



**Mbaruk v Mwasi & 6 others (Civil Application E006 of 2020)
[2022] KECA 520 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KECA 520 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E006 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 6, 2022**

BETWEEN

MBARUK AYUB ALI MBARUK APPLICANT

AND

ANGELA KALAMBA MWASI 1ST RESPONDENT

LONADA TABU MUNA MWASI 2ND RESPONDENT

JULIUS MWASI TUMUNA (NOW DECEASED) 3RD RESPONDENT

MARIA MAGHUWA MWASI 4TH RESPONDENT

REHEMA MABONDHO MWASI 5TH RESPONDENT

MARIAMU WALI MWASI 6TH RESPONDENT

MICHAEL MURIITHI MUTHII 7TH RESPONDENT

(Being an application for conservatory orders and an injunction pending the hearing and determination of the appeal from the ruling of the Environment and Land Court at Mombasa delivered by Munyao, J. on 24th September, 2020 in ELC Appeal No. 30 of 2018)

RULING

1. By a notice of motion dated 8th October 2020, brought under Rule 5(2) (b) of the [Court of Appeal Rules](#), section 3A and 3B of the [Appellate Jurisdiction Act](#) and Article 159 of the *Constitution of Kenya, 2010*, the applicant, Mbaruk Ayub Ali Mbaruk, seeks that pending the hearing and determination of the intended appeal, a conservatory order maintaining the status quo and an injunction do issue against the respondents restraining them from occupying, developing, meddling, interfering and/or assessing the appellant's house on Plot No. 211 Section II Mainland North, hereinafter the suit property, and for costs.



2. The facts of the case are set out in the affidavits sworn by the parties. It is not disputed that the 1st to 6th respondents entered into a sale agreement with the applicant for sale of a house without land, the suit property herein, and that the applicant took possession of the suit property. The respondents contend that for non-payment of agreed sum they rescinded the agreement and sold the suit property to the 7th respondent. The applicant being aggrieved by the sale of the suit property to the 7th respondent filed a suit before the Chief Magistrates Court in Mombasa challenging the sale. Based on a clause in the agreement that stated that the purchase price was fully paid, the trial Magistrate dismissed the suit.
3. On appeal to the ELC, the trial Magistrate's judgment was set aside and judgment entered in favour of the respondents, founded on the basis that the applicant had not paid for the suit property in full as per the agreement. The applicant's application for review of the ELC judgment was dismissed. Being aggrieved by the finding of the ELC, the applicant wrote to the Deputy Registrar of the Superior Court on 24th September 2020 requesting for proceedings, and also filed the Notice of Appeal and the application under consideration.
4. The application is premised on the grounds on the face of the application and in the sworn affidavit of the applicant both dated 8th October, 2020. The grounds are that the applicant being dissatisfied with the ruling of the Environment and Land Court in ELC Appeal No. 30 of 2018, delivered on the 24th September 2020 and ELC No. 21 of 2018, delivered on the 6th May 2020 has lodged a notice of appeal; that the intended appeal raises arguable issues with a high likelihood of success for reason the 1st to 6th respondents sold the suit property to him with vacant possession after he paid the purchase price; that the sale of the suit property to the 7th respondent is an attempt by the 1st to 6th respondents to unfairly enrich themselves; that the 7th respondent is in the process of transferring and/or developing the suit property; and, that unless the conservatory orders sought in order to preserve the suit property herein are issued, the applicant stands to suffer irreparable loss and the appeal will be rendered nugatory. It was further averred that there is grave danger that the 1st, 3rd, 4th, 5th and 6th respondents may succeed in transferring the suit property to the 7th respondent despite receiving full purchase price of the suit property from the applicant.
5. The respondents have filed replying affidavits. The 1st respondent swore an affidavit on her behalf and that of the 2nd to 6th respondents dated 1st March 2021. The 7th respondent's also filed a replying affidavit.
6. The application was heard virtually on the 8th February 2022, with Mr. Mwanza learned counsel appearing for the applicant, Mr. Karina learned counsel appearing for the 1st to 6th respondents and Ms. Mulongo learned counsel holding brief for Mr. Kibaara, learned counsel for the 7th respondent appearing. Each party filed written submissions upon which they relied and which they highlighted before us.
7. We have considered the application, the affidavits sworn by the parties, together with the submissions by counsel. We propose first, to consider the preliminary issue raised by the respondents challenging the competence of the intended appeal. On the part of the 1st to 6th respondents, the affidavit of the 1st respondent on their behalf deposes that the Draft Memorandum of Appeal annexed to the affidavit in support of the application raises new grounds not related to the application for review, and should be struck out.
8. The 7th respondent challenges the competence of the Notice of Appeal filed in support of the application for reason it seeks to challenge two decisions of the ELC, being the judgment delivered on the 6th May 2013, and the ruling delivered on 24th September, 2013. Secondly, that the Notice of Appeal was filed and served out of time without leave; and, for challenging a decision that had already been subjected to review.



