



**Chogi'S Garage Limited v Peers Oasis Park Holdings Limited & 2 others (Civil Application E419 of 2021) [2022] KECA 618 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 618 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E419 OF 2021  
HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA  
APRIL 28, 2022**

**BETWEEN**

**CHOGI'S GARAGE LIMITED ..... APPLICANT**

**AND**

**PEERS OASIS PARK HOLDINGS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**OASIS PARK MANAGEMENT COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**NEO WESTEND LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for injunction and stay of further proceedings against the Ruling and Orders of the Environment and Land Court at Nairobi (Oguttu Mboya, J.) delivered on 29th September 2021 in Environment and Land Court Civil Appeal No. E022 of 2021)*

**RULING**

1. The brief background of this application is that the applicant (Chogi's Garage Limited) purchased from the 1<sup>st</sup> respondent the property known as Apartment B1 erected on LR No. 330/1342 along Gitanga Close in the Lavington area of Nairobi, obtained a lease dated 28<sup>th</sup> May 2013, and thereafter entered upon and took possession thereof.
2. The suit property lies within the vicinity of the parking area, which allegedly exposed the applicant to the risk of insecurity and nuisance. The applicant's complaints to the 2<sup>nd</sup> respondent went unaddressed, prompting them to erect a gate and a grill at the backyard of their apartment with the intention of securing the premises.
3. In response, the respondents took the position that the gate and grill erected by the applicant interfered with the common areas reserved for general use by all residents and occupants of the apartments situate on the said property. Following threats by the respondents to pull down the gate, the grill and a water tank installed in the backyard by the applicant, the applicant filed suit against the respondents in the



Chief Magistrate's Court at Nairobi Civil Case No. E5145 of 2020 seeking inter alia injunctive relief restraining the respondents from removing the grill and the gate at the applicant's backyard.

4. Along with their plaint, the applicant filed a Notice of Motion dated 13<sup>th</sup> September 2020 seeking, among others, a temporary order of injunction to restrain the respondents from removing the gate and the grill from their backyard pending hearing and determination of the substantive suit. The respondents opposed the applicant's Motion in the trial court.
5. Upon hearing the Motion, the Principal Magistrate (Miss. E. Wanjala) dismissed the applicant's Motion by her Ruling dated 19<sup>th</sup> March 2021 with orders that the costs of the application do abide the outcome of the suit.
6. Dissatisfied with the Ruling of the Hon. Principal Magistrate, the applicant appealed to the Environment and Land Court at Nairobi in ELC Case No. E022 of 2021 on 11 grounds inter alia that the learned Magistrate erred in law and in fact: in determining substantive issues raised in the suit, and in drawing conclusive views on the dispute at the interlocutory stage; in failing to appreciate that the damage likely to be suffered by the applicant was not capable of being quantified in monetary terms, and may therefore be irreparable; by failing to appreciate a cardinal principle in *Giella v Cassman Brown & Co. Ltd* [1973] E.A. 358 to wit the preservation of the subject matter of the suit, and that, by failing to maintain the status quo, the subject matter of the suit might be destroyed; and by failing to appreciate that the respondents would not have suffered any prejudice if an order for injunction were granted as sought.
7. In addition to its appeal, the applicant filed a Notice of Motion dated 31<sup>st</sup> March 2021 seeking similar injunctive relief, and on the same grounds, pending hearing and determination of its substantive appeal. The Motion was opposed on grounds similar to those advanced in the Chief Magistrate's court. It was heard and determined by Oguttu Mboya, J. vide his Ruling delivered on 29<sup>th</sup> September 2021 dismissing the application.
8. Aggrieved by the above-mentioned Ruling of Oguttu Mboya, J., the applicant moved to this Court on appeal on 8 grounds, that the learned Judge erred in law –
  - (a) by varying and adding to the terms of the lease dated 28<sup>th</sup> May 2013, particularly clauses 3.5.2 and 6.8 to require written memorandum and/or consent for alterations;
  - (b) in declaring that the appellant's backyard is a common area contrary to clause 1.1 of the lease, which clearly provides for common areas;
  - (c) in making definitive findings on the allegations made against the appellant without evidence and/or hearing, thereby condemning the appellant unheard;
  - (d) in failing to address the issue of estoppel and/or waiver as pleaded and argued by the parties;
  - (e) in failing to correctly appreciate the nature of the injury to be suffered by the appellant;
  - (f) by failing to make a finding on whether or not the 3<sup>rd</sup> respondent had locus standi to issue the purported demolition notice;
  - (g) by delving into substantive issues and making final concluded views of the dispute at the preliminary stage thereby prejudicing the ultimate hearing of the main appeal and the suit in the lower court; and
  - (h) in deliberating on issues not subject of the application before him, thereby pre-empting the lower court's suit.



9. By its Notice of Motion dated 26<sup>th</sup> November 2021 and made under Rule 5(2)(b) of the *Court of Appeal Rules*, the applicant prays for orders:
1. spent.
  2. pending hearing and determination of this application inter partes, the Honourable Court be pleased to order stay of further proceedings in this matter.
  3. pending hearing and determination of the appeal herein, this Honourable Court be pleased to order stay of further proceedings in this matter.
  4. pending the hearing and determination of the appeal herein, the Honourable Court be pleased to issue a temporary injunction restraining the respondents and/or their agents from removing the grill and the gate at the applicant's backyard on apartment B1 erected on LR No. 330/1342 along Gitanga Close in Lavington.
  5. the costs of this application be provided for. Seeks, inter alia, stay of execution”
10. The applicant's Notice of Motion is based on 14 grounds set out on the face of the Motion, and is supported by the annexed affidavit of Florence Sheila Wairimu Chogi (the applicant's Managing Director) sworn on 26<sup>th</sup> November 2021 in which she substantially recites the grounds on which the application is made, but which we need not repeat here. In addition to the supporting affidavit, learned counsel for the applicant (M/s. Wanjohi and Wawuda, Advocates) filed written submissions dated 3<sup>rd</sup> December 2021, which they adopted and highlighted orally at the hearing of the application.
11. The applicant's Motion is opposed as is evident from the contents of the replying affidavit of Jane Cherotich Chepkwony (a Director of the respondents) sworn on 10<sup>th</sup> December 2021. In addition thereto, learned counsel for the respondents (M/s. Otieno and Amisi, Advocates) filed their written submissions dated 14<sup>th</sup> December 2021, which they also adopted and highlighted orally at the hearing of the application.
12. Having considered the Applicant's Notice of Motion dated 26<sup>th</sup> November 2021, the affidavit in support thereof, the draft Memorandum of Appeal annexed thereto, the respondents' replying affidavit, the written and oral submissions of the learned counsel for the applicant and those of the learned counsel for the respondents, we form the considered view that the applicant's Motion stands or falls on two main grounds:
- (a) whether the appeal is arguable, which is to say, it is not frivolous; and
  - (b) whether the appeal, if successful, would be rendered nugatory if stay was not granted.
13. The principles that apply in applications under Rule 5(2) (b) of the *Court of Appeal Rules* for stay of execution or of further proceedings, or for injunctive relief pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed. These principles have been enunciated in, among others, the following judicial pronouncements of this Court, including those cited by the parties, and to which we now turn.
14. On the first limb of this twin principle, this Court held in *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR that, for stay orders to issue in similar cases, the applicants must first



- demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.
15. With regard to the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay orders sought, this Court in *Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 Others* [2014] eKLR observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point will succeed. That brings us to the second limb of the twin principle – whether the appeal, if successful, would be rendered nugatory in the event that stay is not granted.
  16. The term “nugatory” was defined in *Reliance Bank Ltd V Norlake Investments Ltd* (2002) 1 EA p.227 at p.232 thus: “it does not only mean worthless, futile or invalid. It also means trifling.” The Court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.
  17. On our reading of the grounds on which the applicant’s Motion is founded, the affidavit in support thereof, the replying affidavit, and of the respective written and oral submissions of the learned counsel for the parties, we draw the conclusion that the applicant’s grievance revolves around, among other contested issues, (a) the terms and interpretation of the subject lease; (b) the undetermined controversy over what constitutes common areas in respect of the suit property; and, most important, (c) the imminent demolition or removal of the grill and gate complained of. In the circumstances, we are persuaded that the grounds of appeal set out in the draft Memorandum are arguable. They are not, in our considered view, idle. That satisfies the first limb of the twin principle for grant of orders under Rule 5(2) (b) of this *Court’s Rules* subject, however, to satisfaction of the second limb of this principle.
  18. That brings us to the second limb of the twin principle – whether the appeal, if successful, would be rendered nugatory in the event that stay is not granted. We believe it would. In the absence of the temporary restraining orders and orders of stay sought pending appeal, the grill and gate complained of would be pulled down with the effect of constituting the disputed area “common area” accessible to all residents, which would, in turn, result in shutting out the applicant from the course of justice, thereby condemning them unheard on the merits of their appeal, which cannot be compensated by an award of damages. Moreover, the consequences of the imminent demolition would occasion the applicant substantial loss on account of the exposure complained of, an eventuality that cannot, in our considered view, be undone were the appeal to succeed. In the end, the appeal, if successful, would be rendered nugatory.
  19. The term “nugatory” was defined in *Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA p.227 at p.232 thus: “it does not only mean worthless, futile or invalid. It also means trifling.” The Court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. We are persuaded that the circumstances of the case before us calls for temporary orders restraining the respondents from removing the grill and the gate in issue or from otherwise interfering with the suit property pending hearing and determination of the appeal.
  20. Having considered the applicant’s Notice of Motion dated 26<sup>th</sup> November 2021, the affidavit in support thereof, the Respondents’ replying affidavit, the respective written and oral submissions of the learned counsel for the applicant and for the respondents, we find that the applicant has satisfied the two limbs of the requirements in an application for temporary injunctive relief pending the hearing and determination of the intended appeal.
  21. Accordingly –



- (a) the applicant's Notice of motion dated 26<sup>th</sup> October 2021 is hereby allowed in terms of (b) and (c) below;
- (b) the respondents are hereby restrained from removing the grill and gate at the applicant's backyard on apartment B1 erected on LR No. 330/1342 situate along Gitanga Close in the Lavington area of Nairobi pending hearing and determination of the applicant's appeal; and
- (c) the costs of this application be costs in the intended appeal.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL, 2022**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**A. MBOGHOLI MSAGHA**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

