



Sugawara v Nairuko Ene Mutarakwa Kiruti (Sued in her Capacity as the Administratrix of the Estate Mutarakwa Kiruti Lepaso alias Mutarakwa Kiroti Leposo and her own) & 3 others (Civil Application E030 of 2022) [2022] KECA 726 (KLR) (29 July 2022) (Ruling)

Neutral citation: [2022] KECA 726 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E030 OF 2022
HM OKWENGU, J MOHAMMED & A MBOGHOLI-MSAGHA, JJA
JULY 29, 2022

BETWEEN

PAULINE CHEMUGE SUGAWARA APPLICANT

AND

NAIRUKO ENE MUTARAKWA KIRUTI (SUED IN HER CAPACITY AS THE ADMINISTRATRIX OF THE ESTATE MUTARAKWA KIRUTI LEPASO ALIAS MUTARAKWA KIROTI LEPOSO AND HER OWN) 1ST RESPONDENT

MOSES OLE KAE MUTARAKWA 2ND RESPONDENT

JOHN LESIAN MUTARAKWA 3RD RESPONDENT

ADMINISTRATORS OF THE ESTATE OF KIRUTI LEPASO 4TH RESPONDENT

(Being an application for an injunction and stay of execution pending the filing, hearing and determination of an appeal against the judgment of the Environment and Land Court at Kajiado (Gicheru, J.) delivered on 18th January 2022)

RULING

1. Litigation leading to the application now before us commenced at the Chief Magistrate's court in Ngong, Kajiado where the magistrate dismissed a suit that had been brought by Pauline Chemuge Sugawara who is now the applicant before us. The applicant had sued the respondents seeking to be declared the bona fide proprietor of land parcels number Kajiado/Kitengela/10624, 10625, 10630 and 10631 (herein suit properties).
2. The applicant being dissatisfied with the judgment of the trial court, filed an appeal in the Environment and Land Court (ELC) at Kajiado seeking to have the judgment of the Magistrate's Court set aside, the counter claim of the respondent dismissed, and judgment entered in her favour in accordance with



her plaint. Upon hearing the appeal, the learned Judge (Gicheru, J.), found no merit in the appeal and dismissed it.

3. Undeterred, the applicant has filed a notice of appeal in this Court intending to appeal against the judgment of Gicheru, J. The applicant has now moved this Court through a notice of motion dated 2nd February 2022 seeking two main prayers. First is an order restraining the respondents, their servants, agents or anyone claiming under them from selling, trespassing, alienating or interfering with the applicant's quiet possession, peaceful enjoyment and/or ownership of the suit properties, pending the hearing and final determination of the intended appeal. The second prayer is an order for stay of execution of the decree issued in the Chief Magistrate's Court in Ngong, Kajiado pending the hearing and final determination of her intended appeal against the judgment in the ELC appeal.
4. The application was supported by grounds on the face of the motion and an affidavit sworn by the applicant. In brief, the applicant maintains that her intended appeal is of great public interest as the judgment in the ELC appeal if allowed to stand, would have the effect of revising Article 169 of *the Constitution*, the *Magistrate's Court Act* 2015 and the various legal notices issued by the Hon. Chief Justice with regard to jurisdiction in land and environment cases. This is because the superior court held that the magistrate's court in Kenya had no jurisdiction to determine land ownership claims based on adverse possession. The applicant maintains that the parties before the Court did not challenge the jurisdiction of the magistrate's court in their pleading or at all, and therefore, the superior court addressed the matter without giving the applicant a chance to be heard on the issue.
5. The applicant faulted the interpretation of section 38(4) of the *Limitation of Actions Act* by the learned Judge, and maintained that this issue amongst others renders his appeal arguable, and that the Court should therefore preserve the suit properties and protect the applicant's quiet use and possession of the suit properties until the appeal is heard. The applicant explains that the respondents are in a hurry to execute the decree of the trial court; that they have already sent surveyors to the suit properties; and that unless the orders sought are granted, she will suffer great irreparable loss and damage as her intended appeal will be rendered nugatory if the respondents take possession or transfer the property.
6. The 1st respondent who is father to the 1st to 3rd respondents swore a replying affidavit in response to the motion. He deposed inter alia, that the 4th respondent has been wrongly enjoined as its name was struck from the suit; that the intended appeal is premised on the misconceived basis that only a claim of adverse possession can stand, that the court can overlook an illegal and un-procedural transfer of the suit property; that the learned Judge had jurisdiction to make findings on adverse possession; that in any case, the subject matter of the suit was not within the pecuniary jurisdiction of the subordinate court as provided under Article 169(2) of *the Constitution*; and that the applicant does not have an arguable appeal.
7. Both the applicant and the respondents filed written submissions. During the hearing of the appeal, learned counsel Mr. Juma appeared for the applicant while learned counsel Ms. Gikonyo appeared for the respondents. Both counsel substantially relied on their written submissions, Mr. Juma reiterating that the appeal raises an arguable issue of public importance and that if the orders sought are not granted, the applicant who has been in possession of the suit property for the last 19 years would be dispossessed of the suit property, thereby rendering the appeal nugatory.



8. We have carefully considered this motion, the written submissions, and the authorities cited. The applicant has moved the Court under Rule 5(2)(b) of the [Court of Appeal Rules](#). That Rule gives the Court discretion:

“(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.”

