



Keibukwo Investments Limited & another v Sayani Investments Limited & 3 others (Civil Application E273 of 2023) [2023] KECA 1676 (KLR) (15 December 2023) (Ruling)

Neutral citation: [2023] KECA 1676 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E273 OF 2023
SG KAIRU, P NYAMWEYA & PM GACHOKA, JJA
DECEMBER 15, 2023**

BETWEEN

KEIBUKWO INVESTMENTS LIMITED 1ST APPLICANT

SANDHANI LIMITED 2ND APPLICANT

AND

SAYANI INVESTMENTS LIMITED 1ST RESPONDENT

DIRECTOR OF SURVEY 2ND RESPONDENT

THE NATIONAL LAND COMMISSION 3RD RESPONDENT

THE CHIEF LANDS REGISTRAR 4TH RESPONDENT

(An application for injunction against the judgment and for stay of execution of the judgment and decree of the Environment and Land Court at Nairobi (Okongó, J.) delivered on 18th April 2023 in ELC Judicial Review No. 77 of 2018)

RULING

1. Through their application dated 19th June 2023 presented under Rule 5(2)(b) of the [Court of Appeal Rules](#), the applicants, Keibukwo Investments Limited and Sadhani Limited, seek orders, pending the hearing and determination of their appeal, of stay of execution of the judgment and decree of the Environment and Land Court (S. Okongo, J.) (ELC) given on 18th April 2023, as well as an order to restrain the Chief Registrar of Titles, the 2nd respondent, from rectifying the survey records to cancel the applicant's Deed Plan Number 356256 issued for the consolidation or amalgamation of properties known as LR Nos. 209/923; 924 and 925 (the three properties) into LR No. 209/20737 (the amalgamated parcel).



2. The material before us shows that Sayani Investments Limited, the 1st respondent was since the late 1950's the registered owner as lessee for a term of 99 years from 1st January 1911 of the three properties on which there is erected a development known as "Caxton House". The leasehold interest over the three properties was to expire on 1st January 2010.
3. Before the process of extension of the leases was completed, approval of the Director of Physical Planning and Commissioner of Lands having been obtained, it transpired that three properties had purportedly been amalgamated under the contentious Deed Plan, No. 356256 and a title for the amalgamated parcel issued to the applicants.
4. With that realization, the 1st respondent initiated judicial review proceedings before the High Court seeking, among other things, an order of Certiorari to quash the said Deed Plan; and an order of Mandamus to compel the Director of Surveys and The Chief Registrar of Titles to issue grants of the three properties to it.
5. That suit was subsequently transferred to the ELC which in its impugned judgment delivered on 18th April 2023 dismissed the applicant's objection to jurisdiction and ordered that:

"The Deed Plan No. 356256 issued by the Director of Surveys for the consolidation/ amalgamation of all those parcels of land known as LR No.'s 209/923, LR No.'s 209/924 and LR No.'s 209/925 into 209/20737 is brought to this court and quashed."
6. In so ordering, the learned Judge alluded to an earlier judgment he had rendered in the matter, stating that the three properties were not available for allocation to the applicants; that the allocation and the title issued to the applicants was illegal; and that the Deed Plan was created unprocedurally and illegally. The Judge stated:

"I am still persuaded that the process of extension of the applicant's leases for the suit properties was hijacked by shadowy figures that were operating in the corridors of Ardhi House who through manipulation of records and forgery made extension of leases and nightmare for innocent Kenyans."
7. Aggrieved, the applicants lodged a notice of appeal on 26th April 2023 upon which the present application is hinged.
8. Urging the application before us, which is supported by the affidavit of David Some Barno and further affidavit of Henry Some Kiprop (both described as Managing Directors of the 1st applicant) learned counsel Mr. Mukuha holding brief for Mr. Bwire for the applicants submitted, in his written as well as oral submissions, that to the extent that the impugned judgment ordered the cancellation of the applicants' Deed Plan, it is a positive order capable of being stayed; that the intended appeal is arguable in that the ELC granted the impugned orders when it had no jurisdiction in the matter; that unless the orders of stay of execution are granted, the Deed Plan will be cancelled rendering the intended appeal nugatory.
9. Learned counsel for the 1st respondent Mr. Muthui relied on the replying affidavit of Karim Jetha, a director of the 1st respondent and submitted, in writing and orally, that the intended appeal is frivolous; that there is no basis for contending that the ELC did not have jurisdiction as the judicial review proceedings were commenced in the High Court prior to operationalization of the ELC, which in any event, counsel submitted, has concurrent jurisdiction to receive and hear a suit from the High Court.



10. On the nugatory aspect, in addition to maintaining that the impugned order is a negative one incapable of being stayed, counsel submitted that the Deed Plan was cancelled by the Director of Survey in 2014; that the Certificate of Title in respect of the amalgamated parcel, which was issued on the basis of a cancelled Deed Plan, was already cancelled by the Chief Land Registrar in November 2017; that that cancellation is the subject of other pending proceedings; that in addition, the said Certificate of Title was quashed by a judgment of the ELC in ELC JR No. 72 of 2018 given on 4th February 2021; and that what is sought to be stopped is reversible in the event the appeal is successful.
11. Learned counsel Mr. Allan Kamau for the Director of Surveys and the Chief Land Registrar, the 2nd and 4th respondents respectively, drew the court's attention to the applicable principles in applications of this nature as pronounced by this Court in *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* [2013] eKLR and left the matter to the court. There was no appearance for the National Land Commission, the 3rd respondent, despite service of notice of hearing on it.
12. Having considered the application, the affidavits and rival arguments against the established legal principles applicable in applications of this nature (see *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* (above), we note that the grievances the applicants have against the impugned judgment, as set out in their memorandum of appeal, include the claim that the ELC erred in receiving a High Court file and proceeded with the matter without jurisdiction; that under the *Survey Act*, the power to cancel a Deed Plan is reserved exclusively for the Director of Survey; and that the ELC erred in conducting a merit review under judicial review proceedings. We are satisfied that the applicants' appeal is not frivolous. They have demonstrated that the intended appeal is arguable.
13. On the nugatory aspect, the applicants have urged that unless the orders sought are granted, the 2nd respondent will effect the cancellation of the Deed Plan. There is however indication that the contentious Deed Plan, as well as the Certificate of Title relating to the amalgamated parcel are already cancelled. To grant the orders sought would therefore be in vain. Moreover, if the appeal ultimately succeeds, the order quashing the Deed Plan is in our view reversible.
14. The result is that the applicants' application dated 19th June 2023 fails and is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR

