



**Odera & 2 others v Omboto & 4 others (Civil Application
E020 of 2022) [2022] KECA 1116 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1116 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E020 OF 2022
PO KIAGE, M NGUGI & F TUIYOTT, JJA
OCTOBER 7, 2022**

BETWEEN

**CAPTAIN JOTHAM ODERA 1ST APPLICANT
CABINET SECRETARY MINISTRY OF INTERIOR & COORDINATION OF
NATIONAL SECURITY 2ND APPLICANT
ATTORNEY GENERAL 3RD APPLICANT**

AND

**JOHANNES AKELLO OMBOTO 1ST RESPONDENT
GRADUCE OMBOTO AKELO OMBOTO 2ND RESPONDENT
KENYA RAILWAYS COOPERATION 3RD RESPONDENT
KENYA PORTS AUTHORITY 4TH RESPONDENT
NATIONAL LAND COMMISSION 5TH RESPONDENT**

(Being an application for stay of execution pending the lodging, hearing and determination of the intended appeal against the ruling of the Environment and Land Court of Kenya at Kisumu (Ombwayo, J) dated 10th December 2021 in Petition No. 8 of 2019)

RULING

1. The application before us is dated 3rd February, 2022 and is brought, inter alia, under Rules 5(2), 75(1), 42 and 47 of the *Court of Appeal Rules* and Article 159 of the *Constitution* of Kenya. The applicants ask this Court to grant an order staying execution of the ruling dated 10th December 2021 and the order dated December 14, 2021 made by Ombwayo J in Environment and Land Court (ELC) Petition No. 8 of 2019 pending the hearing and determination of their appeal. They also pray for the costs of the application.



2. The grounds on which the application is lodged are set out on the face of the application and in the affidavit in support sworn by the 1st applicant. It is stated that an appeal has already been filed pursuant to Rule 75(1) of this Court's Rules; that the 1st applicant was found to be in contempt of the order dated March 18, 2021 and has been sentenced to jail for 30 days with an alternative of paying a fine of Kshs. 200, 000; that the 1st applicant is aggrieved by the said ruling as he did not disobey the orders of 18th March, 2021 but was providing security of the property as directed. A notice of appeal dated 22nd December 2021 is annexed to the supporting affidavit.
3. The 1st applicant avers that he is a public officer sworn to maintain security. Accordingly, an order for contempt for carrying out his statutory duties upon lawful instructions is unfair, unjust and a threat to his personal liberty. This Court should therefore intervene by issuing the stay orders that he seeks as his liberty is at stake as he is likely to be apprehended any time in execution of the orders of the ELC.
4. The respondents oppose the application through an affidavit sworn by Johannes Akelo Omboto on April 1, 2022. He avers that the 1st applicant was found in contempt of court by the ELC; that he has not purged the contempt as he continues to reside on the suit land and that the allegation by the 1st applicant that he was providing security is a show of impunity and dishonesty.
5. The background to this application is that the 1st and 2nd respondents had filed a petition before the ELC seeking, inter alia, a declaration that they are the bona fide registered proprietors of L. R. No. Kisumu Municipality/Block 7/530. In the judgment dated 5th May 2020, Ombwayo J. found partly in favour of the respondents in the petition (the 2nd, 3rd and 4th applicants) and declared that the acquisition of the title to the property by the petitioners was illegal, null and void.
6. Thereafter, the 1st and 2nd respondents filed an application seeking stay of execution of the judgment. This application and the ruling in respect thereof have not been included in the application before us but it appears that it was successful as the 1st and 2nd respondents thereafter filed an application dated October 7, 2021 in which they prayed that an order of committal be made against the 1st applicant for contempt of court. The application was based on the ground that the ELC had issued an order on March 18, 2021 restraining the applicants from evicting the 1st and 2nd respondents or taking possession of the suit property pending hearing and determination of the 1st respondent's appeal.
7. It was alleged that the order of the court was duly served upon the applicants and their agent, the 1st applicant, who was stationed on the suit property. The 1st and 2nd respondents' contention before the ELC was that despite having knowledge of the order through service upon him, the 1st applicant, without any justification, took possession of the suit property.
8. In its ruling dated December 10, 2021, the ELC found that the 1st applicant was in contempt of court. It ordered that he be committed to prison for a term of 30 days with an option of a fine of Kshs. 200,000.
9. At the hearing of the application before us, learned Counsel, Ms. Juma, appeared for the applicants. She submitted that the land in contention belongs to the 3rd respondent, Kenya Railways. The land was in a high-risk area as it is 50 meters from the shipment port and State House. The 1st applicant was not in possession of the suit property but was only offering security on behalf of Kenya Railways. In their written submissions, the applicants contend that the 1st applicant is a public officer sworn to maintain security and was carrying out his statutory duties upon lawful instructions. The applicants rely on *Global Tours & Travels Limited Nairobi* HC Winding Up Case No. 43 of 2000.
10. Mr. Odeny, learned Counsel for the 1st and 2nd respondents, submitted that the order of committal for contempt emanated from an order made by the ELC on May 5, 2020 which restrained the applicant



