



Ekaterra Tea Kenya PLC v Mokal Investment Limited & another (Civil Appeal (Application) E052 of 2023) [2023] KECA 1281 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KECA 1281 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E052 OF 2023
DK MUSINGA, F SICHALE & FA OCHIENG, JJA
OCTOBER 27, 2023**

BETWEEN

EKATERRA TEA KENYA PLC APPELLANT

AND

MOKAL INVESTMENT LIMITED 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

(An application for an injunction pending appeal against the Ruling/Order of the Environment and Land Court at Kericho (Oundo, J) dated 15th June 2023 in ELC Cause No. E014 of 2022)

RULING

1. The applicant's notice of motion dated June 19, 2023 brought under rule 5 (2) (b) of this [Court's Rules](#) seeks, pending the hearing and determination of an appeal, a temporary injunction to restrain the 1st respondent and/or its servants and agents from entering, remaining or trespassing upon, cutting down or removing trees or any other thing, disposing of, alienating, encumbering, charging, or in any manner interfering with all that property known as LR No. 9932/2 (the suit property), and the excisions arising therefrom.
2. The applicant's affidavit in support of the application shows, inter alia, that the applicant is the registered proprietor of the suit property, including portions excised from it, being LR 9932/5 and LR 9932/6; that on October 6, 2022 the 1st respondent invaded the suit property and started cutting down trees thereon, prompting the applicant to file Kericho ELC No. 014 of 2022 seeking injunctive orders against the respondents, which was dismissed, and being aggrieved by that decision the applicant filed a notice of appeal.
3. The applicant contends that the intended appeal is arguable on various grounds, among them being, that the trial court erred in law and fact in failing to appreciate that the applicant is the lawful registered



- owner of the suit property and the two excised parcel of land aforesaid; that the applicant had only temporarily surrendered the Grant in respect of the suit property, for the purpose of excising the two aforesaid subdivisions after which the Grant was returned to it; that the 1st respondent held an invalid title over the suit property; that the applicant had been in lawful possession of the suit property since 1957 and had extensively developed it by planting tea bushes and trees.
4. The applicant's advocate, Mr. Kamau Karori, Senior Counsel, submitted that unless the orders sought are granted, the applicant's trees will be harvested and its tea harvesting and processing shall be interrupted, and its over 280 employees shall be rendered jobless, which shall render the intended appeal nugatory.
 5. The 1st respondent, through its learned counsel, Mr. Kigamwa, opposed the application. Relying on his client's replying affidavit and written submissions, counsel submitted that the applicant's intended appeal is not arguable because the suit property was not in existence; that the 1st respondent is in occupation of LR No. 9932/7 on which no interlocutory orders had been sought; and that the applicant was introducing new issues that had not been canvassed before the trial court.
 6. Mr. Kigamwa concluded by submitting that since the suit property does not exist, the intended appeal cannot be rendered nugatory. He therefore urged this Court to dismiss the application with costs.
 7. The 2nd respondent also opposed the application. Its learned counsel, Mr. Moimbo, associated himself with Mr. Kigamwa's submissions. He added that the applicant had not exhibited an official search to show that it was the registered owner of the suit property.
 8. We have perused the application as well as all the affidavits, submissions and case digest filed by all the parties. The principles that guide this court in its consideration of an application under rule 5 (2) (b) are well settled. An applicant must demonstrate existence of an arguable appeal, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See [Stanley Kangethe Kinyanjui vs Tony Ketter & 2 others](#) [2013] eKLR.
 9. An arguable appeal is not one that must succeed, rather, it is an appeal that prima facie raises issues that are not frivolous, an appeal that ought to be argued fully before this Court. See [Kenya Commercial Bank Limited vs Nicholas Ombija](#) [2009] eKLR.
 10. In our considered view, the applicant's intended appeal is arguable. There is prima facie evidence that the applicant is in possession of a Grant in respect of the suit property, which was temporarily surrendered for purpose of excision of the two parcels of land as aforesaid, after which the original Grant was returned to it. There is also evidence that the applicant is in occupation of the suit property, part of which has tea bushes, and part of which has residential houses for its workers and some other people. The official search is exhibited at page 42 of the record that is before us. We therefore find no basis in the respondents' contention that the intended appeal is not arguable.
 11. Turning to the nugatory aspect, we are satisfied that unless the orders sought are granted, the 1st respondent is likely to invade the suit property and subdivide it, and/or interfere with the applicant's operations thereon, including destruction of tea bushes, mature trees and structures thereon, which will render the appeal nugatory, in the event that it is successful.
 12. Since the applicant has satisfied both limbs of the twin principles for grant of an interlocutory injunction, we hereby allow this application. The respondents shall bear the costs of the application.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF OCTOBER 2023.

D. K. MUSINGA, (P)



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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

