



**Gakibe v Ngumba & 3 others (Civil Application E300 of 2021)
[2022] KECA 538 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KECA 538 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E300 OF 2021
RN NAMBUYE, J MOHAMMED & S OLE KANTAI, JJA
MAY 13, 2022**

BETWEEN

ZACHARIAH MUIGAI GAKIBE APPLICANT

AND

JOHN MWENJA NGUMBA 1ST RESPONDENT

KENYA COMMERCIAL BANK LIMITED 2ND RESPONDENT

ROYAL BUILDERS LIMITED 3RD RESPONDENT

EQUITY BANK (K) LIMITED 4TH RESPONDENT

(An application seeking for an injunction order pending the hearing and determined of an intended appeal against the judgment of the Environment & Land Court at Nairobi (Komingoi, J.) dated 29th July, 2021 in ELC No. 281 of 2009)

RULING

- 1) Before us is a notice of motion dated August 24, 2021 in which Zachariah Muigai Gakibe (the applicant) prays for orders in the main: that pending the hearing and determination of this application, an interim injunction order do issue to restrain Royal Builders Limited (the 3rd respondent), its agents and/or servants from entering, trespassing or damaging or otherwise howsoever interfering with the applicants' possession of L.R. No. 74/16 North East of Nairobi (the suit property); that an injunction do issue to bar John Mwenja Ngumba (the 1st respondent) and Royal Builders Limited the 3rd respondent, its agents and or servants from entering, trespassing, damaging or otherwise howsoever interfering with the applicants possession of the suit property pending the hearing and determination of an intended appeal against the judgment of the Environment and Land Court (ELC); and that costs of this application be provided for.



- 2) Kenya Commercial Bank Limited & Equity Bank (K) Limited are the 2nd and 4th respondents respectively.
- 3) A brief background of the application is that the applicant vide an amended plaint filed in the ELC sought judgment against the respondents jointly and severally for inter alia:
 - “(a) A declaration that the property known as Land Reference No. 74/16 North East of Nairobi, was held by the late Andrew Ngumba and the 1st defendant in trust for the plaintiff and is currently held by the 3rd defendant in trust for the plaintiff, in the alternative
 - (b) A declaration that a resulting or implied trust sprang up in favour of the plaintiff subsequent to the payment of the deposit of purchase price and the grant of possession, the subsequent development thereof at tremendous cost without either late Andrew K. Ngumba or the 1st defendant disbursing him of the ownership thereof.
 - (c) A declaration that the purported sale on August 26, 2005 and subsequent transfer of the suit property known as Land Reference No 74/16 North East of Nairobi was illegal, null and void.
 - (d) An order do issue to compel the 3rd and 5th defendants to surrender the title issued to the 3rd defendant over L.R. No. 74/16 North East of the Nairobi for cancellation within fourteen (14) days of the judgment herein failing which, the Principal Registrar of Government Lands do take the necessary steps for cancellation thereof.
 - (e) An order do issue directing the 5th defendant to execute a suitable discharge of charge in respect of the charge executed by the 3rd defendant in favour of the 5th defendant over the suit property within 14 days of the judgment, failing which, the Deputy Registrar, High Court Nairobi to prepare and register the same at the 5th defendant’s costs.
 - (f) A mandatory injunction compelling the 2nd defendant herein to give the plaintiff monthly statement of the loan account NO xxxx University Way Branch and refund to the plaintiff the sum of Kshs.1,656,494.50 or any excessive amount found to have been over paid to the 2nd defendant to liquidate the loan.
 - (g) A permanent injunction do issue against the defendants restraining them by themselves, their servants, agents, employees or any one claiming under them from evicting the plaintiff from L.R. No. 74/16 North East of Nairobi.
 - (h) A permanent injunction do issue against the defendants restraining them by themselves, their servants, agents, employees, or anyone claiming under them from selling, transferring, charging, leasing or in any other manner dealing with all that land known as L.R. No. 74/16 North East of Nairobi.”
- 4) The 1st respondent filed a statement of defence denying that the applicant ever purchased the suit property from Andrew K. Ngumba or that he paid the sum of Kshs. 1,200,000.00 as deposit for the purported sale of the suit property; that the plaintiff was allowed onto the suit property by his deceased father as a mere licensee to erect a store for building materials but he (the applicant) converted the store



into living quarters. The 1st respondent denied each and every allegation of fraud attributed to him in the plaint.

