



**Karomo & another v Kiagi & another (Civil Application
E013 of 2022) [2022] KECA 1216 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1216 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E013 OF 2022
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
NOVEMBER 4, 2022**

BETWEEN

BENSON KAROMO 1ST APPLICANT

HUBERT SEIFERT 2ND APPLICANT

AND

PAUL ONYANGO KIAGI 1ST RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 2ND RESPONDENT

(Being an application for injunction pending hearing and determination of the intended appeal against the ruling of the Environment and Land Court at Mombasa delivered by Hon. N.A. Matheka, J. on 8th December 2021 in ELC Case No 227 of 2020)

RULING

1. The Notice of Motion dated March 14, 2021 and filed by Benson Karomo and Hubert Seifert, the applicants herein is brought under Rule 5 (2)(b) of the [Court's Rules](#) for orders that pending hearing and determination of the instant application, injunctive orders do issue restraining Paul Onyango Kiagi, the 1st respondent from continuing with the construction of mixed use building comprising of basement ground, 1st -10th floor, duplex floor and pent house on the suit property known as L.R. No.3205/I/MN situate in New Nyali Area within Mombasa County.
2. The basis for the application for injunctive relief is premised on grounds on the face of the Motion and rehashed in the supporting affidavit sworn by Hubert Seifert, the 2nd respondent herein to the effect that the 1st respondent is presently undertaking construction on the suit property without a valid approval from the County Government of Mombasa, that the development being undertaken is illegal. The applicants challenged the construction before the Environment and Land Court (ELC) at Mombasa in ELC Case No. 227 of 2020; that provoked a preliminary objection by the 2nd respondent urging that



- under the doctrine of exhaustion of remedies, the suit ought to be entertained by the Mombasa County Physical and Land Use Planning Liaison Committee. The applicants' position is that the Mombasa County Physical and Land Planning Committee does not exist and despite the same being brought to the attention of the trial court, the 2nd respondent's preliminary objection was upheld leading to the dismissal of the applicants' suit. The court in its ruling rendered on December 8, 2021 found that the suit was premature; that the applicants did not exhaust the remedies provided for by statute and that the court lacked jurisdiction to entertain the subject suit.
3. The applicants, aggrieved by that decision filed a notice of appeal dated December 16, 2021. The memorandum of appeal faults the learned judge for evicting them from the seat of justice by dismissing their suit and directing them to a nonexistent forum to resolve the dispute. That the applicants had nowhere to go to access justice. It was sought that the impugned ruling be set aside and substituted with an order reinstating the subject suit for hearing on merits before another judge.
 4. The applicants contend that this is a matter that warrants the granting of the orders sought, in order that the 1st respondent's construction is paused to accommodate the applicants' intended appeal and to avert a possible demolition of his building should the Court find that the 1st respondent did not follow the law, which demolition will subject the respondent immense loss.
 5. The applicants relied on the decisions in Civil Application No. E020 of 2021 *Justus Chai Mbaru & 12 Others v. Mombasa County Government & 20 others (interest parties)* (2021) eKLR and *George Orieno Gache & Another vs. Judith Akinyi Bonyo & 5 Others* (2017) eKLR which discusses the twin principles for granting an application brought under Rule 5(2) (b) of the Rules. To demonstrate that the intended appeal is arguable, the applicants urged that the Mombasa County Physical and Land Planning Committee, to which they were referred by the ELC does not exist. The applicants invoked Section 93 of the *Physical and Land Use Planning Act, 2019*, which requires that all disputes relating to physical planning and land use should be heard by the ELC where the County Physical and Land Use Planning Liaison Committee has not been established. On the second limb, the applicants submitted that the intended appeal will be rendered nugatory if the order of injunction is not granted, that the suit challenges the legality of the 1st respondent's development, that none of the respondents filed any statements of defence in the trial court to deny the allegations contained in the plaint. Hence as the allegations remain uncontroverted, the applicants maintained that it would be in the interest of justice that the orders for injunction are granted.
 6. The 1st respondent's reply was rehashed in written submissions. The 1st respondent relied on the case of *RWW v. EKW* (2019) eKLR for proposition that since the applicants took long to file the application for injunction, there was need to explain the delay. Reference was also made to the decision in *Justus Chai Mbaru & 12 Others v. Mombasa County Government & 20 Others (interest parties)* (2021) eKLR in urging that an ongoing development ought not be interfered with unless very good reasons which are shown in the 1st respondent's view was not the case in the circumstances.
 7. We have carefully considered the application, the affidavits sworn for and against the application by the parties, the submissions of counsel and the cases relied upon. This Court in *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR and further reiterated in *Dickson Sinkeet Mapi (Suing as the Personal Representative of Benjamin Mapi Ole Partimo – Deceased v Mutunkei* (Civil Appeal (Application) E041 of 2020) [2021] KECA 235 (KLR) (3 December 2021) (Ruling) observed that the jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that in order to succeed in an applicant of this nature it has to be shown, firstly that applicant's appeal or intended appeal is arguable, or to put it another way, is not frivolous; and secondly, that unless stay is granted and the appeal or intended appeal were to succeed, it will be rendered nugatory.



