



**Boit v Ouko & another (Suing as the administrators of the Estate of the Late Jason Atinda Ouko) (Civil Application E022 of 2022) [2022] KECA 1094 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1094 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E022 OF 2022  
MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA  
OCTOBER 7, 2022**

**BETWEEN**

**SOLOMON BOIT ..... APPLICANT**

**AND**

**AARON TAFARI OUKO ..... 1<sup>ST</sup> RESPONDENT**

**ROSALYN DOLA OUKO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE JASON  
ATINDA OUKO**

*(An application for stay of proceedings pending the lodging, hearing and determination of the intended appeal against the ruling of the Environment and Land Court at Nairobi (Mogeni, J.) dated 14th October, 2021 in ELC. Civil Suit No. 483 of 2011)*

**RULING**

1. The motion dated January 19, 2022; seeks orders to stay proceedings in Milimani ELC. Civil Suit No. 483 of 2011 pending lodging, hearing and determination of the intended appeal; issuance of the certified typed proceedings leading to the ruling delivered on October 14, 2021; be fast tracked by the Environment and Land Court (ELC) at Milimani to enable filing of the record of appeal and for directions before this Court on a priority basis given the age of the matter and that costs of this application do abide the result of the intended appeal.
2. The application is supported by grounds on its body and a supporting affidavit of Solomon Boit, the applicant, sworn on 19<sup>th</sup> January, 2022; plus a further affidavit dated 31<sup>st</sup> January, 2022; together with annexures thereto.
3. The application is opposed by a replying affidavit of the 1<sup>st</sup> respondent dated February 2, 2022.



4. The application was canvassed through written submissions filed by the respective parties which were orally highlighted.
5. The background is that at the ELC, by an application dated June 24, 2021 the applicant herein sought to amend his statement of defence and counterclaim dated 16<sup>th</sup> September, 2011; to include a counter claim of adverse possession, and introduce a new party before the matter was heard, but the application was dismissed.
6. The respondents opposed the application saying there were no compelling reasons to grant the prayers which they described as being brought in bad faith, with an intention to delay the proceedings, as the applicants had ample time to file the counter-claim and an amended defence, but did not.
7. In her ruling, the learned Judge made reference to the Court of Appeal for Eastern Africa in the case of *Eastern Bakery vs. Castelino* (1958) EA 461), to acknowledge that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs, nevertheless, an amendment should not be allowed if it causes injustice to the other side.
8. Drawing from the case of *Ochieng & Others vs. First National Bank of Chicago*, Civil Appeal Number 147 of 1991(UR) which set out the principles under which courts may grant leave to amend pleadings, the learned Judge pointed out that courts will not permit an amendment that is inconsistent with the original pleading and which entirely alters the nature of the defence or plaint.
9. In applying the foregoing principles, the learned Judge stated that in the original defence, the applicant had anchored his defence on the basis that he was the rightful proprietor of LR. No. 3589/6 on account of purchase from one Mrs. Rachael Mumbi Mbugua. That however in the amended defence and counterclaim, the applicant changed tact and now claimed ownership of LR. No. 3589/6 by way of adverse possession in that, vide an agreement made in 1995, the defendant/applicant purchased the suit land and in 1997 took possession and started construction and has been in occupation since then, thus altering the character of the suit since in the earlier statement of defence, there was no mention that his claim arose out of an entitlement by virtue of having been in adverse possession.
10. The learned Judge was of the view that the applicant was engaging in a fishing expedition in the hope that he would stumble onto something, and it was inexplicable why the original defence had no suggestion at all of a counterclaim; the suggestion that the applicant was infact an adverse possessor was coming too late in the course of the case when the matter was scheduled for hearing; that it should not have taken the applicant ten (10) years to suddenly realize that he could claim adverse possession. Further, that while the applicant was nonetheless entitled to seek to amend his pleadings at any stage of the proceedings, to allow amendment at that stage in the proceedings would occasion prejudice and injustice to the respondents; thus, she declined to grant the application.
11. Aggrieved by the said ruling, the applicant filed this instant application contending that the dismissal of his application was tantamount to being denied a fair hearing contrary to Article 50 of the [Constitution](#) and rules of natural justice and it is upon this basis that he filed this instant application.
12. That the delay in hearing Civil Suit No. 483 of 2011 should not be attributed to the applicant's actions as the delays were primarily caused by succession proceedings in Succession Cause No. 353 of 1997 where the issue of letters of administration had to be sought, and other suits filed by third parties that had purchased the suit property.



13. That Milimani Civil Suit No. 483 of 2011 was heard on 29<sup>th</sup> March, 2022 and 25<sup>th</sup> April, 2022 while this application was pending hearing the ELC on 7<sup>th</sup> June, 2022 directed parties to file written submissions after hearing the suit and has scheduled the matter for judgment on 13<sup>th</sup> October, 2022.
14. That taking into consideration the applicant's earlier submissions dated 31<sup>st</sup> January, 2022; the applicant has urged this Court to allow the application as prayed as the ELC is not functus officio because judgment has not been delivered. The applicant has urged this Court to arrest the judgment of the ELC as empowered by Rules 1(2) and 31 of the Court of Appeal Rules bearing in mind that under the provisions of Order 8 Rule 3 and 5 and Order 18 Rule 10 of the Civil Procedure Rules, 2010 the ELC can allow amendments to be made at any stage of the proceedings and recall witnesses at any stage of the proceedings.
15. In rebuttal, the respondents contend that Milimani ELC Civil Suit No. 483 of 2011 has been in court for well over ten (10) years and despite several hearing dates being issued, it was yet to take off primarily due to many convenient excuses brought about by the applicant; and that this suit is a text book case of delayed justice.
16. According to the respondents, the ruling delivered by the ELC was proper and reasons given on the exercise of discretion. Indeed the applicant's application dated 24<sup>th</sup> June, 2021 sought to alter the character of the suit from one of a rightful proprietor to one of adverse possessor.
17. That the applicant filed a notice of appeal dated 28<sup>th</sup> October, 2021 seeking to appeal against the said ruling, but the intended appeal is baseless with little or no chance of success, and is a delaying tactic employed by the applicant; no stay has been granted with regard to the suit; and a hearing date of 20<sup>th</sup> January, 2022; was issued but the applicant once again sought an adjournment.
18. The respondents contend that the applicant's appeal is a non-starter and that the application fails to meet the threshold for stay of proceedings.
19. We have considered the record in light of the rival pleadings and submissions. This being an application for stay of proceedings pending the lodging, hearing and determination of the intended appeal, the applicant has to satisfy the twin requirements of Rule 5(2)(b) of the Court of Appeal Rules as restated in Stanley Kangethe Kinyanjui v Tony Ketter & 5 others (2013) eKLR. The requirements are that the intended appeal is arguable and secondly, that it will be rendered nugatory if the order of stay sought is not granted.
20. In satisfaction of the first requirement, the applicant contends that the intended appeal is arguable as demonstrated in his draft memorandum of appeal wherein he has raised the grounds that the learned Judge erred in law and fact; in declining to exercise her discretion in favour of granting the applicant's application; in holding that the applicant was engaging in a fishing expedition in his application and had no suggestion at all of a counterclaim; and in delivering the ruling without the parties highlighting their submissions and without a ruling notice being served upon the parties.
21. Also in satisfaction of the first requirement, the applicant makes reference to the letter requesting for the trial court's ruling and applicant's written submissions at the ELC. The applicant has also urged this Court to take judicial notice that Order 43(f) of the Civil Procedure Rules, 2010 provides that an appeal lies of with regard to orders relating to amendment of proceedings.
22. Notably, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court, certainly one which is not frivolous. See the case of Joseph Gitabi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008. A single bona



fide arguable ground of appeal is sufficient to satisfy this prerequisite. See the case of *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai. 345 of 2004.

23. Applying the above threshold to the applicant's draft memorandum of appeal, we note that the issues raised were well covered by the learned Judge in her ruling, and the applicant has failed to demonstrate any arguable point regarding the manner in which the learned Judge exercised her discretion. We are satisfied that none of the grounds raised in the draft memorandum of appeal nor in his written submission are arguable, as to warrant orders of stay of proceedings.
24. Turning to the second requirement, whether the appeal shall be rendered nugatory, the position in law is that this 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. See the case of *Reliance Bank Ltd vs. Norlake Investments Ltd* [2002] 1 EA 227.
25. In satisfaction of this requirement, the applicant argues that the intended appeal will be rendered nugatory if the orders sought are not granted as Milimani ELC Civil Suit No. 483 of 2011 shall proceed for hearing on 17<sup>th</sup> February, 2022; without the applicant being afforded the opportunity to amend his defence to enable the ELC to justly determine the ownership of the suit property therefore thwarting his constitutional right to be heard and to own property. In this regard, the applicant has made reference to the case of *Attorney General vs. Okiya Omutatah Okoiti & Another* [2019] eKLR. In the same breath, the applicant has submitted that the proceedings in Milimani ELC Civil Suit No. 483 of 2011 have already been concluded and the judgment has been scheduled for 13<sup>th</sup> October, 2022.
26. Given the fact that the matter at the ELC has already been heard and a judgment date given, it is our view that this application has been overtaken by events. In any case, this Court cannot arrest the judgment of the ELC as no arguable grounds/issues have been raised and no damages will reasonably compensate the respondents for any added decade delay.
27. Consequently, this application lacks merit and is dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2022.**

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**ASIKE - MAKHANDIA**

**JUDGE OF APPEAL**

.....

**J. MOHAMMED**

**JUDGE OF APPEAL**

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**H. A. OMONDI**

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

