



Pwani Maoni Limited & another v Mure & another (Civil Application E030 of 2021) [2022] KECA 43 (KLR) (4 February 2022) (Ruling)

Neutral citation: [2022] KECA 43 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E030 OF 2021
W KARANJA, M NGUGI & P NYAMWEYA, JJA
FEBRUARY 4, 2022**

BETWEEN

PWANI MAONI LIMITED 1ST APPLICANT

EUROBUILD DIANI CONTRACTORS LIMITED 2ND APPLICANT

AND

JOHN LOCHART MURE 1ST RESPONDENT

SOPLASHED LIMITED 2ND RESPONDENT

(An application for stay of execution of the order of the Environment & Land Court of Kenya at Mombasa (Sila Munyao, J.) delivered on 23rd March, 2021 in ELC Case No. 234 of 2020)

RULING

1. A dispute arose between the applicants and respondents herein in regard to a construction the respondents were putting up in a plot on Land Parcel No. Kwale/Diani Beach/800, which abuts the 1st applicant's plot Land Parcel No. Kwale/Diani Beach 799. The applicants were claiming that the 1st respondent had not obtained the requisite approval/licences to construct the building. The respondents were nonetheless adamant that they had obtained all the necessary licences and approvals and the applicants' protestations were occasioned by other ulterior motives. The applicants filed ELC Case No. 234 of 2020 seeking orders, inter alia, to stop the said construction.
2. In the meantime, they filed an application seeking orders of injunction to restrain the applicants from proceeding with the construction pending determination of the suit. The application was opposed, but after considering the application along with the submissions of the parties, both oral and written, the learned Judge (Sila Munyao, J) found in favour of the respondents and allowed the application, thus suspending the construction until further orders from the court or until the main suit was determined.



3. Aggrieved by the said orders, the applicants filed an appeal to this Court and also filed the application before us under certificate of urgency seeking in the main an order staying execution of the impugned Ruling dated 23rd March, 2021 pending the hearing and determination of the appeal. The application is premised on the grounds on its face and supported by the affidavit of Erick Onyango Omolo, a contractor with the 2nd respondent, dated 1st April, 2021.
4. In a nutshell, Mr. Onyango deposes that they had obtained all the necessary licences and approvals; that the 2nd applicant had already procured all the building materials and taken them to the site and the applicants would suffer immense and irreparable loss as the materials risked being stolen or wasted in any other manner. According to Mr. Onyango, the respondents were being driven by malice and the learned Judge ought not to have granted them the orders of injunction.
5. The application is opposed through the affidavit of Nicholette Van Der Plas, a director of the 1st respondent company, sworn on 7th May, 2021. According to Nicholette, there was no evidence tendered before the court to show that the applicants had purchased building materials as claimed, and further, that there were no approvals for the development issued in the names of the applicants, or authority given to the applicants to obtain such approvals in the name of another person. She reiterates that the applicants do not have an arguable appeal as can be deciphered from the draft memorandum of appeal annexed to the applicant's affidavit. She also states that the nugatory aspect has not been demonstrated, nor have the applicants demonstrated the irreparable loss they claim will be suffered in the event the application is not allowed.
6. The applicants filed submissions dated 3rd June, 2021 in which learned counsel for the applicant states that the application meets the required threshold as they have demonstrated both arguability and the nugatory aspect. Learned counsel reiterates that the applicant will suffer irreparable loss if stay is not granted.
7. We have considered the application along with the rival affidavits and submissions on record. When the application came up for plenary hearing, there was no attendance by either party and so the application was considered on the basis of the material placed before the court, and the applicable law. We remind ourselves that the appeal before this Court is in respect of an interlocutory ruling where the learned Judge declined to exercise his discretion in favour of the applicants herein.
8. What we need to consider, therefore, is whether the learned Judge exercised his discretion judiciously as required by law. Before this Court can interfere with the exercise of discretion by the court below, we must be persuaded that the trial Judge either considered irrelevant material or failed to consider some important relevant materials placed before the court and as a result, arrived at a decision that was plainly wrong, a decision that would merit the intervention of this Court. If the learned Judge was malicious, capricious or whimsical in arriving at the impugned decision, then we would be justified to interfere with his exercise of discretion in favour of the respondents. On the other hand, if he was judicious and reasonable and put into account all the material placed before him, then we would have no business interfering with his decision. *See Mbogo v Shab [1968] EA 93*: where the predecessor of this Court pronounced itself as follows:-

“... the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice...”



9. We have considered the Ruling now impugned along with the issues raised in the application the rival affidavits and submissions. We note, like the trial Judge that the so called licences and approvals were not in the applicants' names but in the names of a stranger, whose name was not reflected in the CR12 forms which were displayed in court. It was apparent to the court that the development in question was being constructed by persons other than the lawful directors of the applicant's company. The learned Judge cannot be faulted for that finding. We could not have arrived at a different finding if that evidence was placed before us.
10. Accordingly, we find no basis whatsoever to interfere with the findings of the trial court. we find no arguable points raised in the appeal that would merit a determination by this Court. The first limb on arguability having not been demonstrated, we need not consider the nugatory aspect. Ultimately, we find this application devoid of merit and dismiss it with costs to the respondents.

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

W. KARANJA

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

