



**Thamaini v Thamaini & 2 others (Civil Application E225 of 2022)
[2022] KECA 1093 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1093 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E225 OF 2022
W KARANJA, MSA MAKHANDIA & HA OMONDI, JJA
OCTOBER 7, 2022**

BETWEEN

EPHRAIM MIANO THAMAINI APPLICANT

AND

NANCY WANJIRU THAMAINI 1ST RESPONDENT

ELINA MWAYITSI NAKAYA 2ND RESPONDENT

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES 3RD
RESPONDENT**

*(An application for orders of injunction pending the hearing and determination
of the appeal from the ruling and order of the High Court of Kenya at
Nairobi (Wabwoto, J.) dated 28th March 2022 in ELC Case No. 246 OF 2021)*

RULING

1. By a notice of motion dated 14th April, 2022, the applicant has moved this Court under Articles 25(c), 48 and 50 (1) of *the Constitution*, Rules 5(2) (b), 20(2) 41, and 47 of the Court of Appeal Rules, Section 3A of the *Civil Procedure Act* and Orders 42 Rule 1 and 51 of the *Civil Procedure Rules* seeking an order of injunction to restrain the 1st respondent, her agents and or servants from evicting him and his family or otherwise interfering with their quiet use and enjoyment, and or entering upon, demolishing structures and buildings and or interfering with any developments on the suit property registered as Nairobi/Block 97/2347 pending the hearing and determination of the appeal.
2. The application is based on the grounds on its face. In essence it is the applicant's case that he commenced a suit against the respondents being ELCC No. E246 of 2021 Ephraim Miano Thamaini vs. Nancy Wanjiru Wangai & 2 Others claiming ownership of the suit property, and disputing the 1st respondent's claim to the same. That he had been in occupation of the suit property for more than



15 years and the 1st respondent had threatened him with eviction under in guise of executing orders obtained in Milimani ELC No. 554 of 2008 Nancy Wanjiru Wangai vs. National Social Security Fund & 4 Others, a suit in which the applicant was not a party.

3. Contemporaneously with the suit, the applicant took out an application seeking for orders of temporary injunction to restrain the 1st respondent from evicting, taking possession and demolishing the structures on the suit property, pending the hearing and determination of the suit. Interim orders were granted pending the hearing of the application inter-parties until the 28th March, 2022 when the application was dismissed on the sub-judice doctrine, thereby discharging the injunctive orders aforesaid. Being dissatisfied with the said ruling and order, the applicant lodged an appeal in this Court. That without orders of injunction in place, the 1st respondent will proceed and evict him from the suit property and demolish it.
4. Indeed, towards this end the 1st respondent had already issued eviction and demolition notice to the applicant dated 4th April, 2022, and disconnected both water and electricity supply to the suit property. In the premises, the suit property was in eminent danger of being destroyed and or wasted away. That if the actions aforesaid are not nipped in the bud, the substratum of the appeal will be destroyed thereby rendering the appeal nugatory if successful.
5. The application is further supported by the affidavit of the applicant which affidavit merely reiterates and expounds the grounds above and we need not rehash them.
6. The 1st respondent filed grounds of opposition dated 12th July, 2022 in which she stated that the application was incompetent, frivolous vexatious lacked merit and was a gross abuse of the court process. That the applicant had failed to prove a legitimate and registerable interest in the suit property against the 1st respondent, the registered proprietor. Thus the appeal filed had no chances of success.
7. The 3rd respondent supported the application through the affidavit of one, Austin Ouko the acting General Manager, Corporate Affairs & Corporation secretary of the 3rd respondent who deposed that the injunction sought ought to be granted as failure to do so will render the appeal an exercise in futility. He gave a chronology of how the property in question was created and asked the court to allow investigations into how the 1st respondent acquired the title to the suit to be undertaken by relevant authorities. There was no response to the application by the 2nd respondent brought to our attention.
8. Parties filed their submissions in support of their respective positions. The applicant submitted that he had demonstrated that he had an arguable appeal gleaned from the annexed memorandum of appeal which raises several grounds of appeal among them the applicability of the sub judice doctrine. That the trial court had proceeded to erroneously strike out all the suits that he had filed based on sub- judice doctrine. That the right to be heard by the applicant was violated when the applicant was shut out of the seat of justice and failing to note that the two suits were not entirely similar.
9. On the nugatory aspect, the applicant submitted that he had demonstrated that the 1st respondent was about to evict him and demolish the suit property and therefore, failure to grant the orders sought and the 1st respondent proceeds with her intended actions, will render the appeal nugatory. That if the applicant is evicted and the suit property demolished, the action will be irreversible even if the appeal succeeds.

On its part, the 3rd respondent submitted that the application was merited as from the annexed memorandum of appeal, there was an arguable appeal that had been demonstrated as the applicant challenges the manner in which the trial court exercised its discretion in striking out both ELC No. E246 of 2021 and ELC No. E258 of 2020 for being sub judice. It relies on the case of Stanley Kangethe



Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR to emphasis the grounds which this Court considers in applications of this nature.

10. On the nugatory aspect, it submitted that having been the original owners of the suit property which resulted from a subdivision and thereafter trespassers encroached on the same and fraudulently obtained title, it was only prudent that the suit property be preserved as the court makes an inquiry into the veracity of ownership of the suit property by the 1st respondent. That failure to do so would only result in the appeal being rendered nugatory.
11. On her part, the 1st respondent submitted that she was the registered owner of the suit property and that she had filed a suit and obtained eviction orders against the applicant in 2016. The said orders have never been appealed, reviewed and or set aside. She relies on the case of Dickson Sinkeet Mapi (suing as the personal representative of Benjamin Mapi Ole Partimo) vs. Naisenyu Pargarna Mununkei Civil Appeal Application No. E041 of 2020 for the proposition that if there is a negative order from the trial court, there was nothing to be appealed against, and therefore, the current application should be dismissed.
12. The motion is essentially brought under Rule 5(2)(b) of this Court's Rules, despite the applicant citing other provisions of the law which are really irrelevant.
13. Rule 5(2) (b) of this Court's Rules provides as follows: -
 - “(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may: -
 - a. ...
 - b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”
14. The principles for our consideration in the exercise of our unfettered discretion under Rule 5(2) (b) to grant an order of injunction, stay of execution or proceedings are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of injunction is granted the appeal would be rendered nugatory. See the case of *Multimedia University & Another vs. Professor Gitile N. Naituli*[2014] eKLR.
15. In considering whether the applicant has an arguable appeal, we note the applicant's assertion that the trial court improperly exercised its discretion in refusing to grant an injunction on the grounds that it was *sub judice* ELC No. E258 of 2020. This issue is not idle but weighty enough as it raises a substantial question of law that calls for interrogation. In our view therefore, the applicant's intended appeal on that score alone, is not frivolous. However, we say no more lest we embarrass the bench that will be seized of the main appeal if at all.
16. On the nugatory aspect, it is not disputed that the 1st respondent has commenced the process of execution by issuing an eviction and demolition notice to the applicant. Indeed, she has gone further and disconnected both electricity and water supply to the suit property. These assertions have not in any way been controverted by the 1st and 2nd respondents. It is thus obvious that unless the orders sought are granted, the respondent will carry through her threats, evict the applicant and demolish



the suit property. Such actions are, in our view, irreversible thereby rendering the appeal if successful, nugatory.

17. It is in view of the above that we have come to the inevitable conclusion that the applicant has demonstrated the twin principles and we deem it fit to grant the injunction as prayed in the application pending the hearing and determination of the appeal. Costs of this motion shall be in the intended appeal.

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

W. KARANJA

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JUDGE OF APPEAL

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ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

