Law Society of Kenya v Kinyua & 7 others (Civil Application E301 of 2022) [2022] KECA 1135 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KECA 1135 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E301 OF 2022

K M'INOTI, HA OMONDI & KI LAIBUTA, JJA

OCTOBER 21, 2022

BETWEEN

LAW SOCIETY OF KENYA .... APPLICANT

AND

JOSEPH K. KINYUA, HEAD OF PUBLIC SERVICE .... 1ST RESPONDENT

COUNCIL OF THE KENYATTA UNIVERSITY .... 2ND RESPONDENT

ATTORNEY GENERAL .... 3RD RESPONDENT

NATIONAL LAND COMMISSION .... 4TH RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF LANDS .... 5TH RESPONDENT

CABINET SECRETARY, MINISTRYOF LANDS & PHYSICAL PLANNING .... 6TH RESPONDENT

SHEM E. MIGIT- ADHOLA .... 7TH RESPONDENT

PAUL WAINAINA .... 8TH RESPONDENT

(Being an application for injunction pending the hearing and determination of an intended appeal against the Ruling and Order in the Environment & Land Court of Kenya at Nairobi (Angote, J.) dated 12th August, 2022 in ELC Cause No E029 of 2022)

RULING

1. In its application dated August 18, 2022; made pursuant to rules 5(2) (b) of the *Court of Appeal Rules 2010*, and supported by an affidavit sworn by Florence W Muturi on August 18, 2022, the applicant, the Law Society of Kenya (the LSK), prays that pending the determination of the application, and the appeal, a temporary injunction do issue restraining the respondent, its servants and/or agents from implementing the directives in the letters dated 4th July and July 7, 2022 and/or subdividing, annexing,

alienating and/ or interfering with the ownership and possession of the suit property, LR No 11026/2; such appropriate orders towards preservation of the suit property; and costs.

2. The application is opposed through a replying affidavit dated September 16, 2022 by Prof Joseph Ngeranwa for the 2nd respondent and another dated September 1, 2022 by the 8th respondent, Professor Paul Kuria Wainaina.

3. This matter was triggered by directives issued by the 1st respondent through two letters dated July 4, 2022 and July 7, 2022 to the then Vice Chancellor of Kenyatta University to surrender the title deed of the suit property to enable the Ministry of Lands & Physical Planning carry out excision of the same as directed by the cabinet, which had approved the allocation to various institutions. The applicant herein contested the actions of the 1st respondent contending that; to the extent that the suit property held by Kenyatta University's is reserved for education and research, it cannot be alienated under any circumstances pursuant to the provision of section 12(2) (d) of the *Land Act*; that the 1st respondent usurped the powers of the Kenyatta University Council set out under section 18(2) of the *Kenyatta University Charter*, and that the University faced an imminent threat of being arbitrarily deprived of about 490 acres of the land; and the decision was reached without public participation and in total disregard of the process set out in law.

4. Consequently, by an application dated July 14, 2022, filed at the Environment and Land Court, the applicant sought orders restraining all the respondents their agents, successors and assigns from harassing any employee, officials, agents and or representative of Kenyatta University in the enforcement of the directives contained in the letters dated July 4, 2022 and July 7, 2022; orders restraining all the respondents their agents, successors and assigns and/or issuing an order staying the implementation of the directives contained in the letters dated July 4, 2022 and July 7, 2022, and or subdividing, annexing, alienating, and or any interference with the ownership and possession of the parcel of land known as Land Reference N11026/2; a restraining order preventing the 1st interested party, his agents, successors and assigns from surrendering the title documents to the parcel of land known as Land Reference N 11026/2.

5. The 1st respondent, Prof Shem E Migot-Adola, opposed the application on the grounds that both the application and petition were fatally defective, having been sworn by a person who was not a member of the Kenyatta University Council; had no personal knowledge of the facts deposed; had no locus standi to institute this suit ; and maintained that the letters of 4th and July 7, 2022 were as a result of an elaborate consultative process involving all stakeholders and could not be said to be unconstitutional.

6. On their part, the 1st,2nd, 3rd, 5th and 6th respondents took the position that the suit property was public land, which was allocated to the University by the Government of Kenya; that the Government had an unfettered right to compulsorily acquire public land, administratively and, in any event, the University was not eligible for compensation as it was a public body holding the land in trust for the public; that the allocation of a portion of the suit property was on the basis of a re-planning and re-organization exercise executed by the Government; in which sections of the suit land was allocated to other entities for purposes of efficient, productive and use in a sustainable manner, the entities being:- the World Health Organization, Africa Centre for Disease Control, Kenyatta University Teaching and Referral Hospital as well as the Ministry of Lands and Physical Planning, which needed to regularize the occupation of squatters who were already on part of the suit property; that the matter involved the implementation of a public policy decision; and that the University Council had been consulted at all times on the planned actions.

7. It was also argued that a request by the Executive to a public institution to surrender land for another public purpose could not be unconstitutional, as the Government ordinarily acts in trust for and for

the benefit of the people of Kenya; and that it had not acted in an arbitrary, illegal or unconstitutional manner. The 1st interested and 2nd interested parties in support of the application through its chair, described the cabinet decision as unlawful, unconstitutional, only intended to alienate the University's land and that the then council had declined to accede to the request for surrender of the University Land; but that in an odd twist of events, the Council was realigned, and manipulated, and that the 1st respondent made an arbitrary decision without adhering to the set down processes for alienation, expropriation and annexation of property contrary to article 64(4) of the *Constitution* of Kenya 2010.

8. In a ruling delivered on August 12, 2022, the ELC, whilst confirming that the applicant had the requisite locus standi to move the court, dismissed the application on the grounds that the argument raised that the 4th respondent and the public; should have been involved in the allocation was erroneous as article 62(2) (b) of *Constitution* expressly prohibits the 4th respondent from dealing with the suit property - at least until the land is surrendered; that the letter by the 1st interested party rejecting the request to alienate the land could not be equated to a resolution of the Council; and that no evidence was led to demonstrate that the reconstituted Kenyatta University Council, which passed the resolution of July 15, 2022 to alienate a portion of the University land for public purpose was in the office illegally.

   The trial court stated thus:

   > " ...Having analysed the purposes for which the parcels of land in issue are supposed to be utilized for as captured by the 2nd respondent (the Council of Kenyatta University); and in view of the public purposes that the said land, primafacie, will be used for, and the justification given by the Council of Kenyatta University in its meeting held on July 15, 2022, it is my finding that the petitioner has not established a prima facie case with chances of success. For those reasons, the application dated July 14, 2022 is dismissed with no order as to costs."

9. According to the applicant, this outcome means that, following directives by the 1st respondent, the University will be arbitrarily deprived of 490 acres which will be transferred to 3rd parties; that the 2nd respondent who was in possession of the suit property has since surrendered the title to the property to the Ministry of Lands and Physical Planning for re-planning; that the 4th respondent has commenced preparation for surrender of the titles based on the subdivision carried out by the Ministry of Lands and Public Planning; and that the directive annexing the 490 acres of the suit property as communicated *vide* letters dated 4th and July 7, 2022 was reached at without public participation.

10. The applicant has set out 14 grounds of appeal contending that the appeal is arguable, with high chances of success. We need not reproduce the grounds of appeal, but take note that the gist of the appeal faults the learned judge for failing to analyse, conceptualize and appreciate the evidence on record; and for relying on matters not pleaded by the parties and misdirecting himself in making a determination that the suit property was public land in total disregard of the judgment delivered in *Kenyatta University & 1699 Others v Kimani Mbugua and 78 Others [2021] eKLR*, which held that the land was alienated to Kenyatta University and was no longer public land.

11. The applicant is also apprehensive that, unless the orders sought are granted, Kenyatta University will lose 490 acres of its land without compensation; and the substratum of the intended appeal will be obliterated and rendered nugatory.

12. The 7th and 8th respondents support the instant application, confirming the position that the 490 acres of the suit property was to be used for public purposes, namely research and resettling of squatters; that the directive by the 1st respondent was illegal as it usurped the role of the Kenyatta University

Council under section 60 of the *Universities Act* and section 18(2) (a) of the Kenyatta University Charter, which grants the University Council complete autonomy over the management, supervision, and administration of the assets of the university, as well as promoting the interests of the university; that this was not compulsory acquisition under section 107 of the *Land Act*; and that, in any event, the mandatory processes were not followed.

