



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kandie v Lekakeny (Civil Application E016 of 2022)  
[2022] KECA 994 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 994 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E016 OF 2022  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
SEPTEMBER 23, 2022**

**BETWEEN**

**DAVID KIPKIRUI KANDIE ..... APPLICANT**

**AND**

**JOHN LEMISO OLE LEKAKENY ..... RESPONDENT**

*(Being an application for an injunction pending appeal from the  
Judgement of the Hon. C. Yano, J delivered on the 21st September 2021  
in Mombasa Environment and Land Court Case No. 126 of 2019)*

**RULING**

1. The applicant has by a Notice of Motion dated brought pursuant to Rule 5(2) (b), Rules 41 and 47(2) now 43 and 49(2) of the Court of Appeal Rules 2022, hereinafter the Rules. This application seeks two main orders pending the hearing and determination of the intended appeal; firstly a *status quo* order to preserve the parcel of land Mombasa Island/ Block XXVI/212 (hereinafter the suit land) and secondly an injunction restraining adverse dealing in the suit land.
2. On the face of the application, ten grounds are advanced in support of the motion and are reiterated in an affidavit sworn by David Kipkurui Kandie in support thereof. In summary it is pleaded that there exists two conflicting judgments over the suit land, both by the Environment and Land Court, Mombasa [different benches], ELC Case No. 22 of 2012 and ELC Case No. 126 of 2019. In the former one, from annexed judgment and decree of the court, the applicant was declared the lawful owner of the suit land. In the latter, as per annexed judgment and decree, which is the subject of the application and the intended appeal, declared the applicant was holding the suit land in trust for the respondent, that the suit land belonged to the respondent and consequently cancelled the applicant's title.
3. The background to the application is that the applicant entered into a sale agreement where the respondent was the vendor, for the sale of the suit land. That the suit land was registered in the name



of the applicant and that he was in possession thereof. That the respondent filed the suit the subject of this appeal, contending that the applicant did not complete the payment for the suit land and as a result the sale agreement was vitiated. The applicant in his defence claimed that he paid the full purchase price as agreed. As shown in the above summary, the respondent was successful and obtained judgment in his favour. Being aggrieved by the judgment the applicant filed a notice of appeal dated September 22, 2021.

4. Submissions in support of the application dated 4<sup>th</sup> April 2022 were filed by M.R. Mwadzoyo & CO Advocates. Citing *Regnoil Kenya Ltd V Winfred Njeri Karanja* [2019] eKLR, counsel urged that the application meets the criteria for granting the orders sought, in that the intended appeal was arguable, and that unless the orders sought are granted and the appeal succeeds, the appeal would be rendered nugatory. Relying on *Ruben & others V Nderitu & another* [1989] eKLR for the proposition that at this stage the court should not consider the merits of the appeal, counsel urged that the memorandum of appeal attests to the arguability of the appeal.

He urged that the trial judge in the impugned judgment disregarded the respondent's evidence in ELC No. 22 of 2012 where he testified that he was fully paid by the applicant for the suit land. It was further urged that the loser in the ELC 22 of 2012 had appealed the judgment and that the applicant was the respondent, and further that in the filed appeal CA No. 88 of 2019, stay orders on the suit land had been issued as per annexure 'DKK-5'. It was urged that the appeal will be rendered nugatory if the orders sought are not granted as the respondent may dispose of the suit land unless restrained. It was revealed that the applicant's title to the suit land was cancelled and if the same is transferred to a third party, then the appellant will suffer irreparable loss. The court was informed that the current status quo is that the applicant is in possession of the suit land.

5. The application is opposed by the sworn affidavit of the respondent who averred that the court is functus officio after having dismissed a similar application that is the application E094 of 2021. It was refuted that the applicant's appeal was arguable and that the applicant had no legal rights over the suit land. It was also refuted that the applicant was ever in possession of the suit land.
6. The submissions dated 30<sup>th</sup> March 2022 in opposition to the application were filed by Kurauka & Co Advocates. Making reference to *Stanley Kangethe Kinyanjui V Tony Keter & 5 others* [2013] eKLR, counsel revealed that the appeal and application is overtaken by events as the applicant's title to the suit land has been cancelled and the land sold to a third party who is not party to the instant proceedings; that the transfer cannot be undone. It was urged that the appeal is frivolous as the applicant's breach of the sale agreement led to the cancellation of his title. It was refuted that the applicant was ever in possession of the suit premises.
7. The application was called out for virtual hearing on the 12<sup>th</sup> April 2022. Present was learned counsel Ms. Rajab for the applicant, learned counsel Mr. Kurauka for the respondent and learned counsel Mr. Gikandi for Waterfront Holdings Limited, an affected party not in the suit,. The applicant and the respondent's advocates had exchanged their submissions and were both ready to proceed.
8. We have considered the arguments and submissions canvassed by the applicant and respondent. The applicant seeks orders of status quo and an injunction restraining adverse dealing in the suit land. The Court's powers and discretion under Rule 5 (2)(b) is wide and this Court can order a stay of execution, injunction or stay of further proceedings on such terms as the Court deems just, including specifying the terms and extent of the orders, in order to preserve the subject matter of litigation pending the hearing of a suit or appeal, and are therefore orders that fall within the ambit of Rule 5(2)(b). See *Kolongei Farmers Co-operative Society Ltd V Tom Kevolve Anzingale & 6 others* [2005] eKLR.



9. In this regard, the principles applicable in the exercise of the Court’s unfettered discretion under Rule 5(2) (b) to grant an order of stay and or injunction are well settled. Firstly, an applicant has to satisfy that he or she has an arguable appeal. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR.
10. A jurisdictional issue was raised by the respondent which we wish to begin with. The respondent averred that this Court is functus officio having dismissed a similar application that is Civil Application E094 of 2022. The applicant on its part conceded at paragraph 6 of his affidavit in support of the instant application that he filed the Civil Application No. E094 of 2022, and that the same was dismissed for failure to attach the Notice of Appeal. He averred that failure to annex it was inadvertent and stated that he has however annexed it as ‘DKK1’.
11. The issue is whether this court is functus officio, or put differently whether the application is res judicata. In *Uhuru Highway Development Ltd V Central Bank of Kenya* [1999] eKLR this court dealing with the same issue laid down the elements of what renders a case res judicata thus;
  - a. the former judgment or order must be final;
  - b. the judgment or order must be on merits;
  - c. it must have been rendered by a court having jurisdiction over the subject matter and the parties; and Page 9 of 10
  - d. there must be between the first and the second action identity of parties, of subject matter and cause of action.”
12. The Notice of Appeal ‘DKK1’ is dated 22<sup>nd</sup> September 2021, and was filed on the same day and was in respect of the judgment of the ELC dated 21<sup>st</sup> September, 2021. That was one day after the judgment of the ELC, intended to be appealed herein. That means the Notice was timeously filed. We note from the ruling of this Court striking out the application in Civil Application No. E094 of 2021 that the reason given by this Court for so doing was that it was not properly seized of the application, and that the same was incompetent. The reason for that finding being that the Notice of Appeal annexed to the applicant’s affidavit as ‘DKK1’ in support of the application was in respect of an appeal against a ruling delivered on 30<sup>th</sup> January, 2021. It is clear that the application was not considered on the merits and was not final. It is therefore not res judicata. Nothing turns on this point.
 

In respect of the arguability of the appeal, the complaints enumerated by the applicant in its memorandum of appeal include complaints that the learned Judge the misdirected himself on the evidence presented before him and misconstrued clear clauses of the sale agreement; that he ignored the evidence adduced in the ELC Case No. 22 of 2012 on the same issues and same subject matter and thus rendered a conflicting judgment to ELC Case No. 22 of 12 touching on the ownership of the suit land. Further that the aggrieved parties in both suits have filed appeals before this Court, which are pending. We are cognizant of the fact that 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. See *Joseph Gitabi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008. We are satisfied that the appeal is not frivolous. It is arguable.
13. On whether the appeal may be rendered nugatory the applicant has lamented that the respondent transferred the suit property to his name and unless restrained he may dispose of his interest to third



parties hence rendering the appeal nugatory. We are satisfied that if the orders sought are not granted and the applicant's appeal is successful, the appeal will be rendered nugatory.

14. We are satisfied that the application is merited. Accordingly, we grant orders of status quo in terms of order 2 of the Notice of Motion dated 22<sup>nd</sup> March 2022, to preserve the parcel of land Ref. No. Mombasa Island/ Block XXVI/212 pending the hearing and determination of the appeal.
15. In view of the two pending appeals on the same subject matter, Mombasa Civil Appeal Nos.126 of 2019 and No. 22 of 2012 we direct the Deputy Registrar of this Court to fix both appeals for hearing together.
16. Those are our orders.

**DATED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF SEPTEMBER 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**

