



REPUBLIC OF KENYA



Registered Trustees of Faith Mission Church & 10 others v Ngaruiya (Civil Application E300 of 2020) [2022] KECA 57 (KLR) (4 February 2022) (Ruling)

Neutral citation: [2022] KECA 57 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E300 OF 2020
DK MUSINGA, AK MURGOR & J MOHAMMED, JJA
FEBRUARY 4, 2022**

BETWEEN

**REGISTERED TRUSTEES OF FAITH MISSION CHURCH 1ST APPLICANT
VICTOR WAHOME KARIUKI 2ND APPLICANT
IBRAHIM SAKWA MZEE 3RD APPLICANT
JOSEPHAT MUSYOKA NDAMBUKI 4TH APPLICANT
HARUN NGUGI NDUNG’U 5TH APPLICANT
ISAAC MASILA MUTUA 6TH APPLICANT
FABIAN CHIMAKATI 7TH APPLICANT
MOSICA PROPERTIES LIMITED 8TH APPLICANT
MWANGANGI MUTULA MUTUA 9TH APPLICANT
JOSEPH WAWERU CHEGE 10TH APPLICANT
JOSEPH MUTINDA MUTUKU 11TH APPLICANT**

AND

WILFRED NG’ANG’A NGARUIYA RESPONDENT

(An application for stay of proceedings in Machakos ELC CASE No. 226 of 2016 pending bearing and determination of an intended appeal of the ruling and order of the Environment & Land Court at Machakos (Angote, J.) dated 18th September, 2020 in ELC Cause No. 226 of 2016)

RULING

1. **Background**



Before us is a notice of motion dated 22nd September, 2020 in which Registered Trustees of Faith Mission Church, Victor Wahome Kariuki, Ibrahim Sakwa Mzee, Josephat Musyoka Ndambuki, Harun Ngugi Ndungu, Isaac Masila Mutua, Fabian Chimakati, Mosica Properties Limited, Mwangangi Mutula Mutua, Joseph Waweru Chege and Joseph Mutinda Mutuku (the applicants) pray for orders in the main:

- a. a stay of proceedings and execution of the ruling in ELC No. 226 of 2016 (the suit) which is pending before the trial court for defence hearing and or on such terms as the Court may deem just, pending the hearing and determination of the intended appeal;
- b. that an order be and is hereby granted to all the parties herein that the status quo be maintained on L.R. No. 12715/155 (the suit property) pending the hearing and determination of the intended appeal and subsequently the suit;
- c. that this Court be pleased to grant any such other and/or further orders as it may deem fit; and
- d. that the costs of the application be provided for.

Wilfred Ng'ang'a Ngaruiya is the respondent herein.

2. The application is brought under Rule 5(2) (b) of the Court of Appeal Rules (this Court's Rules) and is premised, inter alia, on the grounds: that the applicants are dissatisfied with the ruling and order delivered by the Environment and Land Court (ELC) (Ang'ote, J.) on 18th September, 2020; that the applicants have filed an application seeking to review and set aside the trial Judge's determination in terms of the memorandum of appeal annexed to the application; that the applicants have an arguable appeal with a high probability of success; that the grant of the orders sought will not occasion any prejudice to the respondent; that it is in the interest of justice and fairness that the instant application be allowed; that there has been no delay in filing the instant application; that a mention date has been fixed by the learned trial Judge in the suit after which a defence hearing date will be fixed; that the applicants are genuinely apprehensive that the suit will proceed for hearing without their testimony being taken as they had allegedly failed to file their witness statements and list of documents in time; that the defence hearing in the suit will thus proceed while the 1st, 3rd, 5th, 6th and 7th applicants did not file their witness statements as required by law; that the said hearing would be grossly prejudicial to the 1st, 3rd, 5th, 6th and 7th applicants should it proceed without their witness statements; that substantial loss may result to the applicants if an interim order of stay of proceedings pending inter-partes hearing and determination of the application herein is not made; and that it would be in the interest of justice that the prayers sought in the instant application are granted.
3. The application was supported by the affidavit of Harun Ngugi Ndungu (Mr. Ndungu, the 5th applicant herein) on behalf of the 1st, 3rd, 6th, 7th and 11th applicants who reiterated the grounds in the application. Mr. Ndungu averred, inter alia, that some of the applicants have constructed houses on the suit property and live thereon and will therefore suffer prejudice if the orders sought are not granted.
4. The application was opposed and in a replying affidavit sworn by the respondent, it was deponed, inter alia: that the instant application is a mere sham as it seeks to stay proceedings pending an appeal in which the applicants intend to seek leave to be allowed to file defence, list of witnesses, list of documents and witness statements out of time; that in dismissing the application, the subject of the intended appeal, the learned Judge observed that the firm of Sharpley Barret & Company Advocates who were



then on record for the applicants filed a joint defence on behalf of the 1st, 3rd, 4th, 5th, 6th & 7th applicants; that the 11th applicant filed his defence and witness statement; and that no application has been made to withdraw the pleadings from the court records and neither have the applicants made any application to amend the pleadings or file additional ones.

5. The respondent further averred that the applicants have not attached a draft memorandum of appeal to enable the Court to determine whether there are triable issues; that the intended appeal is a waste of judicial time as it seeks to file documents, some of which are already in the court's records; that the applicants have had ample time to file any additional documents; that his right to peaceful possession of the suit property continues to be infringed upon due to the never ending delay tactics employed by the applicants; that he is in possession and is the legal and legitimate owner of the suit property; and that the applicants will not suffer prejudice should the hearing proceed since they can explore the option of filing an appeal against the judgment of the ELC should they be aggrieved by the decision rendered by the ELC.

Submissions by Counsel

6. The application was heard by way of written submissions. The firm of Messrs Nyongesa Nafula & Company Advocates represented the applicants. Counsel submitted that where it is in the interest of justice, this Court has powers to stay the proceedings of the ELC. On the question whether there would be substantial loss on their part if the orders sought are not granted, counsel submitted that the subject matter of the dispute is land; that the dispute between the parties pertains to ownership of the suit property; and that due to negligence on the part of the applicants' erstwhile advocates, the applicants did not file their statements of defence and the documents that they wished to rely on at trial. Counsel submitted that the intended appeal is arguable.
7. Counsel further submitted that the applicants' erstwhile advocates did not prosecute the case at the ELC; that being a land matter, if the proceedings before the ELC are not stayed, the ELC case will be heard and determined which will render the intended appeal before this Court an academic exercise; and that substantial loss will occur unless the proceedings before the ELC are stayed and/or an order of status quo granted to prevent the intended appeal before this Court being rendered nugatory. Counsel relied on the decision of *Mugar vs. Kunga* [1988] KLR where this Court held as follows:

“The practice of the Court of Appeal in the case of land which is a sensitive issue is that the parties should be allowed to come to court to have the issues involved in their dispute determined by a court of last resort. For the parties to come to this court, the court has to consider whether the status quo should be maintained pending the hearing of the appeal failing which the appeal if successful will be rendered nugatory. The court was of the view that the status quo should be maintained until the appeal was heard and determined.”

8. Messrs N. K. Mugo & Company Advocates for the respondent opposed the instant application and submitted that the suit, which has culminated into the intended appeal, has been in the judicial system for over five years; that the suit has been proceeding with the full knowledge of the applicants who have had at least four (4) firms of advocates acting for them; that during that time the applicants have applied numerous delaying tactics; that the applicants continue to infringe on the respondent's constitutional right of quiet ownership of the suit property; that the applicants' constant actions to further delay the determination of the suit will only prolong the infringement of the respondent's rights; and that the applicants do not stand to suffer prejudice should the proceedings in the suit proceed, given that should they not be satisfied with the decision of the Court, they have the option of appealing to this Court against the impugned decision. Counsel urged us to dismiss the application with costs.



Determination

9. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction of this Court under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice.
10. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled as was observed by this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR where the Court delineated the jurisdiction of this Court in such an application as follows:

“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. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
11. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR this Court described an arguable appeal in the following terms:

“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.”
12. We have carefully considered the grounds set out in the motion. In our view, there is contestation as to the ownership of the suit property. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
13. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others (supra)* this Court stated that:

“(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 is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
14. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be considered on its merits. In the circumstances of this case, the matter has been in Court for over five (5) years and delaying its finalization any further to await determination of an interlocutory appeal is not in the interest of justice. The ELC should be allowed to expeditiously hear and determine the suit so that if any party is aggrieved with the decision



or any part thereof, they can file an appeal to this Court against the substantive decision. In any event, the ownership of the suit property is reversible, depending on the circumstances and the applicable law. The intended appeal will therefore not be rendered nugatory.

15. The upshot is that the notice of motion dated 22nd September, 2020 lacks merit and is dismissed with costs to the respondent.

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

D. K. MUSINGA (P)

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

