



REPUBLIC OF KENYA



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Opiyo & 123 others v Telposta Pension Scheme Registered Trustees (Civil Application E276 of 2022) [2022] KECA 1276 (KLR) (18 November 2022) (Ruling)

Neutral citation: [2022] KECA 1276 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E276 OF 2022
HM OKWENGU, MSA MAKHANDIA & K M'INOTI, JJA
NOVEMBER 18, 2022

BETWEEN

THOMAS OPIYO & 123 OTHERS APPLICANT

AND

TELPOSTA PENSION SCHEME REGISTERED TRUSTEES RESPONDENT

(Being an application for injunction pending the hearing and determination of an appeal against the judgment of the Environment and Land Court at Nairobi (Okong'o, J) dated 14th December, 2021 in ELC Suit No 629 of 2016)

RULING

1. The notice of motion application dated April 25, 2022 is brought by the applicants under Rules 42, 43 and 47 of the *Court of Appeal Rules*. It seeks an injunction restraining the respondent whether by itself, its servants, agents or otherwise, howsoever from entering, trespassing and or interfering with the applicants' peaceful occupation of the properties known as plot numbers Nairobi/Block 55/204, 205, 206, 207, 208, 209, 210, 211, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 246, 247, 248, 249, 50, 251 and 175 pending the hearing and determination of the appeal. Further, that the costs of the application be provided for.
2. The application is supported by the grounds on the face of the motion and an affidavit sworn by the 1st applicant, on his own behalf and on behalf of the 123 others. He deposes that the judgment in the suit was delivered on December 14, 2021. The applicants being dissatisfied with the same have proffered an appeal by filing the notice of appeal dated December 16, 2021 and a memorandum of appeal dated January 21, 2022. Having lodged the notice of appeal within 14 days of the judgment pursuant to Rule 75 of the *Court of Appeal Rules*, this Court is therefore properly seized of the application. Reliance was placed on the case of *Halai & Another v Thornton & Turpin [1963] Ltd [1990] KLR 365* for this proposition. However, we hasten to add that the application has not been brought under Rule 5(2)



(b) of this Court's Rules as required, but under several other provisions of law which are irrelevant for an application of this nature. That notwithstanding, we shall proceed to determine the application on merit and as though the proper provisions of the law were cited, as we can tell from the prayers the purport of the application. In any event, the respondent did not raise any objection on this issue.

3. The background to the application is that the applicants are former employees of Telkom Kenya Limited and Postal Corporation of Kenya and in that capacity, they were members of the respondent. By that relationship, the applicants occupied the houses on the afore-mentioned properties by virtue of their employment and which were owned by the respondent as a result of a subdivision of all that parcel of land known as LR No 209/12554. The applicants by virtue of their employment were allocated the various suit properties through allotment letters and they were to be given first priority to purchase the suit properties. Due to this arrangement, while the applicants continued to be in employment with the respondent, the housing allowances that were due to them were deducted as rent on account of their occupation of the said properties. There were negotiations between the applicants and the respondent to purchase the said properties but negotiations were abandoned by the respondent who later in 2008 condemned the suit properties as unfit for human occupation and were therefore meant for demolition. This caused the applicants to approach the Environment and Land Court (ELC) for declarations that they were entitled on first priority to purchase the houses erected on the said properties and a permanent injunction restraining the respondent from interfering with their peaceful occupation of the suit properties. Lastly, the applicants prayed that the respondent be directed to sell the properties to them as earlier intended and execute all transfer documents in their favour or their nominees, failing which, the Court to direct the Deputy Registrar to execute the said documents.
4. The trial court after considering the evidence found in favour of the respondent and dismissed the applicants' claim culminating in the intended appeal to this Court and the instant application.
5. The applicants state that they have an arguable appeal having raised substantial grounds, namely that, the trial court erred in finding that they did not prove the existence of a legitimate expectation created in their minds regarding a first priority right to purchase their respective premises from the respondent; that by selling the houses to third parties, this was a clear short change game which the trial court failed to consider; and, that the trial court failed to consider the applicants' evidence thus arriving at a wrong decision that they did not have a claim over the suit properties.
6. The application is opposed by the respondent through a replying affidavit sworn by Peter K Rotich, the administrator cum secretary of the respondent. It is deposed that not all former employees of Telkom Kenya Limited and Postal Corporation of Kenya are members of the scheme by virtue of their former employment. That the applicants are no longer employees of the respondent as their services came to an end during the restructuring process and they were paid their terminal dues and subsequently extinguished their rights under the pension fund. They had been allocated the houses because they were in employment with the respondent. That the suit properties were old and dilapidated and had already been condemned as unfit for human habitation before being vested in the respondent, who subdivided it into plots and that the respondent was selling plots not the houses. That a request by the applicants to continue occupying the houses in 2002 was rejected by the respondent as they had been condemned. That in 2004, the respondent managed to sell the said properties to third parties in an open bidding process. That there was no requirement or legal obligation under the trust deed requiring the respondent to give first priority to any of the applicants. That the applicants have not satisfied the twin principles required before the prayer sought is granted, that is, an arguable appeal which will be rendered nugatory. That the respondent would be prejudiced greatly if the order sought is granted as the third parties who purchased the properties from it will sue it, seeking vacant possession