- 5) The 2nd, 3rd and 4th respondents filed their respective statements of defences and denied each and every allegation of fraud attributed to them in the plaint.
- 6) After hearing the suit, the learned Judge found that the applicant was unable to prove any allegations of fraud against any of the respondents and dismissed the suit with costs to the respondents. The applicant was aggrieved and filed a notice of appeal dated August 3, 2021 on which the application under consideration is anchored.
- 7) The application is brought under Rules 5(2) (b) and 42 of the *Court of Appeal Rules* (this Court's Rules) and is premised inter alia on the grounds: that the intended appeal is arguable and has a good chance of success; that the intended appeal will be rendered nugatory if an injunction order is not granted by this Court since the suit property has already been advertised for sale by the 3rd respondent on the website of Jiji.co.ke for sale; that if the substratum of the intended appeal is sold by the 3rd respondent at any time that will defeat the applicant's otherwise meritorious appeal; and that the applicant will suffer irreparable loss and damage if the impugned judgment is not reversed since the applicant's equitable right to the suit property will be defeated without compliance with the due process of law.
- 8) The application was further supported by the applicant's affidavit which reiterated the grounds on the face of the application.
- 9) In a replying affidavit sworn by Mr. Anthony Nzioka Kyalo (Mr. Kyalo) the 2nd respondent's Credit Administrator, the 2nd respondent opposed the application. It was deponed that the applicant seeks injunction orders against the 3rd respondent from entering, trespassing, damaging, or otherwise howsoever interfering with the 2nd respondent's possession of the suit property; that the suit property was originally registered in the name of Andrew Kimani Ngumba, the applicant's cousin who died on May 13, 1997 and it is not disputed that sometime in the year 1991, the applicant who was a building contractor, was advanced Kshs 1,000,000.00 by the 2nd respondent to finance the construction works which he had been contracted by the Government; that the loan was guaranteed by Andrew Kimani Ngumba and further secured by a mortgage over the suit property; that the applicant defaulted in repayment of the loan to the 2nd respondent; that after many attempts and many suits filed, the suit property was ultimately sold by the 2nd respondent through a public auction staged on April 26, 2005 to Elias Peter Mbao for Kshs 23,000,000.00 to recover an outstanding debt of Kshs 5,750,000.00 owed to the 2nd respondent by the applicant.
- 10) Mr. Kyalo further deponed that Elias Peter Mbao subsequently assigned the benefit of the contract of sale to the 3rd respondent; and that after recovering the debt, the 2nd respondent paid the balance of the proceeds of the sale (Kshs 17,500,000.00) to the 1st respondent as the administrator of the estate of Andrew Kimani Ngumba.
- 11) Mr. Kyalo further deponed that the issue whether a resulting and/or constructive trust was created in favour of the applicant was dealt with by this Court in Civil Application No. Nai. 99 of 2010 (*Zakaria Muigai Gakobe v John Mwenja & 3 others*) where this Court (Githinji, Waki & Visram, JJ.A.) declined to issue any injunctive orders against the 3rd respondent; and that there is no fundamental change in circumstances to warrant interference with that decision.
- 12) On the nugatory aspect, Mr. Kyalo deponed that the applicant has not demonstrated that the intended appeal will be rendered nugatory if the orders sought are not granted. Mr. Kyalo further deponed that the 3rd respondent has stated that the applicant is not in possession of the suit property and further,



the 3rd respondent maintained that it is an investment company and can compensate the applicant should the appeal be successful.

- 13) The 3rd respondent opposed the application and filed a replying affidavit sworn by one of its directors, Hon. Elias Peter Mbau (Mr. Mbau). Mr. Mbau deponed that the intended appeal raises no arguable point as the only issues raised were that there was no auction carried out on 26th April, 2005 yet that issue and all other issues raised by the applicant have been determined by several courts including this Court in Civil Application No. Nai. 99 of 2010 (UR. 74/2010) where the applicant had filed a similar application under Rule 5(2)(b) of this [Court Rules](#); that the applicant thereafter abandoned the proposed intended appeal and filed an application in the High Court seeking similar prayers which have been dismissed by the court after the full hearing; that the applicant is a frivolous litigant whose sole intention is to deny the respondents their fruits of the judgment herein; that it is denied that the 3rd respondent is in the process of selling the suit property and the website alleged does not belong to the 3rd respondent and there is no nexus or link to it; that it is denied that the applicant is in possession of the suit property; that this issue was raised and dealt with at the hearing of the applicant's previous application in Civil Application No. Nai. 99 of 2010 (UR. 74/2010) where the Court noted that the applicant had been evicted from the premises and no longer resided there; that the 3rd respondent has been in occupation ever since; and that in the event the intended appeal's outcome is in favour of the applicant, the respondent being an investment company of respectable businessmen and women, they are more than able to compensate or repay the applicant any resultant awards.

Submissions by Counsel

- 14) The application was disposed of by way of written submissions with brief oral highlighting. Mr. Kyalo Mbobu, learned counsel for the applicant submitted that they have an arguable appeal; that the trial Judge assumed that the applicants were in court to test whether there was a valid contract between the parties; that the application sought a declaration whether there was a constructive trust; that the learned Judge failed to appreciate this position and the intended appeal is therefore arguable; that in a ruling delivered by this Court in Civil Application No. Nai. 99 of 2010 this Court found that the intended appeal is arguable.
- 15) Counsel further submitted that on the nugatory aspect, if the applicant is dispossessed of the suit property, this will be a monumental loss to his family, that the 3rd respondent is a land buying company which has already advertised the suit property for sale and the suit property may be out of the reach of the applicant. Counsel urged this Court to allow the application as they have satisfied both limbs of Rule 5(2)(b) of this [Court's Rules](#).
- 16) Ms. Anne Odwa, learned counsel for the 1st respondent submitted that the instant application has no merit; that the High Court found that the cause of action was time-barred; that the 12-year limit within which to claim has expired and the applicant's fate is therefore sealed; that it is a waste of judicial time to proceed with the application; that the suit is res judicata as the applicant had filed a similar suit; that the applicant is not on the suit property and will therefore not suffer substantial loss if the instant application is dismissed; that the value of the suit property was determined in the High Court and the applicant can therefore be compensated for any loss; that given that the applicant's suit was dismissed, there was no positive order made and there is therefore nothing to stay; and that the application therefore lacks merit and should be dismissed with costs to the 1st respondent.
- 17) Mr. Victor Kaula, learned counsel for the 2nd respondent submitted that the registered owner of the suit property charged it in May 1991; that the applicant could therefore not have bought the suit property without the mortgagee's consent; that it is clear that there is no intention to create a resulting trust; that the applicant has challenged the auction yet he was not the registered owner or the mortgagor



and he cannot, therefore, challenge the auction; that the application is res judicata as the matters filed by the applicant relate to the same parties and the same issues that are in Civil Application No. Nai. 99 of 2010, that this Court did not make a finding regarding who is in possession of the suit property; that the 3rd respondent has sworn an affidavit that should the applicant succeed on appeal, they are ready to compensate him; that the instant application lacks merit and should be dismissed with costs to the 2nd respondent.

- 18) Mr. Chege, learned counsel for the 3rd respondent submitted that they associate themselves with the submissions of the 1st and 2nd respondents. Counsel submitted that there is no single arguable ground; that it was conclusively held that the 3rd respondent was an innocent purchaser for value; that the applicant has never raised an issue to challenge the finding of this Court; that the suit property was sold due to the applicant's own doing as he failed to pay the loan advanced; that his only remedy (if any) was in damages; and that the title has passed and the 3rd respondent was declared the owner of the suit property.
- 19) Mr. Kyalo Mbobu, in reply submitted that the suit is not time-barred; that the issue of limitation of time does not arise in the circumstances of this case; that this application is not res judicata as the matters cited by the respondents were not heard to final determination; and that the applicant seeks an injunction and the issue that there is no positive order capable of being stayed by this Court does not therefore arise. Counsel urged us to allow the application.

Determination

- 20) We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction of this Court under Rule 5(2)(b) of this [Court's Rules](#) is discretionary and guided by the interests of justice.
- 21) The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this [Court's Rules](#) are well settled as was observed by this Court in the case of [Trust Bank Limited and Another v Investech Bank Limited and 3 others](#) [2000] eKLR where the Court delineated the jurisdiction of this Court in such an application as follows:
- “The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
- 22) On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court. In [Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others](#) [2013] eKLR this Court described an arguable appeal in the following terms:
- “vii). 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.
- viii). 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.”



- 23) We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, it is arguable inter alia whether in the circumstances of this case there existed a constructive trust in the suit property in favour of the applicant. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
- 24) On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (supra) this Court stated that:
- “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
- 25) In determining whether or not an appeal will be rendered nugatory the Court has to consider the conflicting claims of both parties and each case has to be considered on its own merits. We find that in the circumstances of this application, the applicant is not in possession of the suit property. The 3rd respondent has confirmed that it is an investment company that can compensate the applicant should the appeal be successful. In the circumstances, the intended appeal will not be rendered nugatory if the orders sought are not granted. See: *James H. Archer & Another vs. Inger Christine Archer & 2 others* [2021] eKLR.
- 26) From the circumstances of the application, the applicant has satisfied only one limb of the requirements under Rule 5(2)(b) of this *Court's Rules*. As the applicant is required to satisfy both limbs of arguability and the nugatory aspect before relief of this nature can be granted, the notice of motion dated August 24, 2021 is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

J. MOHAMMED

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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

