



**Maalim & another v Waso Resources Development Agency (WARDA) & another
(Civil Application E467 of 2021) [2022] KECA 891 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 891 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E467 OF 2021
MSA MAKHANDIA, J MOHAMMED & A MBOGHOLI-MSAGHA, JJA
APRIL 28, 2022**

BETWEEN

ABDULLAHI MAALIM 1ST APPLICANT

NOOR MAALIM 2ND APPLICANT

AND

WASO RESOURCES DEVELOPMENT AGENCY (WARDA) .. 1ST RESPONDENT

BLUE MAGIC LTD 2ND RESPONDENT

(An application for injunction under Rule 5(2) (b) pending the hearing and determination of an appeal from the Judgment of the Environment & Land Court at Garissa (Cherono, J.) dated 17th December 2021 in ELC No. E001 OF 2021)

RULING

1. The motion before us dated 20th December, 2021 is brought under Rule 5(2)(b) and 42 of the *Court of Appeal Rules*. The prayer falling for our consideration is framed thus;

“At the hearing of this application inter-partes and pending the hearing and determination of the appeal, this honourable court be pleased to issue an injunction restraining the respondents by themselves or through their agents, servants or other persons claiming through or under them from proceeding any further with construction of other works on plot No. HAB/KBL/594 L.R No. 29714 located in habaswein sub-county of Wajir County.” “The suit property”.
2. The grounds appearing on the face of the application in its support are that the intended appeal is arguable as per the draft memorandum of appeal filed to wit, that the trial court, erred in law and fact when it declined to grant the order of injunction sought despite the existence of a prima facie case;



that failure to preserve the suit property during the pendency of the suit was in error and that the respondents were thus given green light to proceed with the construction which was detrimental to the applicants; that the applicants' right to a fair hearing was curtailed by the trial court when it refused to grant the orders sought and that the respondents after the ruling had embarked on construction of permanent structures on the suit property, which will have the effect of changing the character of the suit property permanently to the prejudice of the applicants and thereby render the intended appeal nugatory.

3. The application is further supported by the affidavit of the 1st applicant who depones that the suit property belongs to siqle Self Help Group where he is the Chairman and which suit property was allocated to them by Wajir County. That the applicants having failed to obtain an order of stay of the Ruling and Order from the Environment and Land Court at Garissa "ELC" the respondents had mobilized construction materials and equipment and commenced construction works on the suit property which involve putting-up of permanent structures to be used as a health centre/dispensary which if allowed to proceed would amount to acts of trespass and infringement of the applicants' right to property.
4. That they will suffer prejudice if the construction of permanent structures on the suit property are allowed and further that the suit in the ELC will be rendered academic as the respondents will use the suit property as their own. That it is only fair and just that the substratum of the intended appeal be preserved by issuing the orders sought herein.
5. The motion is opposed by the respondents through the affidavit of Abdilaziz Dubat, the 1st respondent's chair. The respondents' case is that the application does not meet the threshold required under Rule 5 (2) (b) of this Court's *Rules* as they have not demonstrated that there is an arguable appeal and that they do not appreciate that not every dissatisfaction of a court's decision warrants an appeal. That there is the issue of public interest which overrides the interests of the applicants and which has been acknowledged by the applicants. That the applicants had not demonstrated how failure to get the orders sought will render their application nugatory and that any loss cannot be compensated by way of costs and damages.
6. Parties thereafter filed written submissions in support of their respective positions. The applicants' in their submissions acknowledged the fact that for a litigant to succeed in an application of this nature he must demonstrate both limbs of an arguable appeal and the same being rendered nugatory, in the event the order sought is denied. The applicants reiterated the averments in the motion and the affidavit in support thereof and pray that we rely on the case of *Angela Mbugua & 4 Others Vs. K.O. Holding Limited & 2 Others* [2021] eKLR and grant the prayers sought as they had met the twin principles required.
7. On the other hand, the respondents in their submissions maintain inter alia that the applicants have not made any case for grant of the orders sought. While placing reliance on the cases of *Kenya Industrial Estate Limited & Another Vs. Matilda Tenge Mwachia* [2021] eKLR and *Multimedia University & Another Vs. Professor Gitile N. Naituli* [2014] eKLR; the respondents submit that the requirements set in those cases for grant of orders sought under Rule 5(2)(b) of this Courts Rules had not been met by the applicants. They reiterate what they had deposed to in the replying affidavit and pray for the dismissal of the application.



8. The law on the grant of orders under Rule 5(2)(b) of the *Court of Appeal Rules* (including injunction) is well settled as restated by this Court in the case of *Chris Munga N. Vs. Richard Nyagaka Tongi & 2 Others* [2013] eKLR where the court succinctly set out the law as follows: -

“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”

9. On the first limb, we have looked at the four grounds raised in the memorandum of appeal. Among the grounds is the fact that they have been denied the right to a fair hearing by refusal to grant the orders sought, and allowing the construction to proceed while equally uttering comments that were interpreted to mean that the court had already made up its mind as to the ownership of the suit property. Being cognisant of the fact that the applicants need only demonstrate one arguable ground and not a multiplicity of them, and further that an arguable appeal is not necessarily one that will succeed, we have no hesitation in finding that the applicants have an arguable appeal. The first limb has therefore been satisfied.
10. On the nugatory aspect, whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or injunctioned, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. See *Reliance Bank Limited Vs. Norlake Investments Ltd* (2002)1 EA 227.
11. It is evident that the applicants are residents of the area where the health centre/dispensary is being constructed and the fear is that the construction which they claim is being put up on the suit property which they claim to be theirs, if allowed to be completed will change the outlook of the suit property. That the respondents will be at liberty to use the suit property as they wish. Further that the case before the trial court will be rendered otiose as the construction which is at an advanced stage will have been completed. On the other hand, the respondent argues that the suit property is community land and the community was asked to give it away for the construction of a medical facility by the Government through donor funding. That in any case the applicants can be compensated by way of costs and damages should they succeed in their intended appeal.
12. Weighing between the two positions, it is clear that the issue of ownership has not been ascertained in the trial court thus we wish not to address it. Secondly, the threat that has forced the appellants to approach the court is the continued construction of the proposed medical facility in a parcel of land whose ownership is disputed. This parcel of land is not being exported to a different place, only that there is construction on the same, which construction, if the trial court finds that the suit property belongs to the applicants, it can order for its demolition at the respondents' cost. The applicants can equally be compensated by way of damages and costs as rightly put by the respondents. Further there is the aspect of public interest which must take centre stage as opposed to individual interest as the applicants wish to stop the construction of a medical facility which is for the general good for the local populace. In the premise, we find that this limb has not been demonstrated to our satisfaction.
13. As stated earlier an applicant needs to demonstrate both arguability and the nugatory aspect, and proving only one limb will not suffice. Having failed to demonstrate the nugatory aspect, the applicants will have to await the outcome of their appeal as the order of injunction sought cannot be granted.
14. Accordingly, the applicants' application is hereby dismissed with costs to the respondents.



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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