9. Therefore, the Court has powers under that Rule to issue an order of stay of execution or an order of injunction, provided a notice of appeal has been lodged and the applicant has satisfied the twin requirements of Rule 5(2)(b) of the [Court of Appeal Rules](#).

10. The twin requirements of Rule 5(2)(b) of the [Court of Appeal Rules](#) as has evolved from many decisions of this Court are first, that the applicant has an arguable appeal, and secondly, that unless the order sought is granted, the intended appeal will be rendered nugatory. (See *Ruben & 9 Others vs Nderitu & Anor* [1989] KLR 455; *Bob Morgan Systems Limited & Anor vs Jones* [2004] 1KLR 194; and *Kenya Airways Limited vs Patrick Waweru Mwangi & Anor* [2016] eKLR).

11. The applicant has urged that she has an arguable appeal and has exhibited a memorandum of appeal in which she has raised 22 grounds. Suffice to state that the applicant has raised the issue of jurisdiction of the trial court. That is, whether the Magistrate’s Court had jurisdiction to hear the applicant’s suit, whether this was an issue that was before the learned Judge and whether parties were given an opportunity to canvass the issue. This is an arguable issue that cannot be said to be frivolous. As was stated in *Stanley Kangethe Kinyanjui vs Tonny Ketter* [2013] eKLR a single arguable issue is sufficient to demonstrate that the applicant has an arguable appeal, and therefore we need not say more in this regard.

12. On the second limb as to whether the appeal will be rendered nugatory if the orders sought are not granted, we first consider this in regard to the order of stay of execution. The learned Judge of the ELC dismissed the appeal and therefore, there is no decree that can be subject of execution other than the order of costs whose execution cannot render the applicant’s appeal nugatory. As regards the judgment of the trial court which the applicant also sought to stay, that judgment is not the subject of the appeal before us. Moreover, the trial magistrate also dismissed the applicant’s suit.

13. In *County Secretary of Kajiado & 47 others vs. Salaries and Remuneration Commission & Anor* [2021] eKLR, this Court stated as follows:

“It is now settled law that the issue as to whether a negative order is capable of being stayed is paramount in determining the success or otherwise of an application under Rule 5(2) (b) of this Court’s rules such as the one before us. (See: *George Ole Sangui v. Kedong Ranch Limited*, Civil Application No. Nai 55 of 2015) where this Court citing the famous case of *Western College of Arts And Applied Sciences v. Oranga & Others* [1976] KLR 63, pronounced itself as follows:-

“In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from



doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.” (Emphasis ours)

14. The order of the ELC sought to be stayed is a negative order dismissing the applicant’s appeal. Needless to state that the applicant has not satisfied the second limb of the requirement under Rule 5(2)(b) of the Court of Appeal Rules in regard to the order of stay of execution pending appeal, as there is no positive order that was made by the ELC Court that is capable of execution.
15. Although the applicant has not specifically mentioned an injunction in the prayers in the motion, he seeks restraining orders which in effect are an order of interim injunction pending appeal. In this regard we refer to the Court’s decision in Oliver Collins Wanyama v Engineers Board of Kenya [2019] eKLR, where it was stated:

“This Court in applications brought under Rule 5(2)(b) exercises jurisdiction similar to that of a court of first instance. It can grant and has on many occasions granted an injunction pending the hearing and determination of an appeal or intended appeal primarily in order to preserve the subject matter of the intended appeal, or where it would facilitate a proportionate resolution of the dispute. Indeed, for many applicants whose actions have been dismissed by the courts below, the refuge is to apply specially for an injunction under Rule 5(2) (b).

We need only add that, whether the application is for stay of execution, injunction, or stay of further proceedings, the consideration and applicable principles are the same.”

16. We have already found that the intended appeal is arguable and therefore what remains for consideration is whether the applicant’s appeal will be rendered nugatory if the order of injunction is not issued. In Stanley Kangethe Kinyanjui vs Tonny Ketter (supra), the Court stated that 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 if the applicant succeeds in the appeal; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
17. In the circumstances of this case, the purpose of the injunction sought by the applicant is to preserve the suit properties which are the subject matter of the intended appeal, by restraining the respondents from disposing of the suit properties or dispossessing the applicant of the suit properties. It is evident that if the order of injunction is not issued, the respondents may dispose of the suit properties, and this may put the suit properties outside the reach of the applicant. Thus, it may not be possible for the applicant to recover the suit properties should she succeed in her appeal. The suit properties being land, damages may not be an adequate remedy, and this would render the appeal nugatory.
18. For the above reasons we are satisfied that the applicant has satisfied both limbs of arguability and the nugatory aspect in regard to the order of injunction. Accordingly, we allow the notice of motion dated 2nd February 2022 to the extent of granting an order of injunction restraining the respondents, their servants, agents, or anyone claiming under them from selling, trespassing, alienating, or interfering with the applicant’s quiet possession, peaceful enjoyment and/or ownership of the suit properties, pending the hearing and final determination of the intended appeal. Costs shall abide the outcome of the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2022.

HANNAH OKWENGU



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JUDGE OF APPEAL
J. MOHAMMED

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JUDGE OF APPEAL
A. MBOGHOLI MSAGHA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

