



Two Peponi Road LLP & another v Nairobi County Government & 2 others (Civil Appeal (Application) E326 of 2021) [2022] KECA 939 (KLR) (22 July 2022) (Reason)

Neutral citation: [2022] KECA 939 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E326 OF 2021
HM OKWENGU, J MOHAMMED & A MBOGHOLI-MSAGHA, JJA
JULY 22, 2022**

BETWEEN

TWO PEPONI ROAD LLP 1ST APPELLANT

**PEPONI ROAD RESIDENTS ASSOCIATION (IN FORMATION. 2ND
APPELLANT**

AND

NAIROBI COUNTY GOVERNMENT 1ST RESPONDENT

AIRVIEW PROPERTIES LIMITED 2ND RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.... 3RD
RESPONDENT**

(An application for temporary injunction of the Ruling and Order of the Environment and Land Court at Nairobi (Komingoi, J) dated 15th April 2021 In ELC JR Application No. E014 of 2020)

REASON

1. By a notice of motion dated 6th April, 2022 the appellants seek the following orders:

“2. Pending the hearing and determination of this Application, an order of temporary injunction be and is hereby issued restraining Airview Properties Limited, the 3rd Respondent herein, whether by itself or through its agents and or assigns, workmen, servants, employees, or any person working under its express and or implied instructions or authority from continuing with construction or conducting construction activities whatsoever or in any manner developing the parcel of land known as Land Reference 17/432 along Peponi Rise Road, Nairobi (hereinafter referred to as the “Suit Property”) pending the hearing and determination of this Appeal.



3. Pending the hearing and determination of Civil Appeal No. E326 of 2021, an order of temporary injunction be and is hereby issued restraining Airview Properties Limited, the 3rd Respondent herein, whether by itself or through its agents and or assigns, workmen, servants, employees, or any person working under its express and or implied instructions or authority from continuing with construction or conducting construction activities whatsoever or in any manner developing the parcel of land known as Land Reference 17/432 along Peponi Rise Road, Nairobi (hereinafter referred to as the “Suit Property”) pending the hearing and determination of this Appeal”.
2. The application is supported by an affidavit sworn by Karim S Anjarwalla who is an advocate, but in these proceedings he swears the affidavit as a partner in the 1st appellant. The application is opposed and there is a replying affidavit sworn by Jayantilal Jivraj Mepa Shah.
3. When this application came up for hearing before us on April 20, 2022 Mr. Paul Muite, SC with Mr. Abbas appeared for the applicants, Mr. E Gitonga appeared for the 1st respondent while Mr. E. Mwangi appeared for the 3rd respondent. There was no appearance for the 2nd respondent though duly served.
4. After hearing the motion, which was prosecuted by way of written submissions and oral highlighting by counsel for the parties, the ruling was reserved for However, upon consideration of the application and based on the submissions, we granted prayer 3 pending the determination of the appeal, and reserved reasons therefor to be given on July 22, 2022, which .in this ruling, which we now hereby do.
5. It is important to set out the contextual background of this dispute. The applicants moved the Environment & Land Court (ELC) by way of an ex parte application No. E014 of 2020 for leave to file Judicial Review proceedings, which order was granted on December 23, 2021. On the same date a substantive motion was lodged. After service of the motion upon the respondents, the 1st and 3rd respondents filed notices of preliminary objection on February 17, 2021 and February 2, 2021 respectively. The thrust of the preliminary objections was that, the ELC had no jurisdiction to entertain the Judicial Review application because the applicants had not exhausted alternative remedies provided under section 129 (1) of the *Environmental Management and Coordination Act*, 1999. On April 15, 2021 Komingo J upheld the preliminary objections and dismissed the Judicial Review application.
6. Aggrieved by that order, the applicants filed an appeal on the grounds that there were exceptional circumstances that should have compelled the court to address the application on merit, since they were not to blame for not invoking the alternative remedies, but that it was the 1st respondent who caused the default. In the meantime, the 3rd respondent continued with construction, hence the filling of the present notice of motion.
7. Upon considering the motion and the memorandum of appeal dated June 20, 2021 and filed on June 21, 2021 we observed from the outset that, both in the supporting affidavit to the application and the replying affidavit opposing the same, the parties have delved heavily into substantive issues that we believe belong to the main appeal, and which it may be prejudicial to address in an application under Rule 5 (2) (b) of the Rules of this Court. We therefore limit ourselves to our duty which at this stage is to determine whether or not the applicants are entitled to orders sought in their application based on the parameters set out by the said rule.



8. The principles upon which such orders can be granted are now settled. The applicants have a duty to demonstrate that they have an arguable appeal, and which may be rendered nugatory if stay or injunction is not granted. In *Bob Morgan Systems Ltd & Another v Jones* [2004] e KLR it was stated,
- “The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly, that unless a stay or injunction is granted his appeal or intended appeal, if successful, will be rendered nugatory.
9. In *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR this court observed as follows,
- “vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
 - 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. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
 - viii)
 - ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227* at page 232.
 - 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.”
10. There are ten grounds set out in the memorandum of appeal which may be compressed into two. The first is whether or not the ELC was right in dismissing the Judicial Review application, yet the alternative remedy was not available to the applicants. The second is whether or not the court was right in relying on or referring to contested evidence contained in the replying affidavit filed on behalf of the 3rd respondent, yet that affidavit was in reply to the Judicial Review application and not related to the notice of preliminary objection.
11. The applicants contended that by the time they moved to the court for leave to file Judicial Review application, the alternative remedy was no longer available as the statutory time limit had expired. and that the delay was caused by the 1st respondent who had not responded to the request by the applicants to provide information necessary to comply with the said timelines. There was a candid disclosure on the part of the applicant and therefore in our view, there is an arguable ground as to whether the applicants should be penalised for noncompliance with the alternative remedy.
12. The dispute herein revolves around environmental degradation. In the event no orders are issued at this stage, the 3rd respondent would continue with construction. If left unchecked, and the appeal eventually succeeds, the question that immediately arises is whether or not this is reversible. It may not be easy to undo the construction once completed, and the destruction to the environment more so the river, threatened by the construction, may never be revived thereafter. In the case of *Angela Mbugua*



“15] According to the applicant, the construction that the 1st respondent intends to carry out on the suit property is an extensive development and the environmental harm complained of, are such that once the development takes place, it will be difficult to address them. In addition, the developments are intended to be sold to third parties, and such action will complicate the situation and may compromise the appeal, thereby rendering it nugatory. We are also satisfied that the second limb has been established.”

13. We are mindful of the 3rd respondent’s concern that there are contracts with 3rd parties which are likely to trigger default clauses leading to liability in damages. However, where damages are adequate compensation for any injury, orders of injunction may be granted. That is the position in this matter. In addition, it has not been alleged that the applicants are incapable of meeting any damages that may be found payable in the event the appeal does not succeed. It is for these reasons that we were persuaded that the application should succeed in terms of prayer 3 set out herein above, and that costs should abide the outcome of the appeal

DATED AND DELIVERED AT NAIROBI THIS 22ND OF JULY, 2022

HANNAH OKWENGU

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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

