



Simandi Investments Limited v Macharia & 2 others (Civil Application E104 of 2021) [2022] KECA 55 (KLR) (4 February 2022) (Ruling)

Neutral citation: [2022] KECA 55 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E104 OF 2021
MA WARSAME, MSA MAKHANDIA & HA OMONDI, JJA
FEBRUARY 4, 2022**

BETWEEN

SIMANDI INVESTMENTS LIMITED APPLICANT

AND

ROSALINE NJERI MACHARIA 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY 3RD RESPONDENT

(An Application for stay of execution from a portion of the Ruling Limb 5 and/ or a portion of the orders from the Environmental and Land Court at Milimani Court, Nairobi (S. Okong'o, J.) dated 4th March, 2021 in ELC No. 1035 of 2016)

RULING

1. The Notice of Motion Application dated 9th April, 2021, brought under Certificate of Urgency and pursuant Rules 5 (2) (b) of [Court of Appeal Rules 2010](#) and Sections 3A and 3B of the [Appellate Jurisdiction Act](#), seeks various injunctive reliefs and is supported by an affidavit sworn by the applicant both dated 9th April, 2021.
2. The background to these prayers is that the Applicant herein filed suit ELC. No. 1035 of 2016 for determination as to who was the proper party/legal registered owner of LR. 209/11293/1, and to whom compensation ought to be made for the compulsory acquisition of the suit land by the Kenya National Highway Authority.
3. Hon. S. Okong'o, by a ruling delivered on the 4th March, 2021, in ELC No. 1035 of 2016 ordered Kenya National Highway Authority (the 3rd respondent herein) to withhold half of the total compensation payable in respect of the compulsory acquisition of LR. No. 209/11293/1 and pay out the other half to the 1st respondent, pending the hearing and determination of the suit. The upshot of the ruling was



to effectively pave way for the release and/or payment of the one half of the total compensation to the 1st respondent.

4. That the said ruling, despite pending litigation in the ELC. Court to determine which of the two rival titles LR. No. 209/21698(2.9640 Ha) and LR. No. 209/21699 (0.725 Ha), a subdivision of LR. No. 209/11292 held by the appellant on one hand and the title LR. No. 209/11293/1 held by the 1st respondent is genuine, the learned judge seemed to have already made predetermination on the same.
5. That in essence the ruling was misdirected as the matter had not been fully heard and determined to enable the court to decide which title was genuine, and to whom the compensation would go to.
6. That the one half of the total compensation ordered by the court to alleviate loss of her business was a special damage claim which claim ought to have been specifically pleaded and proved at a full hearing. It is contended that the ruling was therefore premature by the court delving into a determination of the land ownership dispute.
7. The applicant being dissatisfied with the ruling has now filed this appeal before this court, and meanwhile seeks stay of execution and/or implementation of a portion of the ruling limb 5 (which basically ordered release of/and payment of the one half of the total compensation to the 1st respondent, being payable in respect of the compulsory acquisition of land parcel L.R. No. 209/11293/1. Also sought are orders of injunction to issue restraining the respondents by themselves, servants, agents, employees, representatives, or anyone working under them from processing, pursuing, receiving and/or transferring the compensation payment.
8. The applicant contends that the appeal is arguable, and that unless an order of stay is granted, the appeal will be rendered nugatory. No responses were filed.

9. **Issue for Determination**

- a. Whether the Applicant has satisfied the requirements necessary for granting an order for injunction.

The Supreme Court in Civil Application 12/15-*Deynes Muriithi & 4 Other v LSK & Another* [2016] eKLR stated that Rule 5 (2) (b) applications arise at an interlocutory stage and the orders issued thereunder are for the purpose of protecting the subject matter of an Appeal, the Court of Appeal having yet to finally determine the appeal.

10. In the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 Others*, Sup. Court App 16/2015 [2015] eKLR;

“[23] It is clear to us that Rule 5(2) (b) is essentially a tool for preservation. It safeguards the substratum of the Appeal in consonance with principles developed over the years.”

[“27] Rule 5 (2) (b) of the Court of Appeal Rules is derived Article 164(3) of the Constitution. It illuminated the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of the appeal/intended appeal.”

10. This Court has set out the parameters to be met for an order for injunction to be granted in an application under Rule 5 (2) (b). In the case of *Alferd Mincha Ndubi vs Standard Limited* [2020] eKLR. This Court quoted with approval the case of *Ismael Kangunyi Thande vs Housing Finance*



Company of Kenya Limited Civ. Appl. No. Nai 157/2006 : “to succeed in an application in 5 (2) (b) the applicant has to establish that;

- i. The Appeal is arguable
- ii. The Appeal is likely to be rendered nugatory if the injunction is not granted and Appeal succeeds.

11. These principles were restated by this court Multi Media University & Another v Prof. Gitile N. Naituli (2014) eKLR ‘...from the long line of decided cases on Rule 5(2)(b) the jurisprudence is underlined in the case of Stanley Kangethe Kinyanjui v Tony Ketter & Others (2013) eKLR to the effect that in dealing with Rule 5 (2) (b) of the Court of Appeal Rules, the court exercises original and discretionary jurisdiction, which is wide and unfettered if it is just to do so.

- (iii) 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. An applicant must satisfy the twin principles, namely:-
 - a. Whether the appeal is arguable, and it is sufficient if a single bona fide arguable ground of appeal is raised. It must be noted that an arguable appeal is not one that will necessarily succeed but one which ought to be argued fully before court and is not frivolous,
 - b. Whether or not an appeal will be rendered nugatory depends on whether 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 aggrieved party.

A. Is the Appeal arguable?

13. In the case of Wasike vs Swala [1984] KLR 591 this Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court.
14. The Applicant herein has laid out several compelling reasons how and why it would suffer substantial loss in its Notice of Appeal, Application, Grounds in support of the Application and submissions.
15. A perusal of the contested ruling shows that the court was at was unable to determine which of the titles held by the parties was the genuine and further stated that the determination of that issue had to await the full hearing of the suit. This in effect means none of the titles have been validated by the court.
16. In addition, the court held that that this was a case where it was appropriate for the court to exercise its inherent jurisdiction to preserve the subject matter of the suit pending the hearing and determination of the suit, pointing out that in instances where there are serious conflicts of fact, the trial court should maintain the status quo.
17. The learned judge was alive to the fact that if compensation is paid to the defendant, the substratum of the suit would be lost and in the event the applicant succeeds at trial both the land and compensation would be beyond its reach.
18. A perusal of the Memorandum of Appeal raises several arguable issues such as the Learned Judge’s premature ruling in determining that the 1st respondent is to receive half share of the compensation, yet the judge had not dealt with any substantive prayer in the application. The applicant sees to pursue an original prayer for stay of execution and orders of injunction on a matter not yet substantively determined. We hold the view that the judge merely exercised his discretion in giving administrative



directions. Where such administrative decision is not exercised capriciously, then this court would have no basis to interfere. We find that the intended appeal may not be arguable, and the applicant has not satisfied this first principle of an application under 5(2)(b) of the Civil Procedure Rules.

B. Will the Appeal be rendered nugatory should the injunction not be granted?

On the 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.

19. In the case of *African Safari Club Limited vs Safe Rentals Limited*, Nai Civ. App 53/2010 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.”
20. In short, the court is to decide which party’s hardship is greater. With that in mind, if the Applicant’s prayer for injunction is denied and its appeal eventually succeeds, as the Learned Judge rightly pointed out, “if compensation is paid to the Defendant, the substratum of the suit would be lost and in the event the applicant succeeds at trial in proving that it is the legitimate owner of the property, both the compensation and the land would be beyond its reach.”
21. Having found that the substantive prayers have not been dealt with by the trial court, then the issue of the appeal being rendered nugatory should the injunction not be granted is superfluous, and has no leg on which to stand. We therefore hold that the application lacks merit and is dismissed.

The costs of this application shall abide the appeal.

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

M. WARSAME

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JUDGE OF APPEAL

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

