



REPUBLIC OF KENYA



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**Gulf Timber & Hardware Supplies Limited v Ngaruiya & 5 others (Civil Appeal E203 of 2021)
[2022] KECA 87 (KLR) (4 February 2022) (Ruling) (with dissent - S ole Kantai, JA)**

Neutral citation: [2022] KECA 87 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E203 OF 2021
HA OMONDI, M NGUGI & S OLE KANTAI, JJA
FEBRUARY 4, 2022**

BETWEEN

GULF TIMBER & HARDWARE SUPPLIES LIMITED APPLICANT

AND

MUNGAI NGARUIYA 1ST RESPONDENT

PAUL MWANGI MAKAU 2ND RESPONDENT

PETER GICHANE NGORU 3RD RESPONDENT

BENEDICT VALA NDINGA 4TH RESPONDENT

AGOSTINE KARIUKI KITHAE 5TH RESPONDENT

COUNTY GOVERNMENT OF MACHAKOS 6TH RESPONDENT

(An application for stay of execution from the ruling of the Environment and Land Court at Machakos (Angote J.) dated 11th June, 2021 in ELC No. 145 of 2018)

RULING

1. The application dated 14th June, 2021, made pursuant to Rules 5 (2) (b) of the *Court of Appeal Rules 2010* seeks orders that:
 - (i) A temporary injunction issues against the implementation of the ruling and order issued on 11th June, 2021, in Machakos ELC Case No. 145 of 2018 pending the hearing and determination of the intended appeal,
 - (ii) There be a stay of execution of the ruling and order issued on 11th June, 2021, in Machakos ELC No. 145 of 2018 pending the hearing and determination of this application, and eventually, pending hearing and determination of the intended Appeal,



- (iii) Costs of the application.
2. The background to the application is that the 1st respondent filed suit against the applicant and the 2nd - 5th respondents seeking to be declared the registered owner of the suit property, LR. No. 12715/11 and registered under IR. 167961. He concurrently filed an application seeking a temporary injunction restraining the applicant from trespassing on the suit property.
 3. The genesis of these prayers is that the applicant and the 1st respondent both claim ownership of the suit property. The applicant claims to be a bona fide purchaser for value; that he purchased the property in 2018 from the 5th respondent; that he carried out all due diligence in purchasing the said property; and that he had commenced construction on the property. The applicant provided details of the root of its title, stating that it had conducted due diligence in purchasing the suit property from the 5th respondent (which included Confirmation of Grant issued to the 5th respondent) and consideration paid as an innocent purchaser for value without notice.
 4. The 1st respondent's case before the Environment and Land Court (ELC) was that he had purchased the property in 1988. He produced a title to that effect; stated that he had paid rates for the property; that he had dug a borehole on the property; that he had obtained consent for change of user of the property; and had placed a caveat on the property when the 4th and 5th respondents purported to have titles to the said property. He presented a title document which was contested on grounds that there was nothing to demonstrate how he got title to the suit property.
 5. Subsequently, by a ruling delivered on 11th June, 2021, the ELC issued orders against the applicant directing that pending the hearing and determination of the suit, the applicant be restrained from inter alia trespassing on the suit property.
 6. The applicant being dissatisfied with the ruling/order has now filed this appeal and the present application before this Court. The application is anchored on the grounds that the applicant's appeal is arguable and that it is not frivolous. Further, that unless stay and an injunctive order are granted, the intended appeal, if successful, will be rendered nugatory.
 7. The applicant's case is that the ELC erred in issuing the orders that it did, which were determinative of the issue at the interlocutory stage, and which were also of a mandatory nature as they would result in its being evicted from the suit premises. That its appeal would be rendered nugatory if the stay orders remain in force.
 8. As to whether the appeal is arguable, one proposed ground of appeal is that the learned judge erred in law and in fact in delving into the substance of the suit, and making final determinations of facts at an interlocutory stage, rendering the purpose of hearing the suit no longer readily apparent. That in the interlocutory application, the judge was faced with two titles to the property known as L.R. No. 12715 wherein the applicant provided details of the root of its title, including due diligence conducted.
 9. The applicant contends that the impugned decision is in the nature of a mandatory eviction order issued at an interlocutory stage without having satisfied the prerequisites of granting a mandatory order which has made final determination of facts at an interlocutory stage rendering any further hearing moot. That this therefore makes the appeal arguable with high chances of success and not frivolous.
 10. The application is opposed through a replying affidavit sworn by Mungai Ngaruiya (the 1st respondent) who maintains that the orders issued by Angote, J. were not mandatory in nature but were intended to ensure the trespass complained of ceased.
 11. The parties were directed to file written submissions which I have read and considered.



