



**Kena Properties Limited v Radcliffe & 6 others (Civil Application E132 of 2022) [2022] KECA 1102 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1102 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E132 OF 2022  
MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA  
OCTOBER 7, 2022**

**BETWEEN**

**KENA PROPERTIES LIMITED ..... APPLICANT**

**AND**

**ADRIAN CHARLES JAMES RADCLIFFE ..... 1<sup>ST</sup> RESPONDENT**

**PRINCIPLE MAGISTRATES COURT MILIMANI ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JOHN M. OHAGA ..... 5<sup>TH</sup> RESPONDENT**

**PRIME BANK LIMITED ..... 6<sup>TH</sup> RESPONDENT**

**JEPHYS AUCTIONEERS ..... 7<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution of the ruling and orders of the Environment & Land Court at Nairobi (O.A. Angote, J.) delivered on 10th March, 2022) in E.L.C. Cause No. 6 of 2022)*

**RULING**

1. Before us is a Notice of Motion dated 22<sup>nd</sup> April, 2022 brought under Rule 5(2)(b) of the [Court of Appeal Rules](#) (this Court's Rules) in which Kena Properties Limited (the applicant) seeks orders in the main that:
  - a. this Court be pleased to stay the execution of the ruling and orders of the Environment and Land Court (ELC) (A.O. Angote, J.) dated 10<sup>th</sup> March 2022 in Nairobi ELC Petition No. 6 of 2022 - Adrian Charles James Radcliffe vs. Kena Properties Limited & 6 Others (the impugned Ruling) pending the hearing and determination of Nairobi Civil Appeal No. E133 of 2022, Kena Properties Limited vs. Adrian Charles James Radcliffe & 6 Others (the appeal)



- b. this Court be pleased to stay further proceedings in the impugned ruling pending the hearing and determination of the appeal.
  - c. the costs of this application do abide the outcome of the appeal. Adrian Charles James Radcliffe, The Principal Magistrate’s Court, Milimani, The Chief Land Registrar, The Attorney General, John M. Ohaga, Prime Bank Limited and Jephys Auctioneers are the 1<sup>st</sup> to 7<sup>th</sup> respondents respectively.
2. The application is supported by the affidavit of Carolla Muthoni Ngingi Ohaga sworn on 22<sup>nd</sup> April 2022. The application is premised on the grounds inter alia that the learned Judge erred in law and fact: in failing to appreciate the jurisdictional limits and powers conferred on the Environment and Land Court (ELC) by Article 162(2)(b) of *the Constitution* of Kenya 2010 and Section 13 of the *Environment and Land Court Act*, 2011 and the guiding principles; in failing to appreciate that supervisory jurisdiction vested in the High Court under Article 165 (6) of *the Constitution* is exercisable sparingly and only in exceptional circumstances which did not exist in the instant case; in invoking the supervisory jurisdiction of the High Court under Article 165(6) of *the Constitution* and declaring as null and void the orders issued on 21<sup>st</sup> January, 2022 by the Milimani Principal Magistrate’s Court in respect of Land Reference No. 196/32 (original No. 196/15/13), Nairobi (the suit property) without any proper premise or basis in law; in failing to appreciate that the proceedings before the Principal Magistrate’s Court were in respect of trespass to the suit property which the said Magistrate’s Court had the requisite jurisdiction to hear and determine under the provisions of Article 162(2)(b) of *the Constitution*; and in holding as it did that the Milimani Principal Magistrate’s Court did not have the jurisdiction to hear and determine MC ELC Case No. E008 of 2022; Kena Properties Limited vs. Adrian Radcliffe and to issue any order in respect thereof.
  3. It is the applicant’s case that it has an arguable appeal with a high probability of success and that it will be rendered nugatory if the orders sought are not granted as the 1<sup>st</sup> respondent will resume his unlawful possession of the suit property, erect structures thereon, recklessly use or abuse the said suit property as he deems fit, thereby fundamentally altering the state of the suit property and rendering it unusable by the applicant herein.
  4. The 1<sup>st</sup> respondent opposed the application and in a replying affidavit deponed inter alia that he has been in occupation of the suit property for more than 30 years; that he and his family were evicted from the suit property on 4<sup>th</sup> February, 2022; that the applicant has no valid title to the suit property; and that the applicant will not suffer any prejudice if the orders sought are not granted as it has been in occupation of the suit property for a short period of time.
  5. Written submissions were filed on behalf of the applicant and the 1<sup>st</sup> respondent and orally highlighted in virtual court by learned counsel for the applicant, Mr. Elias Masika, and learned counsel for the 1<sup>st</sup> respondent, Senior Counsel, Dr. Khaminwa. Learned Counsel, Mr. James Ochieng Oduol was on record for the 5<sup>th</sup> respondent while Mr. Theredi held brief for Ms. Fatma for the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> respondents. The Court was informed that the firm of Messrs Kibe & Co. Advocates are on record for the 6<sup>th</sup> respondent.
  6. It was Mr. Masika’s submission that the applicant had established the twin principles which call upon this Court to exercise its discretion in the applicant’s favour by granting the orders sought. Counsel relied on the case of Ben Nyakundi vs Rajab Ahmed Karume & 3 others (2020) eKLR to buttress this position.
  7. On the limb of arguability, Mr. Masika submitted that the substantive appeal has been filed (Civil Appeal No.E133 of 2022) which raises cardinal and substantial questions of law as contained in the



Memorandum of Appeal including, the question of the jurisdiction of the Magistrate’s Court to deal with matters concerning trespass to land particularly where the issue of ownership is not in dispute; the extent to which the ELC may invoke the supervisory jurisdiction of the High Court under Article 165 (6) of *the Constitution*; the rights of a legal and registered owner of a suit property vis a vis the rights of an illegal occupier of private land especially after the determination of the question of ownership by the High Court; and the question whether a non-citizen of Kenya can lay claim to freehold land in Kenya in breach of Article 65(1) of *the Constitution* as read with Section 38 of the *Land Act* and Section 3(3) of the *Law of Contract Act*.

8. On the nugatory aspect, counsel submitted that if the orders sought are not granted and the appeal succeeds, it shall be confronted with an unpleasant situation of finding the suit property effectively wasted by the 1<sup>st</sup> respondent herein in breach of the applicant’s right to property decreed and protected under Article 40 of *the Constitution* as well as the rights and interests of the Chargee (the 6<sup>th</sup> respondent herein) who was neither served nor heard in the instant application. Counsel further submitted that the 1<sup>st</sup> respondent had vide his replying affidavit confirmed that he had already found alternative accommodation and will therefore not suffer prejudice if the orders sought by the applicant are granted.
9. Mr. Ochieng Oduol, learned counsel for the 5<sup>th</sup> respondent submitted that the 5<sup>th</sup> respondent supports the application. Counsel further submitted that the impugned decision is riddled with both jurisdictional and procedural errors and the orders sought by the applicant should therefore be granted pending the hearing and determination of the appeal which has been filed and served.
10. Mr. Theredi, learned counsel submitted that as the dispute is primarily between the applicant and the 1<sup>st</sup> and 5<sup>th</sup> respondents, he will not make submissions in support or in opposition to the application.
11. In rebuttal, Senior Counsel, Dr. Khaminwa, submitted that the applicant acquired title to the suit property illegally, unprocedurally and through a corrupt scheme. Further, that a purchaser cannot evict a legal occupier of a property that he has purchased; and that when a vendor fails to provide vacant possession of a property at completion, the purchaser ought to treat the contract as breached and therefore seek damages from the vendor. Counsel cited the case of *Beard vs Porter* [1948] 1KB 321 in support of this proposition. Counsel urged us to dismiss the instant application with costs.
12. We have considered the application, grounds of opposition, the submissions, the authorities cited and the law. The jurisdiction under Rule 5 (2) (b) of this Court’s Rules is discretionary in nature and guided by the interest of justice. The court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and appeal succeeds, the appeal will be rendered nugatory.
13. 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...”



14. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.
15. 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 applicants in order to warrant ventilation before this Court. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR where 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.”
16. We have carefully considered the grounds set out in the motion. In our view, it is arguable inter alia whether the Magistrate's Court had jurisdiction to deal with matters concerning trespass to land. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the appeal is arguable.
17. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought. 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.
18. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. In the instant application, the applicant is apprehensive that if the orders sought are not granted, there will be nothing to prevent the 1<sup>st</sup> respondent from dealing with the suit property in a way that may irreversibly change its character or waste it to the detriment of the applicant. In the circumstances, we find that the appeal will be rendered nugatory, absent stay.
19. We are therefore satisfied that in the circumstances of the instant application the applicant has demonstrated an arguable appeal which will be rendered nugatory, absent stay.
20. In the circumstances, the applicants have satisfied both limbs of the requirements under Rule 5(2)(b) of this Court's Rules. The upshot is that the notice of motion dated 22<sup>nd</sup> April, 2022 is allowed. Costs shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER, 2022.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**



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**JUDGE OF APPEAL**

**HELLEN OMONDI**

.....  
**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

