



REPUBLIC OF KENYA



KENYA LAW
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**Kogo & 2 others v National Land Commission & 4 others (Civil Application
79 of 2021) [2022] KECA 106 (KLR) (11 February 2022) (Ruling)**

Neutral citation: [2022] KECA 106 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 79 OF 2021
PO KIAGE, M NGUGI & F TUIYOTT, JJA
FEBRUARY 11, 2022**

BETWEEN

**SAMMY ARAP KOGO 1ST APPLICANT
KENNEDY KOGO 2ND APPLICANT
KOGO FLATS COMPANY LIMITED 3RD APPLICANT**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
CHIEF LAND REGISTRAR 2ND RESPONDENT
OFFICER IN CHARGE G.K PRISON ELDORET 3RD RESPONDENT
ANNE LETTING 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**

*(Being an appeal against the judgment and decree of the Environment and Land
Court (Dr. Odeny J) dated 13th April, 2021 in Eldoret ELC Petition No. 3 of 2019)*

RULING

1. In the application dated 18th May, 2021 brought under Rule 5(2)(b) of the *Court of Appeal Rules*, 2010, the applicants seek the following orders:
 - i. That the court be pleased to issue an order of injunction against the 3rd and 4th respondents restraining them whether by themselves, their servants and/or agents from felling the applicants' trees growing on the land parcels known as Eldoret Municipality/Block 10/187, 188 and 190 pending the hearing and determination of this application in the first instance.



- ii. That the court be pleased to issue an order of injunction against the 3rd and 4th respondents' restraining them whether by themselves, their servants and/or agents from felling the applicants' trees growing on the land parcels known as Eldoret Municipality/Block 10/187, 188 and 189 pending the hearing and determination of an intended appeal.
 - iii. That the costs of this application be provided for.
2. The applicants state in the grounds in support of their application that their intended appeal against the decision of the ELC is arguable, shall be rendered nugatory and that the application has been made without undue delay.
3. The application arises in relation to a judgment that was rendered in the applicant's petition dated 6th March 2019 in which the applicants had sought orders, inter alia, for a declaration that the decisions, acts and omissions by the respondents in respect of land parcel numbers Eldoret Municipality/ Block 10/187, 188 and 190 are in breach of the law and a breach of Articles 10, 40, 47 and 50 of the Constitution of Kenya and are a nullity and of no legal effect. The applicants had also prayed for an order of certiorari to quash the decision of the 1st respondent contained in Kenya Gazette Notice No. 6862 of 17th July, 2017 in respect of the said land parcels.
4. An order of prohibition to prohibit the 2nd respondent from revoking and/or cancelling the titles of the petitioners pursuant to the directives of the 1st respondent had also been sought.
5. The applicants' claim in their petition was that they are the registered proprietors of the said land parcels. having acquired the said parcels for valuable consideration and holding leasehold interests from the Government of Kenya since 1993. That however, on 2nd February, 2019, the 3rd and 4th respondents and other persons acting on their instructions and directions had unlawfully trespassed on the said land parcels and cut down 33 trees, destroyed the dwelling houses erected on the land and ejected the petitioners' servants. The applicants had been informed that the said land belonged to the Kenya Prisons Service and that the applicants' titles to the land parcels had been revoked.
6. The respondents' case before the trial court was that the said land had been part of the land gazetted in Legal Notice No. 371 of 22nd June, 1961 and set apart as government land for the exclusive use of the Department of Prison. It was therefore reserved for public use and was not available for allocation. The titles issued in respect of any portion created therefrom were thus null and void ab initio.
7. The respondents' case further was that the applicants, who had been allocated the suit land and to whom titles had been issued, had been invited to a public hearing on review of grants and dispositions on 30th March 2017 at Eldoret County Hall and further invited to submit representation and documents on or before 24th March 2017 but the applicants did not attend. Upon hearing the parties who attended and analyzing the documents presented, the 1st respondent found that the applicants' titles had been issued in respect of land reserved for the prison and it accordingly revoked the said titles.
8. In its decision, the ELC observed that similar cases had been filed by the applicants and other parties namely in ELC No 336 of 2012 and ELC No 253 of 2012. That it had been agreed by consent that ELC Case No. 253 of 2012 be a test case and the other cases be stayed pending the hearing and determination. That in its decision in the test case, the court held that on 22nd June 1967, the suit land in ELC 253 of 2012 was gazetted as prison land vide Gazette Notice No. 751 dated 18th December, 1963. The suit land in this suit was part of the block in ELC 253 of 2012 and therefore the judgment in that suit directly applies to the suit land in this suit. Further, that even in the absence of the test case, the court would still have come to the same conclusion as there was evidence that the suit land was



reserved for prisons and therefore was not available for alienation. The ELC therefore dismissed the applicants' petition with costs, prompting the present application.

9. The 1st respondent did not file a reply to the application. In an affidavit sworn in opposition to the application by Barnabas Kipsang Keino on 14th November, 2020 on behalf of the 2nd -5th respondents, it is averred that the issues of merits or otherwise of the decision of the trial court are a preserve of this Court sitting on the main appeal but not under Rule 5(2)(b) of the Court of Appeal Rules. Further, that the 1st respondent's decision on review of grants and disposition was published and implemented in 2018, and thereafter, his office received a letter dated 26th August 2018 from the applicants requesting that they be granted sufficient time to peacefully and voluntarily vacate the suit lands. They had been allowed up to 31st January 2019 as they had requested and they voluntarily vacated the suit parcels of land. They also removed all their properties, harvested all their trees and crops, and even uprooted the stumps of the trees they had harvested for charcoal burning.
10. The 3rd respondent had thereafter effectively and fully taken possession of the parcels of land on 31st January 2019 and has massively invested and made substantial improvements thereon. It is therefore not true that any of the applicants' properties or trees are or were left on the suit parcels of land.
11. It is also the averment by the 1st respondent that the titles to the land parcels were cancelled even before the petition was instituted. The land parcels therefore remain alienated government land reserved for the Prison Department. The petition before the ELC was not concerned with the alleged trees on the suit parcels of land, and the applicants' intended appeal would not be rendered nugatory even if this application is denied.
12. In their submissions, the applicants contend that they have an arguable appeal. Among the issues they intend to raise is that the ELC failed to find that land parcel number Eldoret Municipality/ Block 10/190 was never the subject of any determination by the 1st respondent as it was not embodied in the Kenya Gazette. Consequently, any actions taken by the respondents which were inconsistent with the 3rd applicant's rights were unlawful and unconstitutional.
13. It is also their argument that the 1st respondent failed to comply with its duty under section 14 (3) of the *National Land Commission Act*, 2012 by failing to give the applicants a notice of review of grant, an opportunity to appear and inspect any relevant documents, failed to comply with regulations 8 and 9 of the National Land Commission and Dispositions of Public Land Regulations, 2017, went contrary to its mandate as no complaints were lodged over the applicants land parcels as required by regulations 5(1) and (2) of the *National Land Commission (Review of Grants and Dispositions of Public Land) Regulations*, 2017.
14. According to the applicants, their intended appeal will be rendered nugatory should the acts of felling their trees proceed as the eucalyptus trees have been growing on the land for over 25 years without any issues and the current value of the trees and the land based on the valuation reports as filed in court are in the cumulative sum of Kshs. 58,000,000.
15. We have considered the parties' averments and submissions. The principles to be considered in determining whether to grant orders under Rule 5(2)(b) have long been settled. An applicant must satisfy the court that it has an arguable appeal, and secondly, that the appeal will be rendered nugatory should the court not grant the orders sought. Both these limbs must be satisfied, as was held in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others (2013) eKLR*.
16. With regard to the first limb, the applicants have contended that the ELC failed to consider that land parcel number Eldoret Municipality/ Block 10/190 was never the subject of any determination, nor was it embodied in the Kenya Gazette as prison land. Further, that the 1st respondent failed to give a



notice of review of grant and acted contrary to the National Land Commission (Review of Grants and Disposition of Public Land Regulations) as no complaints were lodged over the suit land. We have taken into consideration these submissions, and we find that the applicants have satisfied the first limb in a Rule 5(2)(b) application and have established that they have an arguable appeal. The law is that an arguable appeal is not one that will necessarily succeed, but one that is not frivolous. As was held in *Dennis Mogambi Mong'are v Attorney General & 3 others* [2012] eKLR:

“ An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”

17. The question, however, is whether the applicants have satisfied the court that their appeal will be rendered nugatory if the orders they seek are not granted. They seek orders to restrain the 3rd respondent from felling the trees on the suit land, and contend that the suit land and the trees thereon are currently valued at Kshs. 58,000,000. In considering whether an appeal will be rendered nugatory, the court must consider what would result from a failure to grant the orders that an applicant seeks, and whether or not damages would be an adequate remedy should the intended appeal succeed- see *Stanley Kangethe Kinyanjui v Tony Ketter & Others* (2013) eKLR in which the court stated that:

“ 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.”

18. In this case, the applicants’ focus in their application is on the trees on the suit land. As was observed by Mr. Odongo for the 2nd -5th respondents at the hearing of this matter, the trees were not an issue before the ELC. However, even if they were, and in the event that the 3rd respondent does cut them down, though it indicates that it has no intention to do so, would that render the applicants’ appeal nugatory? We have set out above the issues that the applicants intend to raise on appeal which they contend constitute arguable issues on appeal. Whether an order in respect of the trees is issued at this stage or not, the determination of the intended appeal would not be affected. Further, the applicants have not placed before us any evidence to show that the respondents would be unable to compensate them for the loss of the trees in the event that their appeal is successful.
19. It is our finding therefore that the applicants have failed to satisfy both limbs under Rule 5(2)(b) of the Court of Appeal Rules. The application dated 18th May, 2021 is accordingly without merit, and it is hereby dismissed with costs to the 2nd -5th respondents.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF FEBRUARY, 2022.

P. O. KIAGE

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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.