of their properties yet the delay had been occasioned by the applicants' continued illegal occupation of the suit properties.

7. Parties filed written submissions to the application and appeared online for highlighting on July 7, 2022. While relying on the case of Judicial Commission of Inquiry into the *Goldenberg Affair & 3 Others v Kilach [2003] eKLR*, the applicants submit that although one arguable issue suffices to find the appeal as arguable, they had listed several grounds of appeal and key among them is the issue of legitimate expectation. On the nugatory aspect, the applicants submit that they are apprehensive that the respondent may proceed at any time and evict them from the suit properties and it will not be able to compensate them for the huge loss that will have been occasioned by its actions.
8. On its part, the respondent's submissions merely reiterate the depositions in the replying affidavit. Suffice to add that the respondent claims that the applicants have to satisfy triple requirements for the grant of an injunction being that they have to establish the existence of a prima facie case, demonstrate irreparable injury if a temporary injunction is not granted, and if in doubt, decide the application on balance of convenience. It relies on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR* for these propositions. It postulates that no arguable case has been made out by the applicants.
9. On the nugatory aspect, the respondent argues that the applicants have not demonstrated that if the demolition of the houses continues and the properties are transferred to the persons who had bought the same and the appeal is successful, that it will be unable to compensate them. Placing reliance on the case of *Stanley Ng'ethe Kinyanjui v Tony Keter [2013] eKLR* it argues that it has not been demonstrated that whatever may have been done is irreversible or damages will not reasonably compensate the applicants.
10. We must point out at this juncture, that the principles of granting an injunction in this Court are totally different from those in the High Court and the courts below. Accordingly, neither the case of *Giella v Cassman Brown [1973] EA 358* nor the case of *Nguruman Ltd [supra]* cited by the respondent, have any application, and, are in fact irrelevant. In this Court, all that the applicant is required to demonstrate is that the appeal is arguable, that absent an injunction, the appeal will be rendered nugatory, and lastly, in certain instances public interest.
11. We have considered the application, affidavits, rival submissions, authorities cited and the law. It is trite that in an application under Rule 5(2)(b) of this *Court's Rules*, the applicant must establish that there is an arguable appeal and secondly, that the appeal or intended appeal would be rendered nugatory absent an order of injunction. See *Ismael Kagunyi Thande v Housing Finance Company Limited* Civil Application No 156 of 2006 (UR) where these principles were restated thus:-

“The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant to succeed, he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”
12. On the limb of arguability, counsel for the applicants contend that they have raised several issues for determination by this Court among them that the trial court erred when it found that they did not prove the existence of a legitimate expectation created in their minds regarding a first priority right to purchase their respective premises by the respondent, and that for the same to exist, there must be an express agreement between the parties to that effect; that by selling the houses to third parties, it stole a march on them which the trial court failed to consider.



13. In the instant application, we doubt whether the applicants were entitled to any legitimate expectation, more so by insisting to stay in houses that were condemned as unfit for human habitation. Further, there is no relationship between the applicants and the respondent, for the same ended when they stopped being employees of the respondent. We have gone through the memorandum of appeal as annexed and we do not think the issues raised therein are worthy of being termed as arguable. We say so well aware of the holding in the case of Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others [*supra*] 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.”

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. Having failed to satisfy the first limb, it is not necessary to consider the second limb.

15. In the circumstances, the applicants have not 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 April 25, 2022 is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

K M’INOTI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

