



REPUBLIC OF KENYA



Nkoimo (suing as the Legal Administrator of the Estate of Stanley Lemoiyo Nkoimo) v Asanyo & 4 others (Civil Application E018 of 2023) [2023] KECA 1198 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KECA 1198 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E018 OF 2023
FA OCHIENG, LA ACHODE & WK KORIR, JJA
OCTOBER 6, 2023**

BETWEEN

ANGELINE N. NKOIMO (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF STANLEY LEMOIYO NKOIMO) APPLICANT

AND

**GEOFFREY MAKANA ASANYO 1ST RESPONDENT
KANTEET KAPEEN (LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN LEMUTA NAIRURAN) 2ND RESPONDENT
INTONA INVESTMENT COMPANY LIMITED 3RD RESPONDENT
DISTRICT LAND REGISTRAR, TRANSMARA 4TH RESPONDENT
CHAIRMAN, TRANSMARA LAND CONTROL BOARD 5TH RESPONDENT**

(An application for an injunction pending hearing and determination of an appeal from the ruling of the Environment & Land Court at Kilgoris (E. M. Washe, J.) dated 19th December, 2022 in ELC Cause No. E005 of 2022)

RULING

1. Before us is a Notice of Motion dated 28th February, 2023 in which the applicant prays for an injunction to restrain the respondents by themselves, their servants and/or agents from selling, alienating and/or interfering in any way whatsoever with land parcel No Narok/Transmara/Intona 5, 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 3B of the *Appellate Jurisdiction Act*, Rule 5(2)(b) of the *Court of Appeal Rules, 2010* and all other enabling provisions of the law. The application is premised on the grounds that: in the impugned ruling, the trial court struck out the applicant’s suit on the strength of a preliminary objection which was raised by the 1st and 3rd respondents. The applicant



was dissatisfied with the said ruling and therefore filed a Notice of Appeal. She intends to challenge the ruling as she is of the view that the learned Judge ventured into facts while determining the preliminary objection. It is on the strength of this ground that the applicant believes she has an arguable appeal. The applicant points out that the 1st and 3rd respondents with the help of the 4th and 5th respondents are keen on changing the status of the suit land, and if they do so, it will defeat the applicant's claim and thereby render the intended appeal nugatory. The applicant stated that it was necessary to preserve the suit land so as to ensure the ends of justice are met.

3. The application was further supported by the affidavit of the applicant in which she reiterated the grounds on the face of the application and further noted that the suit land is registered in the name of the 3rd respondent. She filed ELC E005 of 2022 to challenge the registration of the suit land basing her said claim on the ground of fraud. She stated that the suit land formed part of Narok/Transmara/Intona 3, which belonged to her late husband. The applicant stated that the caution she had placed on the suit land was unprocedurally removed by the 4th respondent. This prompted her to move the court and on 13th June, 2023 the trial court issued a temporary injunction against the respondents. However, before the main suit could be heard and determined, a preliminary objection was raised to the effect that the case had been filed out of time by virtue of the Limitation of Actions Act. The applicant has been in occupation of the suit land since 1973 and she is apprehensive that she will be evicted if the orders sought are not granted as the respondents already tried to evict her while the suit in the trial court was pending.
4. In a replying affidavit sworn on his behalf and on behalf of the 3rd respondent, the 1st respondent stated that he purchased the suit land from the applicant's late husband vide a sale agreement dated 25th March, 1992 for a consideration of Kshs.2,000,000/.

This led to the closure of the register for Narok/Transmara/Intona 3. The 1st respondent enjoyed peaceful ownership of the suit land from 1993 to 2018 when he transferred the same to the 3rd respondent. The applicant lodged a caution on the suit land in May 2021. The caution was removed on 23rd May, 2022 on application by the 3rd respondent, and after a hearing involving the applicant. This prompted the applicant to file ELC E003 of 2022 which is still pending in court. In the suit, the applicant obtained an order restraining the 4th respondent from making further entries in the Green Card or register for the suit land.

5. The 1st respondent notes that the applicant also filed ELC E005 of 2022. He stated that they challenged the jurisdiction of the court through a preliminary objection dated 27th September, 2022. Their main contention was that the suit was time barred. He was of the view that the application herein had failed to meet the threshold for the orders sought. The applicant's allegation that she is likely to be evicted from the suit land is unfounded as the applicant has never been in occupation of the suit land, the allegation is speculative and the court cannot award a relief on mere speculation.
6. The 2nd respondent in his replying affidavit stated that his late father is the rightful owner and proprietor of 240 acres of the suit land. He alleged that his late father and the 1st respondent jointly purchased the suit land (measuring 400 acres) from the applicant's late husband vide a sale agreement dated 25th March, 1992 for a consideration of Kshs. 2,000,000/-. They enjoyed peaceful possession of the suit land until 2016 when the 1st respondent brought strangers to the suit land claiming that he was the sole owner. This prompted the 2nd respondent to file ELC E007 of 2022 which is pending determination. On 19th December, 2022 the court issued preservatory orders therein. He pointed out that the pendency of this suit is well within the applicant's knowledge.



7. The 2nd respondent was of the view that the applicant had failed to demonstrate the loss she was likely to suffer which cannot be adequately compensated in damages, or the nature of the threat of adverse dealings against her. He contended that the applicant had not proved in any way that he had threatened or in any manner attempted to evict her. He pointed out that after the sale, the applicant's husband subdivided Narok/Transmara/Intona 3 into the suit land and Narok/Transmara/Intona 6 which he retained for his family. He alleged that the applicant has been in physical occupation of Narok/Transmara/Intona 6 and not the suit land and therefore the fear of eviction is far-fetched and unfounded.
8. At the hearing of the application, Mr. Macharia appeared for the applicant, Mr. Muiruri appeared for the 1st and 3rd respondents, while Mrs. Mukira appeared for the 2nd respondent. Parties relied on their respective written submissions which they briefly highlighted.
9. The applicant pointed out the ELC E003 of 2022 seeks to compel the 4th respondent to remove the caveat while the present application seeks to restrain the respondents from using the suit land. She also pointed out that she was not a party to ELC E007 of 2022, and that her interests are not catered for in that suit. She noted that there are several suits touching on the suit land hence the need for an order to maintain the status quo.
10. The applicant relied on the case of *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others* [2021] eKLR on the twin principles for grant of an injunction. She emphasized two grounds: that the learned Judge erred in upholding the preliminary objection; and the learned Judge ventured into facts in determining the preliminary objection. It was her submission that the learned Judge misconstrued the preliminary objection in dismissing her suit summarily by relying on facts which had not been ascertained. The applicant was of the view that she has an arguable appeal.
11. On the nugatory aspect, the applicant was apprehensive that the 1st, 3rd and 4th respondents were likely to interfere with the suit land to her detriment, including having her evicted. The applicant was of the view that these concerns are the reason why the trial court had granted an injunction against the respondents on 13th June, 2022 to preserve the suit land. It was her further view that if the orders sought are not granted, she would suffer irreparable harm which could not be compensated by damages. She urged that the application be allowed.
12. The 1st and 3rd respondents submitted that the trial court enumerated the admitted facts in determining the preliminary objection, and did not delve into any disputed facts. They maintained that the appeal would not be rendered nugatory as the alleged issue of eviction was merely speculative, and the applicant is not in occupation of the suit land.
13. The 1st and 3rd respondents further submit that the applicant had not established an arguable appeal as the annexed draft memorandum of appeal chiefly contended that the trial court had ventured into disputed matters of fact as opposed to the fundamental principles of preliminary objections. It was their submission that the trial court was faced with a jurisdictional challenge based upon prescribed limitation of actions; and that the learned Judge weighed into the pleadings in order to establish whether or not the suit had been caught up by the provisions of the *Limitation of Actions Act*. They admitted that the trial court referred to various undisputed facts to interrogate the limitation question raised. Relying on the decision in *Priscilla Wambui Mathenge v Mary Wairimu Mathenge & Another* [2020] eKLR, the 1st and 3rd respondents submitted that the intended appeal was not arguable and that the applicant was only keen to play judicial lottery.
14. On the nugatory aspect, the 1st and 3rd respondents submitted that the applicant was deceitful in alleging that she had been in occupation of the suit land since 1973 as the suit land was not in



- existence at the time. The suit land came to be in 1993 following the subdivision of Narok/Transmara/Intona 3. They maintained that the applicant has never been in occupation of the suit land and the administrators of the applicant's late husband's estate excluded the suit property from the list of assets during succession in 2001. Therefore, the applicant cannot be evicted from a place she has never occupied, and the allegation is speculative and a misrepresentation of facts. To buttress this submission, they relied on the case of [The Registered Trustees African Gospel Church v Victor Mungai Kamunge & 2 Others](#), Civil Application No E384 of 2022.
15. It was their further submission that the applicant had failed to demonstrate any proprietary interest in the suit land, or that she had been in occupation thereon since 1973, or that they had attempted to evict her. They pointed out that the applicant had failed to disclose to the court the existence of preservatory orders issued in ELC Misc. No E003 of 2022 barring any entries on the register over the suit land pending the hearing and determination of a Judicial Review application filed by the applicant. They further submitted that the suit land is quantifiable and an award of damages would suffice as compensation to remedy any loss. They urged that the application be dismissed with costs.
 16. The 2nd respondent urged the court to be persuaded by the provisions of Rule 5(2)(b) of the [Court of Appeal Rules, 2022](#) and the findings in the case of [Chris M. N. Bichange v Richard Nyangaka Tongi & 2 Others](#) [2013] eKLR. On whether the applicant had an arguable appeal, the 2nd respondent submitted that the applicant had failed to annex a draft memorandum of appeal to his application and therefore, she was underserving of the orders sought. To buttress this submission, he relied on the case of [Kenya Breweries Limited v Lawrence Ndutu & 6000 Others](#) [2014] eKLR.
 17. On the nugatory aspect, the 2nd respondent associated himself with the finding in the case of [Mwangi v Nyali Golf & Country Club](#), [2022] KECA 455 KLR. He was of the view that the applicant has failed to satisfy the first limb of Rule 5(2)(b) and was therefore undeserving of the orders sought. He also pointed out there are preservatory orders issued by the trial court in a pending suit. He was of the view that the applicant had failed to demonstrate to the required legal threshold that the alleged dealings were irreversible or that the applicant could not be compensated in damages. He prayed that the application be dismissed, and that costs follow the event as provided for by Section 27 of the [Civil Procedure Act](#).
 18. There was no response or submissions from the 4th and 5th respondents.
 19. We have carefully considered the application, the grounds in support thereof, the various affidavits, submissions, authorities cited and the law. The issue for determination is whether or not the application has met the threshold for grant of the orders sought under Rule 5(2)(b) of the [Court of Appeal Rules](#).
 20. 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:
 - i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See [Ruben & 9 Others v Nderitu & Another](#) (1989) KLR 459.
 - ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
 - iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. [Halai & Another v Thornton & Turpin \(1963\) Ltd.](#) (1990) KLR 365.



- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No Nai 189 of 2001.
 - v. An applicant must satisfy the court on both of the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004.
 - vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No 124 of 2008.
 - viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. *Damji Pragji (supra)*.
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
 - x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
 - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.
21. 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.”
22. It is trite that the applicant must 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 & another v Investech Bank Limited & 3 others*, Civil Application Nai. 258 of 1999 (unreported) this Court stated that:
- “The jurisdiction of the Court 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.

23. In determining whether the appeal or the intended appeal is arguable or not, it is trite that by arguable, it does not mean that the appeal or intended appeal must be one that will definitely succeed, but rather one that 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).
24. We have perused the applicant's draft memorandum of appeal.
The applicant emphasized that the learned Judge determined the preliminary objection based on facts. The 1st and 2nd respondents have heavily contested this issue stating that the trial court relied on undisputed facts. It is our considered view that this issue calls for serious consideration by this Court, before it can be determined: in effect, the appeal is arguable.
25. The next question that we need to delve into is whether or not the appeal would be rendered nugatory, in the event that the court did not grant the order for an injunction.
26. It is well settled that the factors to be taken into account when giving consideration to this issue are dependent upon the circumstances of each particular case. In this case, the applicant, the 1st, 2nd and 3rd respondents were all laying claim to the suit land. Each of them has claimed that they were in occupation.
27. Obviously, when several persons, who had conflicting interests each lays claim to a parcel of land, it is not possible that all such claims are sustainable. It is thus important to put these matters within perspective.
28. Originally, there was a parcel of land, being Narok/Transmara/Intona/3. That parcel of land measured about 400 acres, and it was registered in the name of the applicant's husband.
29. The 2nd respondent lay claim to about 240 acres, which had allegedly been purchased by his late father in 1992.
30. According to the 2nd respondent, they enjoyed peaceable occupation of the said portion of land until 2016, when the 1st respondent claimed ownership therefore. Although the 2nd respondent asserted that the applicant's husband had sub- divided the original parcel of land, so as to carve out the portion bought by his late father; the applicant insists that the purported sale was completely fraudulent.
31. Whilst there are two distinct titles for different portions of the land, the applicant appears to be laying claim to the whole original parcel. Therefore, even though the applicant was in physical possession of Narok/Transmara/Intona/6, her claim is not limited to that portion of land.
32. We note that ELC No E003 of 2022 is still pending before the Environment and Land Court. In that suit, the court had issued an order in favour of the applicant, so that the 4th respondent is restrained from making any further entries in the greencard or in the register for the suit land. It would appear that the Environment and Land Court was persuaded that there was a need to preserve the suit land.
33. On the one hand, an order for the preservation of the suit land would appear to be sufficient to safeguard the interests of the parties to the case.
34. But, on the other hand, when the respondents vehemently oppose the issuance of the injunction in this matter, we asked ourselves why they needed to do so, if the order already issued by the trial court was sufficient to preserve the subject matter of the appeal.



- 35. As the original title was no longer in existence, yet the applicant insists that her husband’s signature was forged so as to sub- divide the land, we find that unless the orders sought were granted, the appeal would be rendered nugatory. We so hold because, in the absence of an appropriate order, the parcels of land may change hands.
- 36. In the result, we hereby issue an injunction to restrain the respondents from selling, alienating and/or interfering in any way whatsoever with parcel No Narok/Transmara/Intona/5. This order shall remain in force until the appeal is determined.
- 37. Costs of the application shall be in the cause in the substantive appeal; so that the successful party in the appeal shall stand awarded the costs of the application.

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