12. This Court has stated that whether it be an application for injunction, stay of execution or stay of proceedings, the applicable principles are the same. To succeed in an application under Rule 5 (2) (b) of the Court of Appeal Rules, the applicant has to establish that: -
 - (i) The appeal is arguable,
 - (ii) The appeal is likely to be rendered nugatory if the stay is not granted and the appeal succeeds.
13. In the case of *Wasike v Swala [1984] eKLR 591*, this Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court. In addition, an arguable appeal is one that is not idle and/or frivolous. A perusal of the draft Memorandum of Appeal herein in my view raises several arguable issues, one being whether the orders issued by the trial court constituted a determination with finality of the suit at an interlocutory stage. This issue is not an idle issue particularly as regards whether the Judge was justified in issuing a mandatory order of eviction at an interlocutory stage of the matter, or whether the orders were simply intended to preserve the suit property. I am satisfied that the applicant has demonstrated an arguable appeal.
14. It is further argued that the intended appeal will be rendered nugatory as the applicant has made substantial investment on the suit property and is apprehensive about being evicted therefrom, stating that it will suffer immense loss unless the orders sought are granted. Further, that the 1st respondent is likely to use the suit property in any manner it deems fit and which may be prejudicial to the applicant, with the result that if the appeal is successful, then he will already have been out of the suit property.
15. The 1st and 6th respondent on the other hand argue that two orders were issued by the trial court restraining the applicant and the 6th respondent from inter alia trespassing on the property L.R. No. 12715/11, pending hearing and determination of the suit. However, the applicant has disobeyed these orders, and has put in place Administration Police to circumvent the orders of this court, and to try and steal a march against the 1st respondent. That if the orders are granted, then the applicant will move into possession, complete construction, and even sell the property to unsuspecting third parties.
16. That in any event, the applicant must first obey the earlier court orders, and even this very court's orders will be rendered moot so long as they go against the applicant. We are urged to be guided by the decision in *Misc. Application No. 1640 of 2003 Econet Wireless Ltd v Minister for Information and Communication of Kenya (ur)*, where the court held that a contemnor has no right of audience in any court of law unless he or she is punished or has purged the contempt.
17. As regards an appeal being rendered nugatory, this Court has held in the case of *Reliance Bank Limited vs Norlake Investment Limited [2002]1 EA 227* that the factors which render an appeal nugatory are to be considered within the circumstances of each case, and in so doing the court is bound to consider the conflicting claims of both sides. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or restrained, if allowed to happen is reversible, or if not reversible, whether damages will reasonably compensate the party aggrieved.
18. In the case of *African Safari Club Limited vs Safe Rentals Limited, Nai. Civ. App. 53 of 2010 (ur)* this Court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”



19. It is evident that the bone of contention is ownership of the suit property, which although capable of restitution in the event that the applicant's appeal is successful, risks having its character and nature altered. The 1st respondent shares similar fears, and submits that he had constructed a borehole in the suit land in the year 2012 which the applicant had been extracting water from without authority of the owner and had not responded to the question of who had constructed the said borehole; that it had found rates and rent being paid every year; it had attempted to construct on the suit property despite his objection to the Town Administrator before the applicant started construction; that he had applied for change of user and for construction of four bedroom maisonettes in December, 2012 and had been granted approval on 26th March, 2013. He had also been paying rates as could be gleaned from the receipts dated 29th August, 2003, attached to his replying affidavit dated 2nd October, 2019. He had also placed a caveat on the property on 25th February, 2016, before the applicant acquired a title to the property.
20. I note that in reaching the decision that the orders sought by the 1st respondent were merited, the ELC observed that the evidence before it showed that the applicant had started development of the suit property despite knowing that the 1st respondent had filed a suit challenging its claim and that of the 5th respondent; that the applicant had, in its affidavit before the ELC sworn on 30th September, 2019, deposed that its agent had been arrested on 8th October, 2018, when he visited the land; and that therefore by 8th October, 2018, the applicant had not commenced development on the suit land and was aware of the 1st respondent's claim on the suit property.
21. The applicant argues that the decision of the trial court, if implemented, will render the intended appeal nugatory as the applicant will be evicted from the suit property by dint of the impugned decision. The applicant contends that the 1st respondent had, by his application dated 23rd September, 2019, sought an order that the court be pleased to grant a temporary injunction restraining the applicant from trespassing on the suit property pending the hearing and determination of the suit and had thus sought an order that the applicant be declared a trespasser at an interlocutory stage. That it had provided a title to the property which accorded it the rights of a registered owner and was in possession of the suit property at the time of hearing and determination of the interlocutory application.
22. The applicant is emphatic that should the orders sought herein not be granted and the appeal succeeds, its success would amount to a pyrrhic victory as it will have been evicted from the suit property and the 1st respondent would have dealt with the property as he wills.
23. I observe that in issuing the injunctive orders in question, the ELC took into consideration the fact that on 23rd July, 2018, on the application of the 1st respondent, it had issued a temporary ex parte injunction restraining the defendants before it from developing the suit property; its orders had been extended from time in the presence of the parties; that when the applicant's agent had been arrested in October 2018 for disobedience of its orders, it had, in ordering his release, restated its restraining orders. It had also taken into consideration that while giving directions in respect of the two applications filed by the 1st respondent and the applicant respectively, it had restated its restraining orders. The facts therefore show that in entering the suit premises and commencing construction thereon, the applicant was in breach of court orders that it was fully aware of.
24. The applicant's argument, as I understand it, is that the court should not have made orders for its removal from the suit property. However, the facts show that the applicant had entered into and started construction on the suit property despite the existence of court orders, extended from time to time in the presence of the parties and restated by the court, restraining interference with the suit property.



25. On whether its appeal would be rendered nugatory, it is noteworthy that the court restrained it from interfering with the suit property and ordered its removal from the property which it had entered into and commenced construction on in defiance of the orders of the court. I hold the view that the effect of issuing the orders that the applicant seeks is to allow it to continue construction on the land, commenced in breach of court orders.
26. That being the case, I find that the applicant has not demonstrated that its appeal, if successful, would be rendered nugatory, the second of the two conditions that he is required to satisfy under Rule 5(2) (b) of the Court of Appeal Rules. To find otherwise would be to sanction blatant disregard of orders of the court.
27. Regarding its prayer for stay of further proceedings in Machakos ELC. 145 of 2018, the applicant submits that it has shown prima facie that it has an arguable appeal. It cites the decision in *Kenya Anti-Corruption Commission v Bhangra Limited & Another [2009] eKLR* in which this Court held that in circumstances where final determinations have been made, on appeal, it would be befitting to stay further proceedings until the appeal is determined as any continuation with the matter would be prejudicial in view of the final determinations made at an interlocutory stage.
28. In reply, the 1st respondent submits that in seeking orders of stay of the orders of the ELC and the proceedings, the applicant has not approached the court with clean hands. That the ELC had issued two orders which the applicant had disobeyed and continues to disobey - the first was an order for a temporary injunction pending the hearing of his application, which prompted the 1st respondent's lawyers to write to the Deputy Inspector General of Police.
29. The second was the order the subject of the present application, in response to which the applicant has put Administration Police officers on the suit land to circumvent the orders of the court and steal a match on the 1st respondent. Drawing from the case of *Hadkinson v Hadkinson [1952] 2 ALL E.R. 567* in which the court held that the court may, in its discretion, fail to grant a contemnor a right of audience until the impediment, the contempt, has been removed, the 1st respondent submits that the applicant must obey the court order and should not be granted any right of audience unless it is punished or purges the contempt. That the applicant should have obeyed the orders of the ELC whether it agreed with them or not until they had been discharged.
30. The 1st respondent urges this Court not to issue a stay of the order or of the proceedings; that the issue that the trial court would need to address is whether he had a valid title, and the applicant should subject itself to a speedy trial and is undeserving of the orders that it seeks.
31. My position has already been made clear in the earlier part of the ruling, and to even deign to grant stay of the proceedings falls along the pathway in light of the observations I have made.
32. I accordingly dismiss the application dated 14th June, 2021, with costs to the 1st respondent.

DELIVERED AND DATED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR



CONCURRING RULING OF MUMBI NGUGI, JA

1. I have read in draft the ruling of Omondi, JA and the orders proposed therein. I agree with her findings and conclusions and have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

MUMBI NGUGI

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JUDGE OF APPEAL

DISSENTING RULING OF KANTAI, JA

1. I have had the advantage of reading in draft the ruling of Omondi, J.A. but I am afraid that I do not agree with the conclusion my learned Sister has reached. I am of the respectful view that my learned Sister has placed a standard too high for an application under rule 5(2) (b) of the Court of Appeal Rules. That rule requires that in civil proceedings where a notice of appeal has been lodged in accordance with rule 75 of the said rules this Court may stay execution or order an injunction or a stay of any further proceedings in terms that the Court finds just. The Court has discretion to grant such order on terms that are fit depending on the circumstances of the case.
2. A good summary of how this Court has interpreted that rule was given in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR* 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.
 - ii. The discretion of this Court under Rule 5(2) (b) to grant a stay of 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.
 - iv. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
 - v. An applicant must satisfy the Court on both the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
 - 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.
 - 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.
 - ix. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - 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 will be 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 impunity, the onus shifts to the latter to rebut by evidence the claim"

3. I need not repeat the facts of the case which my Sister has well set out in her ruling.
4. The applicant has in the Motion before us asked that we issue a temporary injunction against the implementation of the ruling and order issued on the 11th June, 2021 in Machakos ELC Case No. 145 of 2018 pending the hearing and determination of the application and the intended appeal. We are also asked to stay execution of the ruling pending the hearing and determination of the application and the intended appeal. It is stated in grounds in support of the Motion and in a supporting affidavit of Ramji D. Varsani (the Managing Director of the applicant – Gulf Timber and Hardware Supplies Limited) that the ELC (Environment and Land Court) in a ruling delivered on 11th June, 2021 issued orders against the applicant directing that pending the hearing and determination of the suit pending at ELC the applicant be restrained from inter alia trespassing on the property known as L.R. No. 12715/11 (registered as I.R. 16761) ("the suit property"); the police were ordered to assist in enforcing the order; that the decision was in the nature of a mandatory eviction order issued at an interlocutory stage; that the Judge of ELC made final determinations of facts at an interlocutory stage rendering the further hearing of the suit moot; amongst other grounds.
5. I note that in the Further Amended Plaintiff by Mungai Ngaruiya (the 1st respondent here) he alleged that he had purchased the suit property in 1988 and that the 1st, 2nd and 3rd defendants in the suit had committed acts of trespass on the suit property and were guilty of fraud. He prayed that he be declared the legal owner of the suit property and a title issued to the 1st and 4th defendants in the suit be revoked; another title issued to the 6th defendant (the applicant here) also be revoked and other orders set out in the Further Amended Plaintiff be issued. The plaintiff was accompanied by an application for injunction and there was also an application by the applicant herein where it (the applicant here) prayed that interim orders of injunction granted against it in the suit be discharged and/or that the court review or set aside a ruling that had been granted against it.
6. In the ruling delivered by Angote, J. on 11th June, 2021 all the defendants (including the applicant herein) were restrained from dealing with the suit property; the Officer Commanding Mlolongo Police Station was ordered to enforce the order and the applicant's application was dismissed with costs.
7. It was the case of the 1st respondent before the Judge that he had purchased the suit property in 1988; the 4th defendant in the case (Benedict Vala Ndinga) alleged that the suit property had never been sold or transferred; the 6th defendant (the applicant here) alleged that it had purchased the suit property and was duly registered as the proprietor of the same. That is to say that there were conflicting claims on who owned that suit property and in those circumstances I doubt that a trial Court can make a determination on ownership of a property at that interlocutory stage as doing so may very well amount to making a final determination on the issue of ownership without hearing the parties. As we have seen all an applicant needs to establish in a rule 5(2) (b) application is whether the appeal, or intended appeal, as the case may be, is arguable. In the case before the Judge it is arguable whether the Court was right to make final orders without hearing the parties. A single bona fide arguable point will suffice as an applicant is not required to show a multiplicity of arguable points and it has also been held by this Court that an arguable point is not one that will succeed – See the case of *Dennis Mogambi Mongare v Attorney General & 3 Others [2012] eKLR*.



8. As to whether the appeal will be rendered nugatory I would issue an injunction to preserve the *status quo* so that the competing rights (or lack of them) are determined after the parties have been heard.
9. I would in the premises have allowed the Motion as I think that the applicant has satisfied the principles that govern an application of this nature.
10. As my learned Sisters Omondi and Mumbi Ngugi, JJ.A. are of the contrary view the final orders will be as proposed by the majority.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

S. ole KANTAI

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JUDGE OF APPEAL

