



Kigen & another (Suing as legal representatives of the Estate of the Late Zakayo Sawe Arap Ngasura) v China Hanan International Group Limited & 3 others (Civil Application E034 of 2022) [2022] KECA 1236 (KLR) (4 November 2022) (Ruling)

Neutral citation: [2022] KECA 1236 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E034 OF 2022
K M'INOTI, S OLE KANTAI & F TUIYOTT, JJA
NOVEMBER 4, 2022**

BETWEEN

**JAMES KIGEN 1ST APPLICANT
JOHANA KIPKORIR KIGEN 2ND APPLICANT
SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
ZAKAYO SAWE ARAP NGASURA**

AND

**CHINA HANAN INTERNATIONAL GROUP LIMITED 1ST RESPONDENT
NATIONAL LAND COMMISSION 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT
COUNTY GOVERNMENT OF UASIN GISHU 4TH RESPONDENT**

(Being an application for stay of execution of the Judgment of the Environment and Land Court of Kenya at Eldoret (Odenyo, J.) dated 10th December, 2021 in ELC Case No. 351 of 2015)

RULING

1. The applicants James Kigen and Johana Kipkorir Kigen (suing as the administrators of the estate of the late Zakayo Sawe Arap Ngasura) pray in the motion which was amended orally with our leave on July 18, 2022 when the same came up for hearing that we stay execution of the Judgment of the Environment and Land Court (ELC) at Eldoret dated December 10, 2021 (Okenyo, J.) pending the hearing and determination of the application and of an intended appeal. In grounds in support of the Motion and in a supporting affidavit of the 1st applicant James Kigen, it is said amongst other things that ELC delivered the said Judgment against the applicants; that the applicants came to know that Judgment had been delivered when they conducted an on-line search on January 15, 2022 after



not being notified of its delivery; they were dissatisfied with findings in the Judgment and filed notice of appeal; their application for stay pending appeal was dismissed by ELC and an application by the respondents for security to be provided during removal of ballast at the disputed land was allowed; that the respondent (China Hanah International Group Limited) is a foreign company that would relocate out of Kenya; that ELC dismissed the case summarily after holding that limited grant of letters of administration did not give the applicants *locus standi* to bring the suit. Further, that the estate of the deceased was condemned unheard contrary to law; that the intended appeal has high chances of success and would be rendered nugatory if orders are not granted. It is further deponed that the cause of action at ELC was from a contract between the respondent and the estate of the deceased; that the respondent "... had abused the contract and begun constructed extra roads without compensating us ..."; at paragraphs 9 – 11 (inclusive) of James Kigen's affidavit, it is stated:

9. That paragraph 17 of the said Contract provided that the remaining material after the completion of the Project, which was the Ziwa-Kachibora road, belonged to the estate of my late father.
 10. That the respondent completed the project, constructed extra roads, about 100 Kms stretch and thereafter demanded to collect the remaining 30,000 tons of ballast.
 11. That the issue of the ballast was captured well in the agreement aforesaid."
2. The applicants further depone that the issue of compulsory acquisition of their property (Moiben/Moiben Segero/Block 2/712) was determined at a preliminary stage and they had never been compensated for the land. They say at paragraph 22 of the affidavit:
22. That the Respondent is a foreign Company, whose projects are ending before the general elections in August 2022, and as such we stand to suffer substantial loss in the following manner; unless stay of execution is granted:
 - a. Compensation for the roads constructed using the material from our property, not yet paid.
 - b. Collection of 30,000 tons valued at kes.30,000,000.
 - c. Open quarry that has already caused the death of a minor, the Respondent did not build a perimeter wall to prevent human and animal loss."
3. We have also seen the applicants' further affidavit with documents attached. The parties were informed by the Registrar through a hearing notice dated July 1, 2022 at 2.53 p.m. of the hearing date and were required to file written submissions within the time stated in the notice. We have seen submissions by the applicants but there are none by the respondent or the interested parties.
4. When the application came up for hearing before us on a virtual platform on July 18, 2022, learned counsel Mrs. Chumba appeared for the applicants but there was no attendance by either the respondents or interested parties who, as we have said, had been served for the hearing. Counsel for the applicants highlighted written submissions giving a history of the case. We have considered those submissions.
5. The principles that govern applications for stay of execution pending appeal to this Court are well known. For an applicant to succeed he must, firstly, demonstrate that the appeal, or the intended appeal, as the case may be, is arguable which is the same as saying that the same is not frivolous. Such an applicant must, in addition demonstrate that the appeal would be rendered nugatory absent stay – See *Charter House Bank Limited v Central Bank of Kenya & 2 others* [2007] eKLR.



6. The applicants before us say that they have an arguable appeal which has high chances of success. They fault the Judge of ELC for finding that they had no *locus* to institute the suit when they held letters of administration issued by Court. They also say that they will lose their land without compensation because where the suit was determined at preliminary stage; that they have not been compensated by the respondent, a foreign company which is about to leave Kenya. We find these to be not idle points, they are arguable points on appeal and it has been held by this Court that an arguable point on appeal is not one that will succeed but is one that requires consideration by the Court –

Damji Pramji Mandaria v Sarah Lee Household and Body Care (K) Limited, Civil Application No. 345 of 2004 (UR).

7. We are satisfied, on the nugatory aspect, that if the respondent leaves the jurisdiction of the Court and the appeal succeeds it could amount to an academic exercise as the respondent would be beyond the applicants' reach to satisfy any positive orders that may be made in the appeal. The Motion has merit and we allow it. Let costs of the Motion be in the appeal.

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

K. M'INOTI

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JUDGE OF APPEAL

S. OLE KANTAI

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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