from ejecting the respondents from the suit property. The order had not been challenged in any way and the 1st and 2nd respondents were still in possession. The applicant had refused to pay the fine imposed on him and when the 1st and 2nd respondent tried to get him arrested, they were unable to as the applicants are armed with guns and threatened the court bailiffs. The applicants were seeking the court's assistance yet they continue to disobey court orders.

11. In written submissions dated April 7, 2022, the 1st and 2nd respondent submit that the applicant must satisfy the court that the appeal is arguable and will be rendered nugatory unless the stay is granted. It is their submission that a perusal of the applicant's memorandum of appeal does not raise any points of law. They further submit that the circumstances of the case do not favour the grant of the injunctive relief sought.
12. The applicants seek exercise of the Court's jurisdiction under Rule 5 (2) (b) to grant an order of stay or injunctions pending the hearing of their appeal. The principles on the basis of which this Court will issue such orders are settled. An applicant has to satisfy the Court that he has an arguable appeal, and that should the orders sought not be granted, his appeal will be rendered nugatory- see *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* (2013) eKLR. The intended appeal need not be one that will necessarily succeed but is an appeal that is not frivolous.
13. The 1st applicant has filed a memorandum of appeal dated 3rd February, 2022 raising four grounds of appeal. In the second of these grounds, he impugns the ruling on the basis that the trial judge erred in fact by not appreciating that pursuant to his judgment dated May 5, 2020 in favour of the 1st respondent in the main suit, the 1st respondent took possession of the suit property immediately; that accordingly, at the time of hearing and determining of the application to stay the judgment, the 1st respondent in the main suit was in actual possession of the suit land. He argues, secondly, that the trial court erred in fact by failing to consider that the 1st applicant was maintaining the status quo on the suit property as a mere security provider and could therefore not be found guilty of any eviction or taking possession of the suit property.
14. It is contended, finally, that the trial court erred in fact by failing to consider that it had entered judgment in favour of the 1st respondent on 5th May 2020; that the order of stay of execution had been issued on 18th March 2021, 10 months later, by which time the status quo had clearly changed.
15. These grounds of appeal, we believe, demonstrate that the applicants do have an arguable appeal. The Court hearing the appeal would need to address its mind to the question whether the 1st applicant, who was not a party to the proceedings before the ELC and was providing security on behalf of the 3rd respondent, could be held liable in contempt. Secondly, whether the court erred in not considering that in the 10 months between its judgment on 5th May 2020 and the orders of stay issued on March 18, 2021, the situation with respect to the suit property had changed.
16. As to whether the appeal would be rendered nugatory, the orders issued require payment of a fine of Kshs 200,000 or incarceration of the 1st applicant. Should the 1st applicant be arrested and incarcerated and his appeal is successful, the incarceration cannot be undone, and the appeal would have been rendered nugatory.
17. The facts of the application before us are similar in many respects to the situation that confronted this Court in *Kabale Tache Arero v Salome Munubi & 3 others; Muhammad Swazuri Chairman National*



Land Commission & another (Interested Parties) (2020) eKLR in which the Court, in granting orders of stay, observed as follows:

“One of the issues that the applicant wishes to urge on appeal is whether orders can be made against a party who is not a party to proceedings and that no specific directions were given to the appellant. In our view, this is not an idle grievance and we are satisfied that the applicant has satisfied the condition of arguability. On the 2nd limb of nugatory, the applicant had contended that he is likely to face incarceration, thus she would lose her liberty and if her appeal was to be successful, then the incarceration cannot be undone. In our view, the applicant has satisfied the 2nd limb of nugatory.”

18. We are satisfied that the applicants have met the two limbs required under Rule 5(2)(b). We accordingly grant an order staying execution of the ruling dated December 10, 2021 and the orders issued on December 14, 2021 by Ombwayo J pending the hearing and determination of the applicants’ appeal.
19. The costs of the application shall abide the determination of the appeal.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF OCTOBER, 2022

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