9. The procedure for faulting an incompetent notice of appeal is provided in Rules 83 & 84 of the Court of Appeal Rules, which provide inter alia as follows:

83. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court on its own motion or on an application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

10. Rule 84 of the Court of Appeal Rules provides as follows:

84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

11. In the case of *Kenindia Assurance Co. Ltd v Monica Moraa [2016] eKLR* this Court had this to say in regard to the need to abide by timelines set under Rule 84 of the Court of Appeal Rules when raising a challenge on the competence of an appeal:

“ 14. While we accept that jurisdiction is everything and without it a court must down its tools, Rule 84 of the Rules of this Court requires a party challenging the competence of an appeal on the ground that no appeal lies or that an essential step in the proceedings has not been taken or has not been taken within the prescribed time to do so within thirty days from the date of service of the notice of appeal or the record of appeal.

That requirement is intended to avoid a situation where a party keeps a secret weapon only to unleash it at the eleventh hour.

15. A party wishing to challenge the competence of an appeal should do so at the earliest opportunity. In this case, the appellant has not had an opportunity to respond to the respondent’s submissions on the competence of the appeal. Rule 104 (b) of the rules of the Court provides:

“ 104. Arguments at hearing

At the hearing of an appeal – a.

b. A respondent shall not, without the leave of the Court, raise any objection to the competence of the appeal which might have been raised by application under rule 84.”

12. In the case of *Agricultural Development Corporation v Richard Kipkoech Aiyabei [2020] eKLR* this Court commenting on the proper procedure to fault a Notice of Appeal or appeal held that there is no provision in the said rules for an oral application made either orally in Court or through submissions, whether oral or written.

13. None of the respondents filed a cross application to the applicant’s application, or any relevant application to challenge the competence of the applicant’s Notice of Appeal or appeal. It is settled that such a challenge ought to have been raised by way of an application under Rule 84 of this Court’s, in compliance with the timelines set thereunder. The respondents have not followed the



correct legal procedure for faulting the Notice of Appeal and the appeal and consequently, we decline the respondents' invitation through oral and written submissions to fault the Notice of Appeal that is foundation for the applicant's application.

14. The applicant has to demonstrate the twin principles that the intended appeal is arguable and that if the orders sought are not granted, the appeal will be rendered nugatory. Mr. Mwanza for the applicant submitted that the applicant was the legitimate purchaser for value of the suit property, that it was sold to him in a transaction between him and the 1st to 6th respondents on 19th October 2011 at a consideration of Kshs. 1,400,000/-. He urged that the applicant paid fully for the suit property and was given possession. Counsel relied on the case of *MM Butt vs. Rent Restriction Tribunal* Civil Application No. 6 of 1979 on the principles applicable to applications of this nature. He also relied on the case of *D. J. Lowe & Company vs Prime Bank Limited Mombasa* HCC No. 235 of 2010 and *Wilson vs Church* (No. 2) 12 Ch. 1 (1979), 454 for the proposition that the court had a duty to ensure that an appeal if successful, is not rendered nugatory.
15. In considering the twin guiding principles as elucidated above, both limbs must be demonstrated to the Court's satisfaction.

On the first principle, as to whether or not the appeal is arguable, even a single bona fide arguable ground is sufficient to warrant ventilation before this Court. We are also aware of the fact that an arguable appeal is not necessarily one that must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
16. The applicant contends that he paid fully for the suit property as per his agreement with the 1st to 6th respondents. This is a contested issue. What is not contested is that after putting the applicant in possession, the 1st to 6th respondents rescinded that agreement and sold the suit property to the 7th respondent.
17. Mr. Karina for the 1st to 6th respondents contended that the ruling of 24th September, 2020 issued negative orders incapable of being stayed as the orders did not take away any rights that had accrued to the applicant after the judgment of 6th May, 2020. And that the application and the appeal will not in any way affect the judgement of 6th May 2020 as against the 1st to 6th respondents, since the application for review did not specifically plead the order sought to be reviewed in the judgement of 6th May 2020.
18. In response to that challenge, we shall rely and adopt this Court's ruling in the case *County Secretary of Kajiado & 47 others v Salaries & Remuneration Commission & another* [2021] eKLR where the Court observed:

“In addition, in *Daniel Lomagul Kandeji & 2 Others v. Kamanga Holdings Limited & 40 Others* (2017) eKLR this Court expressed itself as follows:-

“In the motion before us the applicants sought a stay of the striking out of the O.S. This was a negative order which, by parity of a long line of decisions of this court as demonstrated above, is incapable of being stayed.”



Having said that, it is not lost to us that the applicants in their prayers sought an order of injunction. In *Nairobi Metropolitan PSV Saccos Union and 25 Others Vs County Of Nairobi Government & 3 Others (supra)* this court stated as follows:

“In granting orders sought in application for stay or grant of an injunction as the case may be this court exercises original jurisdiction....” and proceeded to cite the case of *Equity Bank Limited vs West Link Mbo Limited* Ca No. Nai 78 of 2011 wherein Githinji JA stated that.

“It is trite law in dealing with 5(2)(b) applications the court exercises discretion as a Court of first instance. It is clear that rule 5 (2) (b) is a procedural innovation to empower the court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”

19. The Court in the cited case concluded by finding that it was properly seized of the application for an injunctive relief, whose purpose was to preserve the status quo. It then proceeded to determine whether the applicants had demonstrated that they were deserving of the relief sought. We need not say anything more.
20. We have considered the arguments for and against the application as to whether the appeal is arguable. The applicant has demonstrated that he made payment and that the 1st to 6th respondents put him in possession of the suit property. The ELC noted that the applicant was the one in possession of the suit property at the time it heard the appeal. We are satisfied that there is a n arguable point that requires to be ventilated on appeal. The appeal is therefore not frivolous. It is arguable.
21. As to whether the 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 circumstance of each particular case as stated by this Court in *Reliance Bank Ltd vs. Norlake Investments Ltd* [2002] 1 E. A. 227. The applicant has demonstrated that the 1st to 6th respondents had transferred the suit property to the 7th respondent who in turn was in the process of either transferring the suit property or developing it; and that if that succeeded the property may be alienated beyond his reach. We are satisfied that the applicant has demonstrated that being a house, any dealing in the suit property may substantially affect the substratum of the appeal. There is therefore a need to preserve the suit property.
22. We have said enough in this matter. We are satisfied that the applicant has satisfied both limbs for the grant of the orders sought. We allow the Notice of Motion application dated 8th of October, 2020 and order that the status quo obtaining at the date of this ruling be maintained pending the hearing and determination of the applicant’s intended appeal.
23. The costs of the application shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2022.

S. GATEMBU KAIRU (FCI Arb)

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....



JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