In addition, 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.

8. We are guided further by the celebrated decision of this Court which succinctly set out what the Court should consider in an application of this nature, in the case of *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR . The above case guided that whether or not the appeal is arguable, should depend on the unique circumstances of each case; that the applicant need not establish a multiplicity of arguable grounds, and that a single *bona fide* arguable ground was sufficient; that 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. In addition, 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.
9. In regard to the first principle, we are satisfied that the appeal is arguable. It is contended that the avenue that is provided for redress is not in existence, and by the applicant being referred to that entity is an arguable ground of appeal.
10. As to the nugatory principle, we have to consider both sides, the prejudice each side stands to suffer, and which side will suffer the greater prejudice, or stands to suffer the most, and in addition that the loss may not adequately be compensated by an award of damages.
11. The applicants' position is that the purpose of the application will only be served if the injunction sought is granted. That if the injunction is not granted and the appeal succeeded, the 1st respondent will stand to suffer immense loss as the construction may have to be demolished.
12. The 1st respondent has urged this Court not to grant injunction sought, and relies on *Justus Chai Mbaru & 12 Others v. Mombasa County Government & 20 others (interest parties)* (2021) eKLR for the proposition that an ongoing development ought not be interfered with unless very good reasons which in the 1st respondent's view was not the case in the circumstances. The 1st respondent has urged that he has expended enormous sums of money which, if the construction is stopped, will lead to massive losses, not only to him but employees and investors.
13. A question was put to the parties by the court to state the stage of the construction. Mr. Oluga for the applicants, relying on the 1st respondent's affidavit in reply stated that he had sold 80% of the apartments off plan. Mr. Gikandi on his part, referring to the photos attached by the applicants in April this year, submitted that since the photos, the construction was 90% done.
14. We have weighed the submissions of counsel on the nugatory aspect. We are persuaded that given the level of completion of the subject construction is 90%, the cost that must have gone into it, the fact 80% of it is said to have been sold off to third parties, the 1st respondent stands to suffer greater prejudice, and the loss that may be incurred may not adequately be compensated by an award of damages. We think that at such an advanced stage of construction, we should not make an order that may stop further progress as we bear in mind that the 1st respondent assumes the risk in the event that an order of demolition is ultimately made.
15. We have come to the conclusion that even though the applicants have shown that they have an arguable appeal, on the nugatory aspect, we find that the circumstances of the case dictates against grant of an order injunction. In the result, the application does not succeed and the same is dismissed. We order that the costs abide the outcome of the appeal.

Those are our orders.



DATED AND DELIVERED AT MOMBASA THIS 4TH DAY OF NOVEMBER, 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

