



REPUBLIC OF KENYA



KENYA LAW
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**Mavumba v Kamau (Civil Application E087 of 2021)
[2022] KECA 451 (KLR) (18 March 2022) (Ruling)**

Neutral citation: [2022] KECA 451 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E087 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MARCH 18, 2022**

BETWEEN

RAMADHAN MASHUA MAVUMBA APPLICANT

AND

GEORGE KAMAU RESPONDENT

(Being an application for injunction against the Respondent restraining the Respondent from selling, charging, transferring or constructing on the suit property or dealing in any manner whatsoever pending the hearing and determination of the intended appeal against the judgement and decree of Hon. C. Yano J. dated 2nd June 2021 in Mombasa ELC Case No. 185 of 2012)

RULING

1. In a judgment delivered on 2nd June, 2021, the Environment and Land Court at Mombasa (C. Yano, J.) (ELC) found that the land the Respondent described as Plot No. 140/KWL/10/2002K Block 4 was the same parcel of land that the Applicant described as Plot No. 140/KWL/17/2007K Block 5 which are located at Golini Township in Kwale County. The learned Judge found that the said land was allocated to the Respondent by the Town Council of Kwale on 22nd February, 2005 and that he has been paying rent and rates for it. The court found that the said land, having been allocated to the Respondent in February 2005, and having been paid for by him, ceased to be available for allocation to anyone else. Thus, the court therefore found that when one Rachel Tabu Kauli, from whom the Applicant purchased the said land, was allocated the same plot on 29th December, 2005 it was a case of double allocation. The court entered judgment for the Respondent with costs. An application for temporary order of stay of execution filed by the Applicant before the Environment and Land Court dated 16th June, 2021 was dismissed on 9th November 2021.
2. Aggrieved by the judgment and ruling of Environment and Land Court the Applicant filed this application dated 18th November, 2021 brought pursuant to Rule 41 and 42 of the *Court of Appeal Rules* seeking an injunction against the Respondent restraining him from selling, charging, referring



or constructing on the Suit Property or dealing in any manner whatsoever pending the hearing and the determination of the intended appeal against the judgment and decree of the Environment and Land Court Mombasa.

3. The application was heard virtually on 26th January, 2022. Ms. Kwamboka held brief for Mr. Mwarandu for the Applicant, while Ms. Kibos appeared for the Respondent. Both counsels opted to rely entirely on their filed submissions and the affidavits sworn by their clients.
4. We have considered the application, the supporting and replying affidavits of the respective parties, and the filed written submission of counsel. We note that the application failed to cite the correct rule through which such an application can be brought before this court. It is clear what the Applicant through his Notice of Appeal dated 18th November, 2021 together with the Draft Memorandum of Appeal, is seeking. The application falls under Rule 5(2) (b) of this Court's rules. Pursuant to Article 159(2) of the *Constitution*, and the need to give substantive justice, we shall entertain the application.
5. To succeed in this application, the Applicant is required to demonstrate that his intended appeal is arguable, that if the orders sought are declined, the appeal if successful, will be rendered nugatory. (See *Stanley Kang'ethe Kinyanjui vs Tony Ketter and others [2013] eKLR*).
6. In the filed submissions of Mr. Mwarandu, he relied on the grounds set out in the motion and supported by the Applicant's affidavit sworn on 18th November, 2021. On arguability Mr. Mwarandu submitted that the learned trial judge failed to consider the survey report which established that the Applicant's parcel of land was distinct from the Respondent's parcel of land. Secondly, that the learned trial judge erred for finding that there was double allocation, yet evidence was clear there were two distinct parcels of land. Counsel relied on the case of *Meso Multipurpose Society Limited Vs Luore Nyoiro Co Ltd & 2 Others Civil Application No. 56 of 2020* on the twin principles an applicant must satisfy before an injunction is granted.
7. Mr. Njiru for the Respondent has urged that the Applicant does not have an arguable appeal on grounds the Applicant admits in his supporting affidavit that the Respondent is the owner of the property and is the one in possession. Secondly, on the basis of the trial court's finding that the Respondent was in fact the first to be allocated the suit property.
8. On whether the intended appeal is arguable the issue of who is in actual possession of the land is contentious. The Applicant did not admit that the Respondent is in possession, but was silent on that issue in his supporting affidavit. We have considered whether the appeal is arguable and find that there is for instance the question whether the learned trial judge correctly addressed his mind on the evidence to find that the case was that of double allocation as opposed to two distinct parcels of land. Further whether the Report of the Surveyor was properly considered by the learned trial judge. Bearing in mind that an arguable appeal is not one that must succeed (*Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd & 2 Others [2009] eKLR*), we do not think that the intended appeal is frivolous. It is arguable.
9. On the nugatory aspect, Mr. Mwarandu urged that the intention of the injunction is to preserve the substratum of the appeal on the grounds that if the property were to be sold or charged, the Applicant may not be able to recover the property.
10. Mr. Njiru for the Respondent urged that the appeal will not be rendered nugatory. Counsel cited the case of *Stanley Kang'ethe Kinyanjui, supra*, and urged that the Respondent is a man of means and capable of paying damages, if any arises, and therefore, the Respondent has no reason to worry. Counsel urged that the Applicant has failed to establish that he stands to suffer irreparable harm that cannot be compensated by an award of damages.



11. As to whether appeal will be rendered nugatory if the orders sought are not granted and the appeal ultimately succeeds, what may render the success of an appeal nugatory must be considered within the circumstances of each particular case as was stated by this court in *//Reliance Bank Ltd vs Norlake Investment Ltd* [2002]. EA 227}}. The Applicant has offered to provide security equivalent to the value of the land in order to obtain the prayer sought in his application, as the court may direct. We are of the view that in order to preserve the substratum of the appeal being land, it will be necessary to give an order to enable such preservation.
12. We find that in the circumstances of this case, the order which commends itself to us to make is an order that the status quo as currently obtains on the ground be maintained until the appeal is heard and determined, or other order of the court. The costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MARCH 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

