



MJK v FML; Atticon Limited (Interested Party) (Civil Application E068 of 2022) [2022] KECA 933 (KLR) (19 August 2022) (Ruling)

Neutral citation: [2022] KECA 933 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E068 OF 2022
HM OKWENGU, J MOHAMMED & A MBOGHOLI-MSAGHA, JJA
AUGUST 19, 2022**

BETWEEN

MJK APPLICANT

AND

FML RESPONDENT

AND

ATTICON LIMITED INTERESTED PARTY

(An application for an injunction pending hearing and determination of an appeal from the ruling of the Environment & Land Court at Nairobi (E.K.Wabwoto, J.) dated 17th January, 2021 in ELC Cause No. E393 OF 2021)

RULING

- 1) Before us is a notice of motion dated 10th February, 2022 in which MJK (the applicant) prays for a temporary injunction restraining FML (the respondent) by himself, his agents, servants or otherwise howsoever from evicting, removing or in any other way interfering with the applicant’s occupation of all that property comprising of Mae Ridge County Villa No.16 erected on L.R No.7785/1324(I.R.123703) (the suit property) pending the hearing and determination of the intended appeal; a temporary injunction restraining the respondent from disposing, selling, occupying or in any way dealing with the suit property and costs of the application. Atticon Limited is the Interested Party herein.
- 2) The application is brought under Rule 41 of the Court of Appeal Rules (this Court’s Rules), Section 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution. It is premised, inter alia, on the grounds that: the applicant filed an application in the Environment and Land Court (ELC) on 17th November, 2022 seeking various orders against the respondent, including a prayer for a declaration that she is the absolute, rightful and bona fide owner of the suit property and that the respondent holds



the title in trust for her; that the applicant contributed Kshs.71,419,864.09 towards the construction and furnishing of the house erected on the suit property; and that other monies that were expended towards the construction, acquisition and construction costs were met by the interested party.

- 3) A further ground is that the respondent did not contribute any monies towards the purchase of the suit property although the certificate of title is registered in his name; that the applicant was aggrieved by the ruling of the ELC (Wabwoto, J.) dated 17th January, 2022 upholding the notice of preliminary objection dated 24th November, 2021 filed by the respondent and has since preferred an appeal seeking to set aside the orders of the ELC; that the intended appeal raises substantial and arguable points of law as stated in the memorandum of appeal annexed to the instant application; that the intended appeal will be rendered nugatory if an injunction is not granted as the respondent will evict the applicant from the suit property; that the respondent has previously charged the suit property without seeking the applicant's consent and therefore there is a real danger that the respondent will dispose of, alienate, sell, or further charge the suit property; and that her right of appeal will be grossly impaired and hindered thereby causing her substantial and irreparable harm.
- 4) The application was further supported by the applicant's affidavit in which she reiterated the grounds on the face of the application. The applicant contended that the learned Judge ought to have considered whether the respective courts adjudicating Milimani HCCC No.71 of 2018 (O.S), Milimani HCCC No.E201 of 2021, Milimani Misc. No. 138 of 2021 and Milimani CMCC No. 1044 of 2018 had jurisdiction to determine the suit before the ELC and grant the reliefs sought; and whether the ELC misapprehended the provisions of Section 6 of the Civil Procedure Act and acted in excess of jurisdiction by dismissing the application and the suit on the basis of an objection that the same was sub judice.
- 5) The respondent opposed the application and in a replying affidavit deponed inter alia: that he is a director of the interested party and authorized to swear the affidavit on his own behalf and on behalf of the interested party; that it is evident from the record that the applicant has filed multiple suits in various courts seeking the same or similar reliefs against the respondent and the interested party in respect of the suit property; and that the conclusion by the ELC that the applicant's suit was sub judice and an abuse of the court process is unassailable, and the only conclusion is that the intended appeal is not arguable and will not be rendered nugatory if the orders sought are not granted and the appeal succeeds. The respondent urged us to dismiss the application with costs.

Submissions by Counsel

- 6) The application was disposed of through written submissions with oral highlighting. Learned Counsel, Mr. Moses Kurgat represented the applicant. On the question whether a prima facie case was established, counsel faulted the trial court for abdicating its judicial responsibility by declining to determine questions of resulting trust which are uniquely within the jurisdiction of the ELC; and failing to acknowledge that respective courts adjudicating on Milimani HCCC No. 71 of 2018 (O.S), Milimani HCCC No. E201 of 2021, Milimani Misc. No. 138 of 2021 and Milimani CMCC No.1044 of 2018 had no jurisdiction to determine the issues before the ELC and to grant the reliefs sought.
- 7) Counsel submitted that the ELC misapprehended the provisions of Section 6 of the Civil Procedure Act and acted in excess of its jurisdiction by striking out the application and the suit on the ground that the same was sub judice. The applicant relied on Rift Valley Machinery Services Limited v Agro Complex (K) Ltd & 14 others [2020] eKLR and Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR in support of the proposition that an arguable appeal is not one that must succeed, but rather one that raises a serious question of law or a reasonable argument deserving consideration by the Court.



- 8) On the nugatory aspect, counsel maintained that since the suit property is registered in the name of the respondent there is nothing to stop him from selling, subdividing or, in any other manner, dealing with the same in a way to change the character so as to render the appeal worthless, otiose and an academic exercise. Counsel went on to state that the applicant currently occupies the suit property as her residence and since she has expended her time and resources in construction of the same to her taste, she has developed sentimental attachment to the suit property. In the circumstances, the applicant may not be reasonably compensated by way of damages if the suit property is sold, alienated, transferred or destroyed by the respondent. The applicant relied on *George Otieno Gache & another v Judith Akinyi Bonyo & 5 others* [2017] eKLR in support of this proposition.
- 9) Dr. Muthomi Thionkolu, learned counsel for the respondent and the interested party submitted that the applicant did not have an arguable appeal as she had obtained, and is still enjoying reliefs that are analogous to the reliefs she is seeking in the instant application. Counsel submitted that in the circumstances, the intended appeal is not arguable and will not be rendered nugatory if the orders sought are not granted. Counsel submitted that the applicant has through dilatory tactics frustrated the determination of Milimani Divorce Cause No.XXX of 2018 for four years because its determination would lead to the lapse of interlocutory injunctions she has enjoyed in respect of the suit property for the last four years. Counsel submitted that the intended appeal will not be rendered nugatory and urged us to dismiss the application with costs.

Determination

- 10) 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.
- 11) 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...”

- 12) 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 applicant 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.”



- 13) 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 the respondent was holding the suit property in trust for 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.
- 14) 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.
- 15) In determining whether or not an appeal will be rendered nugatory, the Court has to consider the rival claims of both parties and each case has to be considered on its merits. From the record and submissions made by counsel for the respondent which was not controverted by counsel for the applicant, the applicant has obtained and is still enjoying reliefs that are analogous to the reliefs sought in the instant application. The suits include Milimani Divorce Cause No. 272 of 2019 (previously, Meru Divorce Cause No. 26 of 2018). The intended appeal will therefore not be rendered nugatory if we decline to grant the orders sought.
- 16) As the applicant has to establish both the arguability and the nugatory aspects, the applicant has therefore failed to establish the twin limbs for consideration in an application under Rule 5(2)(b) of the Court of Appeal Rules.
- 17) The upshot is that the application dated 10th February, 2022 is without merit and is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 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