13. The 2nd respondent argues that the applicant has no arguable appeal, nor has it demonstrated how the said appeal will be rendered nugatory if the orders are not granted; that Kenyatta University holds title to the suit property granted by the Government of Kenya free of charge; that section 48 of the *Universities Act* vests such moveable property in the University to be dealt with in any manner the institution deems fit; that section 60(a) of the *Universities Act* allows the 2nd respondent to manage the assets of the University as it deems fit, and that the 2nd respondent met to consider the request to surrender the title of the suit property for public purposes, which included among others, augmenting the university academic and research program and also resettling squatters; that this was not a compulsory acquisition as the surrender was voluntary, and that section 111(1) (d) of the *Land Act* prohibits compensation to a public body, unless there was evidence that the land was purchased and developed by that public body-which was not the case here as the land was granted to Kenyatta University free of charge.

14. With regard to the requirements necessary for granting an order for injunction, pending appeal, this court has held that, whether it be an application for injunction, stay of execution or stay of proceedings pending appeal, the applicable principles are the same. To succeed in an application under rule 5(2) (b) of this *Court's Rules*, the applicant has to establish that:

    i. The appeal is arguable

    ii. The appeal is likely to be rendered nugatory if the stay is not granted and the appeal succeeds.

15. In the case of *Wasike v Swala [1984] KLR 591* this court held that an arguable appeal is not one that must necessarily succeed, but one that merits consideration by the court; it is one that is not idle and/or frivolous. This court has also stated in *Co-operative Bank of Kenya Ltd v Banking Insurance and Finance Union Kenya [2014] eKLR* thus: "It is sufficient that the issues raised are arguable. In Kisumu Civil Appeal 74 of 2016, *George O Gachie & Anor v Judith Akinyi Bonyo & others* that: 'at this stage the court is not expected to inquire into the merits of the case and whether or not the appeal will succeed. It is sufficient that the applicant has met the threshold as existence of a single bonafide issue ....

16. As stated earlier, an arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the court. One of the grounds raised is that the decision was reached without public participation. The other grounds relate to the nature or tenure of the suit property (whether public or private vis a vis the University, and whether its subdivision amounted to compulsory acquisition for which the University is entitled to compensation. In view of the foregoing, we form the view that the applicant has demonstrated that it has an arguable appeal, and has satisfied the first limb of the twin principle for grant of orders under rule 5(2) (b) of this court's *rules*.

17. On the second limb of the twin principle as to whether the appeal, if successful, would be rendered nugatory if the orders sought are not granted, this court has held in the case of *Reliance Bank Limited v Norlake Investment Limited [2002]1 EA 227* that the factors which render an appeal nugatory are to be considered within the circumstances of each case and, in so doing, the court is bound to consider the conflicting claims of both sides.

18. In the case of *Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR*, this court held that whether or not an appeal will be rendered nugatory depends on whether the status of the subject matter

sought to be stayed is reversible or, if not reversible, whether damages will be an adequate remedy for the party aggrieved.

19. The case of *African Safari Club Limited v Safe Rentals Limited, Nai Civ App 53 of 2010* held:

> " ...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable."

20. The applicant has stated that Kenyatta University will suffer irreparable loss and harm as it being forced to surrender a portion of the land without compensation. We hold the view that, in the event that the University suffers loss on account of any misdealing, the harm is capable of being compensated, by an award of damages. We draw this conclusion from the case of *Esso Kenya Limited v Mark Makwata Okiya Civil Appeal No 69 of 1991*, where this court stated: "...as it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available."

21. The applicant has failed to show that the loss cannot be adequately remedied by an award of damages. In any event, should the title change hands, which is yet to happen as the applicant submits, this court has the power to reverse the same should the appeal succeed.

22. We find that the applicant has failed to satisfy the second limb of the twin principle in accord with the requirements under rule 5(2) (b) of the *Court of Appeal Rules* and, accordingly, its motion fails. The same is hereby dismissed and this being a public litigation, we direct that the parties bear their costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

KATHURIMA M'INOTI

....

JUDGE OF APPEAL

H A OMONDI

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JUDGE OF APPEAL

DR K I LAIBUTA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR