Mugo v Gitau & another (Civil Application 340 (UR 250) of 2013)
[2022] KECA 1224 (KLR) (4 November 2022) (Ruling)

Neutral citation: [2022] KECA 1224 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 340 (UR 250) OF 2013

HA OMONDI, JM MATIVO & PM GACHOKA, JJA

NOVEMBER 4, 2022

BETWEEN

NJOROGE MUGO ..... APPLICANT

AND

MILKA MUGURE GITAU ..... 1ST RESPONDENT

GEORGE GITAU ..... 2ND RESPONDENT

(Being an application for injunction pending the hearing and determination of the appeal from the Judgment and Decree of the High Court of Kenya at Nairobi, (Wendoh, J.) dated 28th February, 2012 in HCCC 50 OF 1980)

RULING

1. The notice of motion application dated November 27, 2015 made pursuant to rules 5(2) (b),of the *Court of Appeal Rules 2010*, and supported by an affidavit of even date, seeks: an order of injunction directed at the 1st respondent restraining her either by herself, servants, agents or any other person acting on their behalf from trespassing onto the suit property and/or in any was dealing with the suit property pending the hearing and determination of the appeal; the OCS ensures compliance of the order; and costs.

2. The application is opposed through replying affidavits dated September 1, 2014 and June 27, 2014 sworn by the 2nd and 1st respondents respectively.

3. The applicant claimed to be the duly registered owner of Nyandarua/Mkungi/2572, the suit property herein, whose title was cancelled following a court order of May 24, 2005; the said cancellation was not communicated to him nor was he accorded a hearing to defend his title; the cancelation of the title adversely affected the applicant's proprietary rights; the cancellation of the title its legality and correctness, are the subject of an application dated November 29, 2013 which is yet to be determined.

4. It is the applicant's contention that pending the determination of the application, parties mutually, and in particular the applicant, refrained from interfering with the suit property; however, the respondent despite this mutual understanding began to issue sub division threats to the suit property and threats to the applicant's farm manager of their continued stay in the property; and on November 5, 2015, the respondent forcibly trespassed on the suit property and begun to plough and cultivate, thus alienating the suit property.

5. The applicant laments that there are mature trees on the property which risk being felled by the respondent, and the temporary wooden structure erected on the suit property will be run down and alter status quo, yet he has an arguable appeal, which will be rendered nugatory if the application is not allowed.

6. The 2nd respondent supports the application, saying the applicant bought land from him, and was registered as the owner of the suit property; that title was cancelled by the court on grounds that the said parcel was not available for sale as per the consent dated January 20, 1986 in HCCC 50 of 1980; the applicant applied for review of the court's decision, but the application was dismissed; the applicant then applied for an order of status quo which was also dismissed; and the court was in breach of the rules of natural justice as the applicant was not a party in HCCC 50 of 1980.

7. The 1st respondent opposes the application, pointing out that by a consent dated January 20, 1986, she, alongside the 2nd respondent agreed to equally share their matrimonial property upon their divorce; the 2nd respondent impeded the implementation of the said consent, and charged the suit property to Kenya Commercial Bank (KCB) prompting the 1st respondent to obtain a court order giving her possession in line with the consent, which orders the 2nd respondent ignored; the 2nd respondent was aware of the orders touching on the suit property, as such no proper title could pass; the applicant has not shown that he was an innocent purchaser for value, or even how he paid the purchase price.

8. The 1st respondent maintains that there is collusion between the applicant and 2nd respondent; that the applicant is guilty of contempt as he put up structures on the suit property and has come to court with unclean hands, neither does he have arguable appeal with high chances of success; nor has he demonstrated that the appeal will be rendered nugatory should the application not be granted, as he has not shown that he gave consideration for the suit property; nor is there any threat to sell the suit property and no such intention has been shown.

9. In relation, to whether the applicant has satisfied the requirements necessary for granting an order for injunction under rule 5(2) (b), we draw from the case of in *Housing Finance Company of Kenya Limited v Sharock Kher Mohamed Ali Hirji & Anor [2015] eKLR*, this court stated:

> " The principles governing the exercise of the court's jurisdiction under rule 5(2) (b) of our *rules* are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. We need only restate these principles from *Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd* – Civil Appl No Nai 93/02 (UR), thus:
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> "Hitherto, this court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely: -
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> 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,

2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction."

10. Both limbs must be demonstrated to exist before one can obtain relief under rule 5(2) (b). (See *Republic v Kenya Anti-Corruption Commission & 2 others [2009] KLR 31*), and we reiterate that applications arising at an interlocutory stage and the orders issued thereto are for the purpose of protecting the subject matter of an appeal, the Court of Appeal having yet to finally determine the appeal.

11. In the case of *Equity Bank Ltd v West Link Mbo Ltd* Civil application 78 of 2011 Githinji, JA stated:

> "From the foregoing, it is clear that rule 5(2)(b) is a procedural innovation designed to empower court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."
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> This was echoed in the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 Others, Sup Court App 16 of 2015 [205] eKLR* that:
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> "
>
> "(23) It is clear to us that rule 5(2) (b) is essentially a tool for preservation. It safeguards the substratum of the appeal in consonance with principles developed over the years."
>
> "[27] rule 5(2) (b) of the *Court of Appeal Rules* is derived article 164(3) of the *Constitution*. It illuminated the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of the appeal/intended appeal."
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> This court has established that whether the application is for stay of execution, injunction or stay of further proceedings, the consideration and applicable principles are the same.

12. On the question of arguability, the case of *Wasike v Swala [1984] KLR 591* this

Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court. An arguable appeal also must not be idle and/or frivolous. The applicant's central issue is the fact that the title to the said property was cancelled without giving him a chance to be heard.

13. Of course we note with concern that the title to the suit property was cancelled in 2005, and we question what has held the applicant back all this time, even from prosecuting to conclusion the other substantive motion dated the November 29, 2013 and which is part heard and remains pending, only to wake up at the last minute and move the court for orders of injunction.

14. Whilst this court agrees with the submission of the 1st respondent that the applicant has been indolent and has not shown real desire to prosecute the appeal as since he filed notice of appeal on March 7, 2012, there have been no serious efforts made to prosecute the intended appeal, we must hasten to add that unfortunately, that is not one of the two key considerations for an application under rule 5(2) (b).

15. This court has carefully perused the grounds set out in the motion and the memorandum of appeal inter alia whether the court erred in cancelling title without giving the applicant a chance to be heard.

16. This court is well aware that an arguable point is not one that must succeed but one deserving consideration by the court and the question that the applicant poses is whether the learned judge was justified in holding that proper title had not passed as a result of the consent dated January 20, 1986? We find that there are germane issues on ownership and possession raised by the applicant which will call for proper and final adjudication, and therefore raise at least one arguable issue.

17. There is the twin principle which must be satisfied, with regard to the appeal being rendered nugatory should the orders not be granted. The applicant has stated that he is apprehensive that the 1st respondent pursuant to the judgment will proceed to deal with the suit property in a manner detrimental to the applicant, as the 1st respondent has forcibly entered the suit property and there is risk of the mature trees and his temporary wooden structure being felled.

18. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party. The demolition of the temporary wooden structure and the felling of trees are items whose value can be assessed, and can be compensated for in damages.

19. We therefore hold that the feared actions of the 1st respondent on the suit property can be adequately compensated for in damages; consequently, the applicant has not satisfactorily shown the nugatory aspect. The application therefore fails as the second principle has not been satisfied, and accordingly, the notice of motion dated November 27, 2015 is hereby dismissed with costs to the 1st respondent.

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

H A OMONDI

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JUDGE OF APPEAL

J MATIVO

.....

JUDGE OF APPEAL

M GACHOKA– CI Arb, FCIARB

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR