Luka & 3 others v Chairman Land Adjudication Committee, Leshuta Land Adjudication Section & 6 others (Civil Appeal (Application) E005 of 2022) [2023] KECA 1232 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KECA 1232 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL (APPLICATION) E005 OF 2022

FA OCHIENG, LA ACHODE & WK KORIR, JJA

OCTOBER 6, 2023

BETWEEN

JIMMY PARNYUMBE LUKA ..... 1ST APPLICANT

SLATI MARDADI ..... 2ND APPLICANT

NAIPERAI MASAGO ..... 3RD APPLICANT

KONANA KIRAISON ..... 4TH APPLICANT

AND

THE CHAIRMAN LAND ADJUDICATION COMMITTEE, LESHUTA LAND ADJUDICATION SECTION ..... 1ST RESPONDENT

THE DISTRICT LAND ADJUDICATION OFFICER, NAROK WEST DISTRICT, NAROK COUNTY ..... 2ND RESPONDENT

THE DIRECTOR, LAND ADJUDICATION & SETTLEMENT .... 3RD RESPONDENT

DEPUTY COUNTY COMMISSIONER, NAROK WEST SUB-COUNTY ..... 4TH RESPONDENT

CABINET SECRETARY MINISTRY OF LANDS ..... 5TH RESPONDENT

THE ATTORNEY GENERAL ..... 6TH RESPONDENT

MASAI MARA UNIVERSITY ..... 7TH RESPONDENT

(An application for a temporary injunction pending hearing and determination of an appeal from the ruling of the Environment & Land Court at Narok (Mbogo, J.) dated 30th November, 2021 in ELC Cause No. E001 of 2021)

RULING

1. Before us is an application dated November 21, 2022in which the applicants pray for a temporary injunction restraining the 7th respondent from developing, constructing, charging, disposing or in any other manner dealing with all that parcel of land known as CIS MARA/LESHUTA/2585 measuring, 89.97 Ha (222.32 Acres), hereinafter, "suit land" pending the hearing and determination of the present application and the intended appeal.

2. The application is brought under sections 3A and 38 of the *Appellate Jurisdiction Act*, Rules 5(2) (b), 41, 42 and 47 of the *Court of Appeal Rules*, 2010, articles 22, 23, 35 and 40 of the *Constitution* of Kenya 2010 and all other enabling provisions of the law. The application is premised on the grounds that: the 1st respondent in violation of the applicants' rights failed to conduct any public participation when allocating 210 acres of the suit land to the 7th respondent. That this was done through manipulation by the 7th respondent's administration, and resulted in some of the registered members of the adjudication section not being allocated any land. An objection against the 1st respondent was lodged by one, David Kijuku Kedienye. The objection was dismissed by the 2nd respondent after a meeting between the 1st and 7th respondents. The 1st applicant filed appeal No. 578 of 2020 against the decision to allocate suit land to the 7th respondent, the appeal was dismissed by the 4th respondent without considering the plight of the members who missed in the allocation. This prompted the applicants to file ELC Petition No. E001 of 2021. The petition was dismissed with costs. Aggrieved by the dismissal, the applicants have since lodged an appeal against the decision of the court. Their application for conservatory orders to restrain the respondents from processing any title in favour of the 7th respondent was dismissed. A title has since been processed in respect of the suit land in favour of the 7th respondent, to the detriment of members who were not allocated the suit land as their names were omitted in the final adjudication register. That the 7th respondent has since started developing the suit land and also fenced it. The applicants averred further that unless the application is determined expeditiously and conservatory orders or an injunction is issued, the 7th respondent will continue to develop the suit land while the members will suffer irreparable harm as they will be denied land which they are entitled to, thus rendering the appeal nugatory. The failure to allocate any land to the members, in particular the members who are persons with disabilities, rendered the members landless, squatters and destitute in a place they have known as their ancestral and community land; this will only serve to perpetuate further historical land injustices. It is in the interest of PWDS, who form a majority of the members, who missed out on land allocation that the appeal should be set down for hearing on priority in order to protect their constitutional rights, and to enable the applicants to canvass their appeal. The suit land has always been community land, and no prejudice will be occasioned to the respondents as the said land is yet to be developed. They urged that the status quo be maintained, and a temporary injunction do issue.

3. The application was further supported by the affidavit of the 1st applicant, the chairman of persons living with disability within Narok County. He swore the affidavit on behalf of the members of Leshuta Adjudication Section and Maasai Mara Disability Self-Help Group. He reiterated the grounds on the face of the application.

4. In a replying affidavit sworn by Daniel M. Naikuni Nchorira, the 7th respondent's Director, Endowment Fund, the 7th respondent was of the view that the application as filed was grossly incompetent, fatally defective and an abuse of the court process, and the same should be dismissed. This was so because the applicants had in Civil Application No. E082 of 2021 sought similar orders as the present application, and the application was dismissed. That a similar application was also filed

before the Environment and Land Court. The applicants' application for stay having been dismissed, it is improper for the applicant to move the court over the same matter. The 7th respondent was rightfully allocated part of the suit land and it has nothing to do with those allegedly not allocated the suit land; and it is unfair for the applicants to claim to stop the 7th respondent from developing land rightfully allocated to it. The 7th respondent did not play any role in the allocation as the same was done by the 1st to the 4th respondents. The applicants' petition before the land court was rightfully dismissed. Further, the applicants were not party to the objection proceedings whose outcome they allege to challenge. Daniel further stated that the allocation was done in 2012 and as such it is not understandable why the applicants alleged that the allocation committee was manipulated in November 2020. The 7th respondent was of the view that the applicants have not demonstrated that they have an arguable appeal, and that if the orders sought are not granted the appeal will be rendered nugatory. The applicants have also not demonstrated that they will suffer substantial loss. There are no squatters on the suit land, the applicants are on a fishing expedition. The landless members are not in occupation of the suit land and the issuance of title does not the render the appeal nugatory as the court has jurisdiction to cancel a title in the event the appeal is successful. The application is devoid of merit and the same should be dismissed with costs.

5. Parties relied on their written submissions.

6. The applicants relied on the cases of *Clerk, Nairobi County Assembly v Speaker,Nairobi County Assembly & another* [2021] eKLR and *Stanley Kangethe Kinyanjui v Tony Ketter & others* [2013] eKLR in submitting that they had an arguable appeal. They were of the view that the grounds raised in the memorandum of appeal were prima facie arguable without making substantive arguments. They pointed out the ground where the learned Judge determined the petition without according the applicants their right to information in compliance with the interim orders issued on March 15, 2021 in which the respondents were ordered to supply the applicants with copies of all the minutes, documents, orders, decisions, proceedings and rulings of Leshuta Adjudication Section in respect of the objection and the final determination by the 4th respondent.

7. It was the applicants' further submission that they had demonstrated that genuine and deserving members were not allocated land, and that therefore their right to own property underarticle 40 of the *Constitution* was infringed upon.

8. On the nugatory aspect, the applicants submitted that the 7th respondent had commenced fencing and development of the suit land, and that unless the orders sought are granted, the 7th respondent will continue to develop the suit land and members will suffer irreparable harm. They urged the court to consider the plight of the members, some of whom are persons living with disabilities. The suit land is community land hence it would be just to maintain the status quo.

9. The applicants maintained that it is only fair, just and expedient that a temporary injunction is issued to protect the constitutional and inalienable rights of the members who were not allocated land.

10. Opposing the application, the 7th respondent reiterated that the present application is similar to Civil Application No. E082 of 2021 and therefore, an abuse of the court process. The 7th respondent proceeded to submit that the Leshuta Adjudication Section was declared in 2008 and it applied for allocation. In 2012, it was allocated 210 acres, being the suit land. The process of adjudication has been ongoing. However, in 2021 the applicants faulted the allocation made to the 7th respondent, through an appeal to the Minister for Land and later by way of the ELC Petition E001 of 2021.

11. On whether or not an injunction should be issued, the 7th respondent submitted that it is the registered proprietor of the suit land and the application before court does not meet the requisite conditions for

grant of the orders sought. In that regard the 7th respondent relied upon the case of *Nguruman Limited v Jan Bonde Neilsen & 2 others* [2014] eKLR).

12. The 7th respondent was of the view that the applicants had not demonstrated that they have an arguable appeal or that if the appeal succeeds, it will be rendered nugatory. The 7th respondent cited the case of *Hassan Guyo Wakalo v Straman EA Limited* [2013] eKLR to support its case. The 7th respondent further submitted that the applicants had not established that they would suffer irreparable harm if the orders sought are not granted. The members who were not allocated land are not settled on the suit land and the issuance of title to the 7th respondent is a process that can be reversed. The 7th respondent submitted that the applicants have not satisfied that condition for grant of stay, as set out in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & others* (*supra*). The 7th respondent further submitted that the applicants have no legal right over the suit land, whereas the 7th respondent has the legal right, as the registered owner.

13. The 1st to 6th respondents did not file a reply to the application or submissions thereof.

14. We have carefully considered the application, the grounds in support thereof, the various affidavits, submissions, authorities cited and the law. We note with utmost concern that the applicants herein, filed Civil Application No. E082 of 2021 seeking an order for stay of execution of the judgment in ELC Petition No. E001 of 2021. In a ruling dated April 28, 2022the applicants' application was dismissed with costs. The applicants have now moved this court seeking an injunction.

15. In the application before us, the 7th respondent's argument is that the present application raised similar issues which had been considered and determined in Civil Application No. E082 of 2021. It is quite unfortunate that neither party deemed it pertinent to submit further on the issue.

16. The substantive law on res j*udicata* is found in section 7 of the *Civil Procedure Act* cap 21 which provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

17. The *Black's law Dictionary*, 10th Edition defines "res judicata" as:

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties ..."

18. It is trite that a person may not commence more than one action in respect of the same or a substantially similar cause of action and the court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions. In order to decide whether the issues in this application are res judicata, we have to look at the decision claimed to have settled, the issues in question and the entire application and the instant application to ascertain; what issues were determined in the previous application, whether or not the issues are the same in the subsequent application and whether the issues were covered by the decision, and whether or not the parties are the same or are litigating under the same title and that the previous application was determined by a court of competent jurisdiction.

19. In the case of *Siri Ram Kaura v M.J.E. Morgan*, CA 71/1960 (1961) EA 462 the then EACA stated that:

> " The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for
>
> before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...
>
> The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.
>
> It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

20. In The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, this court, constituted differently, held that:

> " For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a. The suit or issue was directly and substantially in issue in the former suit.
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> b. That former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was heard and finally determined in the former suit.
>
> e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."
>
> Thecourt went on to state as follows:
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> > " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and

> fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

21. *Mulla, Code of Civil Procedure*, 18th Ed. 2012 p.293 states:

> " The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."

22. The Supreme Court in the case of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* [2016] eKLR stated that:

> " The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

23. A perusal of the application shows that indeed that applicants filed an application before this Court dated December 10, 2021seeking an order of stay of execution of the Decree and Orders of Mbogo J., issued in Narok ELC Constitutional Petition No. E001 on 30 November 2021. The application was filed pursuant to the provisions ofsection 3A of the *Appellate Jurisdiction Act*, Rules 5(2)(b), 41, 42 & 47 of the *Court of Appeal Rules*, 2010 and articles 22, 23, 35 and 40 of the *Constitution*. It has also not escaped our keen eye that the grounds and the affidavit in support of the application herein are similar to the application dated December 10, 2021.

24. Thiscourt, in the ruling dated April 28, 2022made a determination with respect to the said application. The court determined that the application lacked merit and dismissed the same with costs. Addressing our minds on the orders sought in this application, we hold the considered view, that regardless of the terms or words employed thereunder, the same were ultimately geared towards stopping the 7th respondent from acquiring title and from taking possession of the suit and; and also from developing it. Whether the applicants sought an injunction or an order for stay of execution, we hold the view that the substratum of the applications had been determined conclusively.

25. Therefore, the issue of a preservative order under Rule 5(2)(b) was directly and substantially in issue in the ruling dated April 28, 2022 hence could not be raised again, even with the use of judicial craftsmanship.

26. The present application is between the same parties over the same subject matter, supported by the same grounds. It is our considered view that this matter is res judicata. The application before us is frivolous and an abuse of the court process.

27. As it stands, the present application is for striking out. Nevertheless, we would have made the following finding had the application before us been competent.

28. The jurisdiction of this court under Rule 5(2)(b) is original, independent and discretionary. In *Stanley Kangethe Kinyanjui v Tony Keter & 5 others* (*supra*) this Court laid down the principles for grant of the orders sought as follows:

> " 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 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."

29. The Supreme Court in *Teachers Service Commission v Kenya National Union of Teachers*, Sup. Ct. Appl. No. 16 of 2015 considered the nature and scope of the jurisdiction of this Court under Rule 5(2) (b) as follows:

> " It is clear to us that Rule 5(2)(b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years...Rule 5(2)
>
> (b) of the Court of Appeal Rules, 2010 is derived from article 164(3) of the *Constitution*. It illuminates the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal."

30. Be that as it may, the applicant has an obligation to prove that there is an arguable appeal, that is, the appeal is not frivolous and upon satisfying that principle, the applicant has the additional duty to demonstrate that the appeal if successful, would be rendered nugatory should the orders sought not be granted. In *Trust Bank Limited & ano v Investech Bank Limited & 3 others*, Civil Application Nai 258 of 1999 (unreported) this Court stated that:

> " The jurisdiction of thecourt under Rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case..." Emphasis ours.

31. In determining whether the appeal or the intended appeal is arguable or not, this Court need not determine whether or not the same was likely to succeed; it is sufficient that it raises a serious question of law or a reasonable argument deserving consideration by the court. (See: *Dennis Mogambi Mang'are v Attorney General & 3 others*,Civil Application No. NAI 265 of 2011 (UR 175/2011).

32. As to whether the intended appeal will be rendered nugatory, it is trite that the factors which can render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the court is bound to consider the conflicting claims of both sides. It is common ground that the 7th respondent was allocated the suit land and has since been issued with a title. The applicants' contention is that the suit land should not have been allocated to the 7th respondent and instead it should have been allocated to the members of the group of the persons living with disabilities, in Narok County. The said members are not in occupation of the suit land. In as much as their contention is with regard to the title issued to the 7th respondent, the applicants are amenable to have their members being given land elsewhere as had been promised by adjudication committee. In other words, the interest of the

applicants is to be given some land, which they can own. It does not have to be the suit land. If the orders sought are not granted they will remain in the same position they are in at the moment. They are not in occupation of the suit land, and therefore they cannot be evicted therefrom. Furthermore, there is no complaint that the 7th respondent may dispose of the suit land. If anything, the applicants confirm that the 7th respondent was developing the said land.

33. We find that the applicants have failed to demonstrate the hardships, if any which they might suffer if the orders sought were not granted, would be out of proportion to any suffering which the 7th respondent might undergo while waiting for the hearing and determination of the appeal. In *Reliance Bank Ltd v Norlake Investments Ltd* [2002] E.A. 227, 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).

34. In the circumstances of the present application, we are of the view that the main issue revolves around land. Land can be quantified in monetary terms and therefore the applicants can be compensated in damages in the event the intended appeal is successful. Similarly, nothing prevents the court from cancelling the title that was issued to the 7th respondent.

35. In the result, the applicants have demonstrated that the intended appeal is arguable but they have failed to establish that it will be rendered nugatory if the instant application is dismissed and the appeal succeeds. The applicants have therefore, failed to demonstrate the existence of both limbs as required by Rule 5(2)

    (b) of this *Court's Rules* and as was held in the cases of *Republic v Kenya Anti- Corruption Commission & 2 others* [2009] KLR 31 and *Reliance Bank Ltd v. Norlake Investments Ltd* (*supra*).

36. The upshot is that we decline to grant an injunction against the respondents. The application is accordingly dismissed with costs to the respondents.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF OCTOBER, 2023.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR