



Luka & 3 others v Chairman Land Adjudication Committee Leshuta Land Adjudication Section & 6 others (Civil Application E82 of 2021) [2022] KECA 697 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KECA 697 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E82 OF 2021
RN NAMBUYE, F SICHALE & S OLE KANTAI, JJA
APRIL 28, 2022**

BETWEEN

**JIMMY PARNYUMBE LUKA 1ST APPLICANT
SIATI MARDADI 2ND APPLICANT
NAIPERIAL MASAGO 3RD APPLICANT
KONANA KIRAISON 4TH APPLICANT**

AND

**CHAIRMAN LAND ADJUDICATION COMMITTEE LESHUTA LAND
ADJUDICATION SECTION 1ST RESPONDENT
DISTRICT LAND ADJUDICATION OFFICER NAROK WEST DISTRICT,
NAROK COUNTY 2ND RESPONDENT
DIRECTOR LAND ADJUDICATION AND SETTLEMENT .. 3RD RESPONDENT
DEPUTY COUNTY COMMISSIONER NAROK WEST SUB-
COUNTY 4TH RESPONDENT
CABINET SECRETARY MINISTRY OF LANDS 5TH RESPONDENT
ATTORNEY GENERAL 6TH RESPONDENT
MASAI MARA UNIVERSITY 7TH RESPONDENT**

(An Application for Stay of the Judgment/ Decree of the High Court of Kenya at Narok (Mbogo, J. (delivered 30th November 2021). IN High Court ELC Petition No. E001 of 2021)



RULING

1. Jimmy Parnyumbé Luka, Siati Mardadi, Naiperial Masago and Konana Kiraison (the applicants herein), have moved this Court vide a motion filed on December 10, 2021, brought pursuant to provisions of Section 3A of the Appellate Jurisdiction Act, Rules 5 (2) (b) 41, 42 and 47 of the Court of Appeal Rules 2010, Articles 22, 23, 35 and 40 of the Constitution of Kenya and all other enabling provision of the Law, seeking an order of stay of execution of the Decree and Orders of Mbogo J, issued in Narok ELC Constitutional Petition No. E001 on November 30, 2021.
2. The applicants further seek an order of temporary injunction restraining the Narok West Land Registrar and the respondents herein, from closing the Land Adjudication Register and/or processing and issuance of any title deed in respect to Plot No. 2585 Leshuta Adjudication Section and in particular processing any title deed in favour of the 7th respondent, in respect to an allocation of 210 acres in the Leshuta Adjudication Section, pending the hearing and determination of the intended appeal.
3. The motion is supported by the grounds on the face of it and an affidavit sworn by Jimmy Parnyumbé Luka, the 1st applicant herein who deposed inter alia that the Leshuta Land Adjudication Committee had without conducting any public participation and in violation of the rights of the petitioners to own property, allocated 210 acres of land to the 7th respondent in Plot No. 2585 Leshuta Adjudication Section, prompting one David Kijuku Kedienye to file an objection disputing the decision by the Leshuta Adjudication committee to allocate the said parcel of land, which objection was dismissed by the Adjudication Officer.
4. That, the 1st applicant in his capacity as the Chairman of persons living with disabilities in Narok County and in public interest had filed an appeal to the Minister in Appeal Case No. 578 of 2020, against the decision of the Adjudication Officer which appeal was dismissed without considering the plight of the members who missed out in the allocation of land. Further, that the applicants had filed Narok ELC Constitutional Petition No. E001 of 2021, alleging inter alia contravention of constitutional rights of several members of the Leshuta Adjudication Section, who were not allocated any land in the said Section by the respondents, which petition was dismissed by Mbogo, J on November 30, 2021, thus provoking the instant motion.
5. He further deposed that being aggrieved with the aforesaid decision of the ELC Court, the applicants had lodged an appeal; that the respondents had now prepared the final Land Adjudication Register; that unless the orders sought were issued, title deeds will be processed and the applicants' members will suffer irreparable harm, as they would be denied land which they are entitled to, thus rendering the intended appeal nugatory.
6. The motion was opposed vide a replying affidavit sworn on January 14, 2022, by Daniel M. Naikuni Nchorira, the Director, Endowment Fund in the service of the 7th respondent, who deposed inter alia that the 7th respondent was rightfully allocated land in the Adjudication Section; that the applicants were not party to the objection proceedings whose outcome they seek to challenge; that they had not demonstrated that they had an arguable appeal and that if the orders sought were not granted, their appeal would be rendered nugatory and further, that they had not tendered evidence nor established the substantial loss that they would suffer if orders of stay were not granted.
7. On January 31, 2022, the motion came up before us for hearing via GoToMeeting video link on account of the Covid 19 protocols. The 1st applicant appeared in person whereas Mr. Eredi learned



counsel appeared for the 2nd, 3rd, 4th, 5th and 6th respondents. Mr. Nyabochwa learned counsel appeared for the 7th respondent.

8. It was submitted by the applicants that they had an arguable appeal on the grounds *inter alia* that the learned Judge failed to appreciate that they had exhausted the alternative remedies provided for under the *Land Adjudication Act* and that in the alternative, there were exceptional circumstances demonstrated to warrant the intervention of the Court.
9. On the nugatory aspect, it was submitted that unless the orders sought were granted, title deeds would be processed and the applicants' members would suffer irreparable harm as they would be denied land which they were entitled to thus rendering the intended appeal nugatory.
10. Mr. Eredi on the other hand for the 2nd-6th respondents while relying on his written submissions dated January 13, 2022, submitted that the applicants had no arguable appeal in that the cause of action was a violation of constitutional right arising out of implementation of a statutory provision; that from the pleadings and the prayers being sought, the applicants were contending that they were not allocated land; that the *Land Adjudication Act* does not "allocate" land and further, that an order of stay of execution would only be granted if the subject matter would dissipate and the applicants can be compensated by way of damages.
11. On the other hand, Mr. Nyabochwa for 7th respondent while opposing the motion and relying on his written submissions dated January 14, 2022, submitted that the applicants had not demonstrated that they had an arguable appeal and neither had they established that if the same eventually succeeds, the same would be rendered nugatory. Further the applicants had not established that they would suffer irreparable harm if the orders sought are not granted as the alleged persons who did not get land are not settled on the land allocated to the 7th respondent and that issuance of title to the 7th respondent was not a process that could not be reversed. Finally, that the fact that title will issue to the 7th respondent does not make the alleged harm to the persons represented irreparable.
12. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the 7th respondent's replying affidavit, the rival written submissions and oral highlights made by the parties before us on 31st January 2022, the authorities cited and the law.
13. The applicants motion is brought *inter alia* under Rule (5) (2) (b) of this *Court's Rules*. Rule 5 (2) (b) of the Rules, which guides the Court in applications of this nature provides:
 - (2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:
 - (a)...
 - (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just."
14. The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay or injunctions are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be



rendered nugatory. These principles were summarized by this Court (differently constituted), in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2013] eKLR as follows:

- “i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge’s discretion to this Court.
- v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
- vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
- vii. 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.
- viii. An applicant must satisfy the Court on both the twin principles.
- ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
- x. 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.
- xi. 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.
- xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- xiii. Whether or not an appeal will be rendered nugatory depends on whether or not 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 party aggrieved.”

- 15. With regard to the first limb, it was submitted by the applicants inter alia that they had an arguable appeal as the learned Judge proceeded to determine the petition without according the petitioners their right to information in compliance with the interim orders given by Kullow, J. on March 15, 2021, in which the respondents were ordered to supply the petitioners with copies of all the minutes of
- 16. Leshuta Adjudication Section, copies of all documents, orders, proceedings and rulings rendered in respect of the objection filed by one David Kedienye and the final determination by the Deputy County Commissioner in Minister Appeal No. 578 of 2020, Plot No. 2585, Leshuta Adjudication Section filed by the 1st petitioner.
- 17. We have indeed looked at the Memorandum of Appeal annexed to the application and from a cursory perusal of the same and from the circumstances of this case, we are satisfied that the applicants have demonstrated that they have an arguable appeal worthy of consideration by this Court. As we had alluded to earlier, an arguable appeal is not one that must necessarily succeed. Of course we are mindful of the fact that we should exercise restraint and refrain from saying more regarding this issue at this stage lest we embarrass the bench that will be seized of the matter on appeal. Consequently, we are satisfied that the applicants have satisfied this Court on this limb.



18. On the nugatory aspect, it is indeed not in dispute that the subject matter herein in dispute revolves around land which can be easily quantified in terms of monetary terms/value and the applicants will definitely be adequately compensated in the event of the appeal succeeding. In any event and as was rightly submitted by the 7th respondent, the mere fact that title may be issued to the 7th respondent does not of itself make the alleged harm to the applicants irreparable as title can be revoked/cancelled at any time. Ultimately therefore, we are not satisfied that the applicants' appeal would be rendered nugatory if the orders sought are not issued.
19. In view of the above, and the applicants having failed to establish the twin principles for consideration by this Court in an application under Rule 5 (2) (b) of this Court's Rules, the applicants motion filed on 10th December 2021 is without merit and the same is hereby dismissed with costs to the 2nd-7th respondents.
20. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

