the application, the respondent maintained that the applicants had not annexed a draft memorandum of appeal, and therefore the intended appeal was frivolous. Relying on the case of Ishmael Kagunyi Thande v Housing Finance of Kenya Limited [2006] eKLR, the respondent was of the view that the applicants' hands had been tainted and the court should not exercise its discretion in their favour. He faulted the applicants for failing to inform the court the challenges they are faced with in implementing the court order. The respondent was also of the view that the applicants had not shown how the appeal will be rendered nugatory if they are sentenced for disobeying a court order. The respondent placed further reliance on the cases of *Reliance Bank Limited v Norlake Investment Limited* [2002] EA 227 and *Githinji v Amrit & Another*[2004] eKLR.

13. It was the respondent's submission that damages are an adequate remedy in the event the intended appeal succeeds. Citing the case of African Safari Club Limited v Safe Rentals Limited, Civil Application No. 53 of 2010, the respondent submitted that government officials must observe the law without making excuses as all parties are equal before the law. He contended that the applicants' claim that they were public servants and any adverse order against them will prejudice them did not add up. The respondent maintained that the applicants had not met the requirements for grant of stay under Rule 5(2)(b).

14. We have carefully considered the application, the grounds in support thereof, the affidavits, submissions by counsel, authorities cited and the law. The issue for determination is whether or not the application before us is merited.

15. It is trite that the jurisdiction of this Court under Rule 5(2)(b) is original, independent and discretionary. However, the discretion is to be exercised judiciously and with reason; not on impulse or sympathy. Rule 5(2)(b) is a procedural innovation designed to enable the court to preserve the subject matter of an appeal where one has been filed or an intended appeal where the notice of appeal has been

filed. In the case of Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others (supra), this Court stated inter alia:

> " That in dealing with Rule 5(2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court." The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable."

16. It follows therefore that, the applicants have a duty to demonstrate that they have an arguable appeal, and upon satisfying that principle, they have the additional duty to demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay. (See: *Trust Bank Limited & Ano. v Investech Bank Limited & 3 Others* [2000] eKLR).

17. In the case of *Dennis Mogambi Mang'are v Attorney General & 3 others* [2012] eKLR the court held that; in determining whether the appeal is arguable or not, the court should ascertain if it raises at least one serious issue of law, that would call for appropriate consideration. However, at this stage, the court is not called upon to establish that the appeal has a probability of success.

18. On whether the applicants have established an arguable appeal, we have considered the applicants' annexed draft memorandum of appeal. Among the issues raised and emphasized by the applicants which we think merit consideration by this Court is the contention that they were held in contempt of court yet the court order issued was incapable of implementation and that the learned Judge did not consider the evidence which had been provided, to that effect. The respondent contends that, the applicants have not purged contempt and they have also not taken any necessary steps to do so. The respondent also contends that there is no appeal against the judgment which gave rise to the application for contempt.

19. It is common ground that the applicants were held in contempt of court for failing to implement the orders issued in the judgment. It is also common ground that the applicants admit that they have not done as the trial court had ordered; however, they emphasise that that was only because it was not possible to implement the said judgment, and the said judgment had been overtaken by events. The applicants have since filed an application for review of the judgment. In the circumstances, it is our considered view that the issues raised in the draft memorandum of appeal call for serious consideration. Therefore, the issues raised in the draft memorandum of appeal are, in our considered view, not frivolous and are thus, arguable.

20. On whether the appeal will be rendered nugatory, should the further proceedings not be stayed, we note that the applicants have been held in contempt of a court order by the trial court. It is also not in dispute that; the applicants are awaiting sentencing. The pending sentence is what makes the applicant apprehensive that their liberty is at stake, and that if this Court does not intervene, then they will be sent to jail and their intended appeal will be rendered nugatory.

21. We find the concern by the applicants that their liberty is at stake, to be a legitimate concern, given that one of the sentences prescribed by law for contempt of court is a jail term, and that the respondent's prayer before the trial court is that, if the applicants are held in contempt, they should be committed to prison for a maximum period of six months. We therefore hold that since jail term is a possible sentence to be meted against the applicants, they have a right to explore all avenues available to them,

including an appeal against the conviction before they are sentenced. In the case of Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another (supra) the court held that:

> " The power of the court in guarding and protecting the authority and dignity of court orders, although jealously guarded is also balanced with the prospect of an applicant being subjected to a punishment that may entail loss of his or her liberty. Thus courts always allow the applicant an opportunity to state his or her case."

22. Nevertheless, should the sentence meted out on the applicants be a jail term or a fine, we have no doubt in our minds that, if stay is not granted, then the applicants will serve or have partially served their sentences by the time their intended appeal is heard and determined. In the case of Jackson Kipkemboi Koskey & 7 Others v Rev. Samuel Muriithi Njogu & 4 Others, (supra) the court held thus:

> " We are of the view that this is a proper case in which we should exercise our discretion in favour of the applicant. It cannot be denied that to refuse the application would render the intended appeal nugatory since the applicant is likely to have served the six months' jail sentence by the time the appeal comes up for hearing."

23. In the case of Reliance Bank Ltd v Norlake Investments Ltd, (supra) this Court stated that:

> " To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined." (Emphasis ours).

24. In the circumstances of the present case, we are persuaded that the applicants have demonstrated an arguable appeal which may be rendered nugatory should stay not be granted. We so hold because if the applicants are sentenced to jail, they will not be unable to recover the time and freedom lost, in the event that their appeal was successful after they had been imprisoned.

25. Accordingly, the application dated 24th October, 2021 is allowed. There shall be a stay of further proceedings in Kericho ELC Petition No. 1 of 2013, David Kipkorir Langat v Physical Planning Officer Kericho County & 4 Others, until the appeal is heard and determined.

26. Costs shall abide the outcome of the intended appeal.

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

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR