



REPUBLIC OF KENYA



**Moschion v Stuart & 16 others (Civil Application E219 of 2023)
[2023] KECA 1668 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1668 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E219 OF 2023
K M'INOTI, M NGUGI & F TUIYOT'T, JJA
DECEMBER 15, 2023**

BETWEEN

DOROTHY SEYANOI MOSCHION APPLICANT

AND

ANDREW STUART 1ST RESPONDENT
CLAUDIA STUART 2ND RESPONDENT
PATHMARK VENTURES LIMITED 3RD RESPONDENT
ADRIAN DEARING 4TH RESPONDENT
JACQUELINE CHANIA STEWART READING 5TH RESPONDENT
TARA SAVAGE 6TH RESPONDENT
ZEHRABANU JANMOHAMED 7TH RESPONDENT
CHARLES KIMERIA MWANGI 8TH RESPONDENT
ULMUS LIMITED 9TH RESPONDENT
GUY SPENCER ELMS 10TH RESPONDENT
FIONA JANE ELMS 11TH RESPONDENT
TRUSTEES OF THE ULMUS FAMILY TRUST 12TH RESPONDENT
FIDLA ALMASI LIMITED 13TH RESPONDENT
DAVINDER SINGH VIRDEE 14TH RESPONDENT
FAYE HARDISTY 15TH RESPONDENT
SAMMY MUTTA MUREITHI 16TH RESPONDENT
BEKIAN LIMITED 17TH RESPONDENT



(An application for injunction and stay of further proceedings pending hearing and determination of an intended appeal from the ruling of the Environment and Land court at Nairobi (L. N.Mbugua J.) delivered on 27th April, 2023 in ELC NO. 350 of 2018)

RULING

1. The applicant, Dorothy Seyanoi Moschion, has filed the Notice of Motion application dated 27th April 2023 under Rule 5(2) (b) of this Court's Rules. She seeks in this application an order of temporary injunction restraining the 1st respondent from, inter alia, in any manner whatsoever dealing with property L.R. No. 5892/11 so as to diminish or change its status pending the hearing and determination of her intended appeal.
2. The applicant seeks, secondly, a temporary injunction against the 2nd-17th respondents restraining them from putting on sale or transferring property nos. L.R Nos. 5892/7, 17, 18, 19, 20, 23, 25, 26 and 29 situate in Karen. In the alternative, she prays that this Court grants a conservatory order to protect and preserve the suit properties. Finally, she prays for an order of stay of proceedings in Nairobi ELC No. 350 of 2018, consolidated with the several other cases set out in the application, which she had filed against the respondents, pending hearing and determination of her intended appeal.
3. The application is based on the grounds set out on the face of it and on an affidavit sworn on 27th April 2023 by her advocate, Mr. George Miyare. Her case is that she filed the consolidated suits seeking recovery of her properties, named in the application, which had been illegally and fraudulently acquired by the respondents with no or no lawful consideration at all. That at the time of going to court, the 1st and 2nd respondents had put up a notice for sale of L.R No. 5892/11 and were preparing to construct on L.R No. 5892/23, while the remaining respondents had developed and occupied the remaining properties either directly or by proxy.
4. The applicant averred that the matters had been consolidated and interim orders issued restraining the 1st and 2nd respondents from disposing of, occupying or developing L.R Nos. 5892/11 and 23. The consolidated matters were then fixed for hearing on 26th June, 2023, but on 27th April, 2023, all the suits were struck out with costs for delay by the applicant in filing witness statements, except for ELC No. 915 of 2012. She avers that the court also discharged the interim orders previously granted.
5. The applicant states that she has filed a Notice of Appeal from the decision striking out the suits; that she deserves protection of the suit properties and that the respondents will not be prejudiced should the orders sought issue since they retain illegal occupation of the properties. The intended appeal is arguable with high chances of success and should therefore not be rendered nugatory by what she terms the 'controllable and voidable conduct of the respondents'.
6. In his affidavit sworn on 27th April 2023, Mr. George Miyare sets out some twenty-three grounds that the applicant intends to raise in her appeal. He avers that the substratum of the applicant's claims is in imminent risk of being completely dissipated and the intended appeal rendered nugatory through the calculated acts of the respondents, and the applicant will be made to incur extra costs to recover the properties once the appeal and the suits succeed. The applicant states in ground 9 in support of her application, however, that the properties at issue "are developed and occupied by the respondents save for L. R. 5892/11 which remains vacant and undeveloped though illegally registered to the 1st respondent."



7. The application is opposed by all the respondents. The 3rd respondent has filed a replying affidavit sworn on 7th August, 2023 by Paul Karuga in which he states that the appeal has no chances of success as the suits were struck out for failure by the applicant to comply with directions of the court, and that despite being given several opportunities and the matter having been set down for hearing, the applicant failed to file witness statements. It is his averment that the applicant has not demonstrated any substantial loss she will suffer, if the injunctive orders are not granted, which cannot be compensated by damages.
8. The 4th respondent also opposes the application through an affidavit sworn by Adrian Dearing on 15th September, 2023. Mr. Dearing states that since inception of the suit, the applicant did not file any witness statements and reply to defence despite the matter having come up for pre-trial conferencing on two occasions.
9. Affidavits in opposition were also filed by the 8th respondent, Charles Kimemia Mwangi on 29th June, 2023 in which he deposes that he is the registered owner of L.R. No. 5892/26, which was registered on 6th March, 2009; the 13th respondent, Guy Elms sworn on 26th September, 2023, and by the 16th respondent through an affidavit sworn by Sammy Muita Mureithi on 7th June, 2023.
10. While the affidavits set out the respective cases of the respondents vis-a-vis the applicant's claim against them individually, they are in accord as regards the present application: that the applicant filed suits against them before the ELC in 2018; that these suits were consolidated and directions given for the filing of witness statements; that despite appearing in court on at least four occasions when she was given time to file the statements, the applicant failed to do so; that all the suits were struck out, save for Case No. 915 of 2012, on 27th April 2023.
11. The parties filed written submissions and case digests which were highlighted by their respective counsel at the hearing hereof. In her submissions on behalf of the applicant, Ms. Achieng submitted that the applicant was seeking preservation of the status quo with respect to the ten properties the subject of the applicant's suits. These properties had been previously preserved by conservatory orders issued by the ELC which had subsequently been removed once the suit was struck out. Ms. Achieng submitted that the applicant's appeal is arguable and will be rendered nugatory if the application is not granted.
12. With regard to whether the appeal was arguable, Ms. Achieng submitted that in a suit for recovery of properties, if the properties are not preserved, it is possible for them to be transferred to other parties or to be further developed in a manner that will involve third parties. That should this happen, the applicant will be required to re-litigate all the matters once again before yet another court and with other parties, which would render her appeal pointless.

Further, according to the applicant, the suits were struck out with costs to the respondents; that such award is a positive order that is capable of execution; and if the application to stay further proceedings is not allowed, the respondents can proceed with taxation while the appeal is ongoing, which will heavily punish the applicant if she is required to pay the costs when she may very well have a good case on appeal.
13. The applicant submitted further that the circumstances under which her suits were struck out did not warrant striking out of the suits. The suits were struck out during a routine mention for directions; that all the parties were, at that mention, seeking extension of time to file their documents, that upon the application for extension of time by all the parties, the court proceeded to strike out the suits and award costs to the respondents, thus, only punishing the applicant. The applicant submits that the court thereby denied her the right to fair hearing of her case in circumstances which did not warrant or



justify the denial of such an inherent right. Ms. Achieng urged this Court to reinstate the conservatory orders issued earlier by the ELC and to find that the properties require protection during the course of the appeal.

14. Learned counsel appearing for all the respondents were in agreement that the present application did not meet the threshold for grant of discretionary relief under rule 5(2) (2(b)). They submitted that the affidavit in support was sworn by the applicant's counsel, rather than the applicant; that the applicant did not have an arguable appeal; that the respondents are the registered owners of the suit properties, and that the injunctive orders being sought would act to restrain them from doing anything with the properties which are registered in their names.
15. It was their submission further that none of the respondents have filed their bills of costs, and in any event, such costs would be in form of money, and there is nothing to show that the respondents do not have the means to refund the money should the appeal succeed; that the properties at issue are in the hands of the respondents who are the registered proprietors, and that the applicant is neither a proprietor nor is she in possession; that the only order capable of being granted in the appeal is the reinstatement of the suits; and that the appeal can still be heard and determined even if the application was not allowed.
16. The respondents submitted, finally, that there was no leave to appeal granted to the applicant with respect to the striking out of the suits; that the order impugned is an order striking out the suits under Order 11; no leave to appeal had been sought or granted under section 75 of the *Civil Procedure Act* and order 43 rule 1; that the notice of appeal in this case was filed without leave, and is therefore a nullity. They submitted that this Court, therefore, has no jurisdiction as there is no appeal before it.
17. We have considered the very extensive averments and submissions of the parties in this matter, for which we are grateful. However, the determination of this application turns on two fairly straightforward issues: first, whether the applicant has brought herself within the rubric of rule 5(2)(b) of the Court of Appeal Rules. Secondly, and more importantly, whether there is a proper appeal, or basis of appeal, which underpins this application.
18. First, we deal with the requirements for the exercise of this Court's discretion under Rule 5(2)(b) of this Court's Rules. The principles that guide the exercise of such discretion are well settled. In exercising the discretion in favour of a party, the Court must be satisfied on two principles: that the appeal is arguable, and that if the orders sought are not granted, the appeal, if successful, will be rendered nugatory. In *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR this Court stated:

“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.”
19. The applicant asks this Court to exercise discretion and grant her an order for stay of execution of the orders of the court issued on 27th April 2023, and injunctive or conservatory orders in respect to the properties held by the respondents. The orders issued on 27th April 2023 were negative in nature: the court struck out the suits that the applicant had filed against the respondents, which had been consolidated by an order of the court. The consolidated suits were struck out for failure by the applicant to comply with pre-trial directions issued under Order 11 of the Civil Procedure Rules for filing witness statements in preparation for the hearing of the consolidated suits. None of the parties was ordered



to do, or refrain from doing, anything. There is therefore nothing for this Court to stay- see *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR.

20. The applicant, however, also sought conservatory orders to protect and preserve the suit properties by restraining the respondents from inter alia, dealing with the suit properties. In response, the respondents argue that granting conservatory orders, which, they argue, are not available in any event to a private litigant, would act to restrain them from doing anything with the properties which are registered in their names.
21. We observe, first, that the applicant concedes that she is not the registered owner of the suit properties, which are currently registered in the names and are in the possession of the respondents. Secondly, she is only litigating her private claim, alleging entitlement to the suit properties which she claims were fraudulently acquired by the respondents. That being the case, she is not entitled to the grant of conservatory orders which are only available in litigation where a public interest is demonstrated as deserving of protection- see *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR in which the Supreme Court held:

“[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”
22. The applicant argues, finally, that the suits had been struck out with costs to the respondents, and that they would execute against her. Perhaps. The respondents, however, have averred that none of them has filed a bill for taxation, and even if they had, costs are monetary in nature, and there is nothing to show that the respondents would not be able to repay such costs as the applicant would have paid to them should her appeal succeed.
23. Would the appeal, in any event, be rendered nugatory if orders of stay are not granted? This question is answered by considering what the applicant would be placing before this Court on appeal. The issue that the trial court addressed did not pertain to the ownership of the properties the subject of the suits and in this application. The applicant’s suits were struck out for failure to comply with pre-trial directions. The issue that the applicant would raise before this Court on appeal, as the respondents submitted, is whether the trial court exercised its discretion properly in striking out the suits. That being the case, the applicant’s appeal on whether or not the trial court correctly exercised its discretion in striking out her suits would not be rendered nugatory.
24. Which brings us to the second issue identified earlier, relating to whether the applicant is even properly before us, and whether she had a right of appeal from the decision of the trial court. The applicant argued before us that everyone has a right to appeal, her argument appearing to be that whether or not the rules give a party a right of appeal, one can file a notice of appeal and approach this Court under rule 5(2)(b).
25. Order 43(1) of the *Civil Procedure Act*, however, provides the orders in respect of which an appeal lies as of right to this Court, while Order 43(2) provides that an appeal from any other order shall lie only with the leave of the court. Order 11 is not one of the orders listed in Order 43(1), so the applicant needed, but did not seek, the leave either of the trial court or this Court to file an appeal. The respondents are



correct, therefore, in their submission that the notice of appeal filed before us is a nullity. There being no valid notice of appeal, the present application was unsustainable from the get-go.

26. In the circumstances, we find and hold that the application is devoid of merit, and it is hereby dismissed with costs to the respondents.

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

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

