



Kidero & 9 others v Chief Magistrate of Milimani Law Courts & 4 others (Civil Appeal (Application) 242 of 2020) [2022] KECA 42 (KLR) (4 February 2022) (Ruling)

Neutral citation: [2022] KECA 42 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 242 OF 2020
RN NAMBUYE, MSA MAKHANDIA & J MOHAMMED, JJA
FEBRUARY 4, 2022**

BETWEEN

**EVANS ODHIAMBO KIDERO 1ST APPLICANT
SUSAN AKELLO MBOYA 2ND APPLICANT
EVANS ODHIAMBO KIDERO (SUING ON BEHALF OF THE ESTATE OF THE
LATE ABIGAEI ATIENO KIDERO) 3RD APPLICANT
EVANS ODHIAMBO KIDERO (SUING ON BEHALF OF THE ESTATE OF THE
LATE PHILIP AYOT KIDERO) 4TH APPLICANT
GEM INVESTMENTS 5TH APPLICANT
GEM APARTMENTS 6TH APPLICANT
GEM SUITES 7TH APPLICANT
ORRO LIMITED 8TH APPLICANT
ARGENTI LIMITED 9TH APPLICANT
PAUL AOL 10TH APPLICANT**

AND

**CHIEF MAGISTRATE OF MILIMANI LAW COURTS 1ST RESPONDENT
ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATIONS 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**



(Being an Application for injunction pending the hearing and determination of the Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mumbi Ngugi, J.) dated 4th June 2020 in Petition No. 25 of 2018)

RULING

1. The Notice of Motion before us for determination is dated 9th July 2021 brought under Rules 5 (2) (b), 41 and 47 of the Court of Appeal Rules. It seeks orders that: -
 1. Spent
 2. That this honourable court be pleased to issue a temporary injunction restraining the 2nd respondent and any/or of its agents, officers or investigators from purporting to investigate, search, and value any of the 1st Applicant's properties listed in the letter dated 6th July 2021 scheduled to occur between 12th July 2021 and 29th July 2021 pending hearing and determination of Civil Appeal No. 242 of 2020 Dr. Evans Kidero & Others Vs. EACC & Others already filed in this Court.
 3. THAT the honourable court be pleased to issue a temporary injunction restraining the 2nd respondent and any/or of its agents, officers or investigators from purporting to investigate, search, and value any of the 5th, 6th and 8th applicants' properties listed in the letter dated 6th July 2021 scheduled to occur between 12th July 2021 and 29th July 2021 pending hearing and determination of Civil Appeal No. 242 of 2020 Dr. Evans Kidero & Others Vs. EACC & Others already filed in this Court.
 4. THAT this honourable Court be pleased to issue a temporary injunction against the 2nd respondent, its agents, officers or investigators from purporting to place any caveats and or restrictions on any of the 1st Applicant's properties listed in the letter dated 6th July 2021 scheduled to occur between 12th July 2021 and 29th July 2021 pending the hearing and determination of Civil Appeal No. 242 of 2020 Dr. Evans Kidero & Others Vs. EACC & Others already filed in this Court.
 5. THAT this honourable court be pleased to issue a temporary injunction to restrain the 2nd respondent, its agents, officers or investigators from purporting to place any caveat and/or restrictions on any of the 5th, 6th and 8th Applicants' properties listed in the letter dated 6th July 2021 scheduled to occur between 12th July 2021 and 29th July 2021 pending the hearing and determination of Civil Appeal No. 242 of 2020 Dr. Evans Kidero & Others v EACC & Others already filed in this Court.
 6. THAT costs of this suit (sic) follow the outcome of this appeal.
2. The application is premised on the grounds that the applicants filed an application dated 19th June 2020 seeking orders that this Court stays the execution of the Judgment and decree herein dated 4th June 2020 and an injunction restraining the 2nd respondents from conducting any further investigations



secretly and or seizing the applicant's properties on the basis of the illegal search warrant issued pending the hearing and determination of Civil Appeal No. 242 of 2020 Dr. Evans Kidero & 3 Others Vs. EACC & Others "the civil appeal" which was already filed.

3. However this Court through a ruling delivered on 9th October 2020 by Nambuye, Musinga & Gatembu, JJ.A. declined to grant the orders aforesaid on the grounds that the applicants had not satisfied the nugatory test required under Rule 5(2) (b) of this Court's Rules. That the main reason why the court declined to grant the orders was because of the 2nd respondent's submission that it was yet to commence any actions complained of against the applicants. However, since the ruling, the 2nd respondent had embarked on a fresh witch-hunt mission against the 1st applicant by purporting to commence afresh the process of investigation, inspection and valuation of the 1st applicant's properties despite the pendency of Civil Appeal. Towards this end, the 2nd Respondent had served a letter dated 17th June 2021 on the applicant informing him of its intent to enter its offices, inspect and value his properties on the 28th June 2021. That another similar exercise is scheduled to be carried out on 12th July 2021 to 29th July 2021. It is therefore the applicants' case that the process of continued investigation, inspection and valuation of the applicant's properties during the pendency of the Civil Appeal, was a flagrant assault to the principle of rule of *sub-judice* as the issues are directly and substantially in question in the Appeal before this Court.
4. According to the applicants, their appeal raises several issues among them the legality of the search warrant dated 19th September 2018 and the jurisdiction of the 2nd respondent in investigating the 1st applicant's assets acquired throughout his life even when working for private institutions. That the search warrant issued on 19th September 2018 was only issued in respect to? the 1st applicant and could not therefore be used to search the properties of the other applicants thereby their putting into play the issue of corporate veil.
5. The applicants further aver that their appeal will be rendered nugatory as the 2nd respondent will have conducted the investigation, searched, inspected and valued the 1st applicants' properties that he acquired while he was a private citizen. Further, the appeal will be rendered nugatory as the alleged new inspection and valuation processes are meant to remedy the initial illegalities of inspecting, valuing and placing restrictions on the 1st applicant's properties without following the due process of law as set out under **Section 76** of the [Land Registration Act](#) which are the same illegalities that form the basis of the appeal before this Court thus defeating the substratum of the appeal.
6. The motion is further supported by the detailed affidavit of the 1st applicant sworn on his own behalf and on behalf of the other applicants. The affidavit merely rehashes, expounds and reiterates the grounds above.
7. The application is opposed by the 2nd respondent on behalf of the other respondents by way of a replying affidavit dated 13th August 2021 sworn by Paul Mugure an investigator with the 2nd respondent. The 2nd respondent contends that the application is an abuse of the court process as the same is a replica of the applicant's earlier application dated 19th June 2020 that was dismissed on 9th October 2020. That the applicants were trying to re-litigate an application under **Rule 5(2)(b)** whose ruling was conclusive, the same having not met the nugatory test. That the allegation by the applicants that the court's ruling was majorly based on the fact that it had not commenced any investigations against the applicants was untrue, misleading and unfounded as there was nowhere in the court's ruling that it was indicated that it had not commenced any investigations. That the applicant's rights to a fair hearing as provided for under Article 50 of the Constitution had not been violated and further that, the same rights were subject to limitations enshrined under **Article 24** of the same [Constitution](#) so as to protect the public interest. That the inspection and valuation were part of investigations undertaken



by the 2nd respondent pursuant to its constitutional and statutory mandate and the applicants had been notified of the intention to commence inspection and valuation of the applicant's properties from 28th June 2021 on the 17th June 2021. That the investigations by the 2nd respondent had established that the 1st applicant has interests in the companies listed in the schedule and hence the inclusion of these in the investigation, inspection and valuation and further that the 1st applicant was using companies, proxies and associates to register his properties in an effort to distance and camouflage the ownership of the said properties.

8. That what the 2nd respondent is doing is not an infringement of any constitutional right of any person but was only conducting investigations. That in the interest of justice, the appeal ought to be heard instead of re-hearing the current application as the 2nd applicant has always resisted the exercise from as early as 2016. In the upshot it was the 2nd respondent's contention that the applicants had not met the threshold for the grant of any of the orders sought in the application.
9. Parties filed written submissions with respect to their rival positions as well as case digests which we have duly read and considered. The principles for our consideration in the exercise of our unfettered discretion under Rule 5(2)(b) to grant orders sought are now well settled. Firstly, the applicant has to satisfy that he she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles were restated and amplified by this Court in the case of *Multimedia University & Another Vs. Professor Gitile N. Naituli (2014) eKLR* wherein it was stated:

“ When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underling those decisions was summarized in the case of *Stanley Kangethe Kinyanjui Vs. Tony Ketter & Others* [2103] eKLR.”

10. Further, in *Gatirau Peter Munya Vs. Dickson Mwenda Kithiji & 2 Others* [2014] eKLR the Supreme Court of Kenya added a third consideration, this being whether it is in the public interest that the order of stay be granted. We need to reiterate that these principles apply equally whether the application is for an injunction as in the instant case or for stay of execution proceedings. In considering whether the applicant has established an arguable appeal, we remind ourselves that an arguable appeal is not necessarily one that will succeed, but suffice to state that it should not be frivolous. The applicants' assertion is that the current application now satisfies both limbs that had not been met when a similar application was presented before a different bench of this Court.

According to the applicant the appeal will be rendered nugatory as the 2nd respondent has started fresh processes of investigating, inspection and valuation of the 1st applicants' properties and those of the other applicants' properties despite the pendency of the Civil Appeal. That the respondents had gone further to start a process the applicants had appealed against on the legality of the search warrants and if allowed to carry through the process afresh, this would destroy the substrata of the appeal thus the need to have the injunction granted.

In our view, the applicants' appeal is arguable and is not frivolous as correctly held by this Court differently constituted in a previous application. We have no reason to hold otherwise. However, we



do not want to make further comments on this aspect lest we embarrass the bench that will be seized of the main appeal.

On the nugatory aspect, it is not disputed that unless an order of injunction is granted, and the respondents proceeds as threatened, the applicants' appeal will no doubt be rendered nugatory. The appeal questions the search warrants issued and the jurisdiction of the 2nd respondent to investigate the applicants. Would the results of the appeal then be rendered nugatory? We do think so as this is an act which is the subject before this court and until the court makes a determination on the same, the 2nd respondent cannot be said to be protected by the law when it re-starts again the process of investigation, inspection and valuation of the applicants' properties. The prejudice that will be suffered by the applicants supersedes the actions of the 2nd respondent which can await the outcome of the appeal.

11. It is in view of the above that we have come to the conclusion that the applicants have established the twin principles for consideration in an application under Rule 5(2) (b) and we deem it fit to grant an injunction against the respondents pending the hearing and determination of Civil Appeal No. 242 of 2020. For avoidance of doubt, when the matter came up for hearing on the 20th September 2021, we granted interim orders and reserved our reasons to be given in this ruling. The orders as granted then in terms of prayers 2,3,4 and 5 of the application are extended until the hearing and determination of the appeal. Costs of this motion shall be in the appeal.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

