



**Kagereki v Industrial & Commercial Development Corporation Limited & another
(Civil Application 291 of 2019) [2022] KECA 664 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 664 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 291 OF 2019
HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA
JULY 8, 2022
IN THE MATTER OF THE INTENDED APPEAL**

BETWEEN

LUKE NJIRU KAGEREKI APPLICANT

AND

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION
LIMITED 1ST RESPONDENT**

EDWIN NYAGA NJAMURA 2ND RESPONDENT

(Being an application for an order of inhibition of all dealings in the title number Kagaari/Weru/1544 and for stay of further proceedings and execution pending the hearing and final determination of the appeal against the Judgment and Orders of the Environment and Land Court sitting at Embu (Y. M. Angima, J.) dated 11th July, 2010 in Embu ELC Case No. 67 of 2017)

RULING

1. What is before us is a notice of motion filed by Luke Njiru Kagereki (the applicant), seeking orders of inhibition prohibiting all dealings in regard to Land Parcel known as Kagaari/Weru/1544 (the suit property), pending the hearing and final determination of an appeal that has been filed by the applicant against the judgment in Embu ELC Case No. 67 of 2017. The applicant, who was the plaintiff, is dissatisfied with the judgment in which the ELC dismissed his suit and, therefore, seeks an order of stay of execution of the orders of ELC and the inhibition order pending the hearing and determination of his appeal.
2. The applicant had sued the Industrial and Development Corporation and Edwin Nyaga Njamura (the 1st & 2nd respondents), seeking a permanent injunction restraining the two, their servants or agents, from selling the suit property, and a declaration that the sale of the suit property is illegal, null and



void, and an order of cancelation of the registration of title in respect of the suit property in favour of the 2nd respondent.

3. The suit property, which was previously registered in the name of the applicant, was sold by the 1st respondent to the 2nd respondent on May 23, 2008 in exercise of the 1st respondent's alleged statutory power of sale. The applicant disputed the legality of the sale, and hence his suit. In an affidavit sworn in support of his motion, the applicant maintains that he has an arguable appeal, and that his intended appeal, if successful, would be rendered nugatory unless the orders sought are granted, as he is apprehensive that the 2nd respondent intends to sell or alienate the suit property upon which his home is situated. The applicant pleads that the Court issues an inhibition order, so that the property is preserved until the appeal is heard and determined.
4. The applicant has filed written submissions in which he reiterates that he has an arguable appeal, which may be rendered nugatory unless the orders sought are granted. The applicant relies on *Multimedia University & another v Prof. Gitile N. Naituri* [2014] eKLR for the principles to be applied in an application for inhibition. He also relies on *Dhamji Pragji Mandava v Sara Lee Household and Body care (K) Limited*, Civil Appeal No. 345 of 2004 for the proposition that a single bona fide arguable ground is sufficient.
5. During the hearing of the application, learned Counsel Mr. Kagimu was present for the applicant, while learned counsel Ms. Ndorongo was present for the 2nd respondent. There was no appearance for the 1st respondent even though his advocate was duly served. Ms. Ndorongo opposed the application and explained that they had only managed to file their submissions two days before. Neither the advocate for the applicant nor the Court had received the submissions, nevertheless, Ms. Ndorongo was allowed to proceed with oral submissions but ensure that the written submissions are availed to the Court as soon as possible. As at the time of writing this ruling, none had been availed to the Court.
6. In her oral submissions, Ms. Ndorongo argued that the suit property was registered in the name of the 2nd respondent on July 9, 2008 and that, under section 99(4) of the *Land Act*, the applicant's remedy lies against the 1st respondent, and that the 2nd respondent should therefore not be inhibited from enjoying his rights as the owner of the suit property. In support of her submissions, Ms. Ndorongo cited Civil Appeal No. 133 of 2006 *Nancy Kaboya Amadiva v Expert Credit Limited & another*; [2015] KECA 373 (KLR). Counsel submitted that Rule 5(2) (b) of the *Court Appeal Rules* only gives Court power to grant orders of stay of execution not inhibition, and that, in any case, there was nothing to stay because the applicants suit was dismissed. She maintained that the applicant's appeal would not be rendered nugatory.
7. In response, Mr. Kagimu urged that damages would not be an adequate remedy to the applicant, who is over 70 years, and who has sentimental attachment to the suit property, and that disposal of the suit property would render his appeal useless. He reiterated that the applicant was seeking an order for stay of execution in regard to payment of costs.
8. We have carefully considered the motion before us, the applicant's written submissions and the parties' oral submissions. Although the applicant has not cited Rule 5(2) (b) of the *Court of Appeal Rules* in his motion, it is apparent that his application is actually anchored on that Rule, as he seeks orders pending the hearing of his appeal against the judgment of the ELC. The principles upon which such an application is considered are now well settled. An arguable appeal must be demonstrated, and the Court must be persuaded that unless the orders sought are granted, the appeal will be useless to the applicant (*Multimedia University & another v Prof. Gitile N. Naituri (supra)*).



9. It is apparent that the suit property was sold and transferred to the 2nd respondent by the 1st respondent, and that for the last 14 years, the suit property has been in the hands of the 2nd respondent, who is a third party in so far as the relationship between the applicant and the 1st respondent is concerned.
10. The property having been transferred pursuant to a sale by auction, and no fraud having been alleged, it is evident that the applicant's redress regarding any irregularity or unlawfulness in regard to the sale of the suit property, lies in damages as against the 1st respondent. We are not persuaded that the applicant has an arguable appeal in regard to the recovery of the suit property, nor are we persuaded that the applicant's appeal would be rendered nugatory, if successful.
11. The applicant has urged the Court to consider his age, and we do sympathize that he is in his sunset years. However, the sale took place about 14 years ago, and the delay in pursuing his application can only be attributed to his own laxity.

For these reasons, we find no merit in this motion. It is accordingly dismissed.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

DR. I. K. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

