



Sketty (Administrator of the Estate of Nassor Mohamed Nahdy-deceased)TY (Administrator of the Estate of Nassor Mohamed Nahdy-deceased) v Shah & 3 others (Miscellaneous Application E085 of 2021) [2022] KECA 1242 (KLR) (4 November 2022) (Ruling)

Neutral citation: [2022] KECA 1242 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
MISCELLANEOUS APPLICATION E085 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
NOVEMBER 4, 2022**

BETWEEN

MUNIR MOHAMMED SKETTY APPLICANT

ADMINISTRATOR OF THE ESTATE OF NASSOR MOHAMED NAHDY-DECEASED)TY (ADMINISTRATOR OF THE ESTATE OF NASSOR MOHAMED NAHDY-DECEASED

AND

JANENDRA RAICHAND SHAH 1ST RESPONDENT

RAVJI RAMJI MANJI 2ND RESPONDENT

REGISTRAR OF TITLES 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

(Being an application for stay of execution pending appeal from the Judgment of Hon C.K. Yano, J. delivered on 9th March, 2021 in Mombasa High Court Civil Case No 233 of 2009)

RULING

1. The application before us is a Notice of Motion dated 10th November, 2021 brought pursuant to Rules 5 (2) (b); 41, 42 (2), 43 and 47 of the *Court of Appeal Rules* [now Rules 5 (2) (b), 43, 44, 45 and 49 of 2022 Rules]. It seeks for an order of stay of execution of the judgment delivered by C.K. Yano, J. on 9th March, 2021 together with all consequential orders emanating there from pending the hearing and determination of an intended appeal.
2. The application is premised on 11 grounds on the face of the Motion, the gist of which are that the applicant is aggrieved with the judgment of the High Court rendered on 9th March, 2021 and has thus filed a notice of appeal; that the appeal raises substantial issues of law that touches on the effect of the



- sale of land without the consent of the Land Control Board; whether judicial pronouncements can repeal an Act of Parliament; that principle of constructive trust was elevated over the requirement for Land Control Board consent; and, that the applicant will suffer miscarriage of justice if stay is refused. The affidavit sworn by the 1st applicant rehashes the grounds on the face of the application.
3. The application is opposed. The 1st respondent, Janendra Raichand Shah has sworn a replying affidavit dated 11th April, 2022. It was refuted that the appeal is arguable as the grounds raised are unfounded; that the applicant has no demonstrated interest in the suit land; and, that he did not prove fraud on the part of the deponent. It was added that lack of Land Control Board consent did not render the validly obtained title null and void. It was refuted that the nugatory test was met because the appellant has never been in possession of the suit land; he has not produced evidence of his ownership to the suit land.
 4. The background to the application is that the 1st respondent as the registered owner of the land Subdivision Number 890 (Original No 284/99) Section 111 Mainland North under Certificate No CR 39208, hereinafter the suit land, sued Nassor Mohamed Nahdy, now deceased for trespass into the suit land and construction of illegal structures. In the said suit the 1st respondent sought a mandatory injunction ordering the deceased to remove his illegal structures; an injunction restraining the deceased from accessing the suit land, trespassing on the suit land or remaining on the suit land; and that the illegal structures on the suit land be demolished.
 5. The deceased in his defence denied that the 1st respondent is the owner of the suit land and instead stated that he was in possession of the suit land before the 1st respondent entered the same; that he took possession from his father Mohamed Ali Nahdy who was seized of the suit land and who died on 21st August, 1972. It was revealed that there was a previous suit touching on the suit land (Mombasa High Court Civil Case 346 of 1993) between the deceased as a plaintiff and Ravji Ramji Manji as defendant; that in the said suit the court decreed that the deceased was the rightful owner of the suit land. By way of counterclaim, it was pleaded that it was the 1st respondent who trespassed on the suit land because as at the time the land was transferred to the 1st respondent, the plot was in the names of the deceased. It was revealed that the original owner of the land was one Nassor Ali Nahdy who died in 1964 and then Mohamed Ali Nahdy took out letters of administration for the said land however he died in 1972; that Nassor Mohamed Nahdy took out letters of administration in respect of the suit land and remained the legal owner of the suit land. It was sought in the counterclaim that the 1st respondent vacate the suit land and be restrained from making any claims to the suit land. It was sought that the title deed of the 1st respondent be cancelled.
 6. The High Court noted that there was a title deed in the names of the 1st respondent and that the subdivision of plot 284 gave rise to plot 890. The court was satisfied that there was a sale of a portion of the suit land between Mohammed Ali and Ramji. The court was not satisfied that the 1st respondent acquired his title through fraud, but found that rather his title was indefeasible. The court noted that want of Land Control Board consent on the part of the 1st respondent was not pleaded and therefore it was an afterthought; that the memorandum of sale agreement, evidence of payment of the purchase price and the transfer of land that were produced by the 1st respondent resulted in the application of the equitable doctrine of constructive trust meaning the requirement of Land Control Board consent were overridden.
 7. The court concluded that the deceased had not proven his case and was satisfied that the 1st respondent proved his case and, in the result, a mandatory injunction was issued compelling the deceased to pull down his structures from the suit land; he was restrained from remaining on or accessing the suit land



- and an order of demolition of illegal structures on the suit land was made. The deceased's counterclaim was dismissed.
8. The applicant, the administrator of the estate of the deceased Nassor Mohamed Nahdy, was dissatisfied with the decision rendered and filed a Notice of Appeal on 24th March, 2021.
 9. The application was heard virtually on the 6th of July 2022. Learned counsel Mr. Andrew Hayanga led learned counsel Mr. Obonyo for the applicant, while learned counsel Ms. Nzisa held brief for Mr. Langat for the 1st respondent, while learned counsel Ms. Kiti was present for the 3rd and 4th respondents. The 2nd respondent the Registrar of Titles was not represented at the hearing despite service with the hearing notice.
 10. Mr. Hayanga relied on his written submissions which are dated 28th November, 2022. He cited Multimedia University & Another v Professor Gitile N. Naituli (2014) eKLR which sets out the principles that apply in an application for stay orders or injunctive relief. In his submissions counsel urged that the applicant has raised serious legal issues in his appeal, and urged that the impugned judgment was based on the assumption that the Land Control Board has been repealed, that there was gross misrepresentation of facts especially of previous case which determined ownership of the suit land which he urged the court ignored, and which counsel urged was an arguable issue. On the nugatory aspect, Mr. Hayanga urged that the High Court gave the land to the respondent, and that the substratum of the appeal may disappear; that the applicant may never be able to recover if his appeal is successful. Counsel cited *RWW vs. EKW* [2019] eKLR for the proposition that the purpose of a stay of execution is to preserve the subject matter in dispute so that the rights of the appellants are safeguarded and the appeal, if successful is not rendered nugatory.
 11. Ms. Nzisa for the 1st respondent relied on their written submissions dated 10th June 2022 and the replying affidavit sworn by the 1st respondent dated 11th April 2022 in opposition to the application. Counsel urged that the applicant did not prove interest in the suit land, that the acquisition of the suit land by the 1st respondent was through a valid sale, and that for that reason the appeal is not arguable. On the nugatory aspect, Ms. Nzisa urged that the applicant has never been in possession of the suit land, and that he stands to suffer nothing. Counsel relied on Benja Properties Ltd vs. Syden Mohammed Burhanuddin Sabed & 4 others [2015] eKLR for the proposition that titles to land are ultimately based on possession, that the man seised prevails against all who can show no better right to seisin. That possession is nine-tenths ownership.
 12. We have considered this application, the written submissions, and the authorities cited. The applicants have moved the Court under Rule 5(2)
 - (b) of the Court of Appeal Rules. That Rule gives the Court discretion:
 - (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.”
 13. The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay of execution or injunction 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 stay is granted the appeal or intended appeal would be rendered nugatory. These principles were summarized by this Court (differently constituted), in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR.



14. On the aspect of arguable grounds, this Court in *Somak Travels Ltd vs Gladys Aganyo* [2016] eKLR held:

“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that

merits a consideration and determination by this Court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”

15. We have considered the aspect whether the appeal is arguable or not. In addition, the applicant has annexed a Memorandum of Appeal which we have looked at. The draft Memorandum of Appeal faults the learned judge for erroneously finding that Land Control Consent was not pleaded; for failing to pronounce itself on the effect of Mombasa High Court Civil Case 346 of 1993; and for misdirecting himself on the facts of the case before him and the law. We find that the applicant has demonstrated that he has an arguable appeal. The issue of the Land Control Board is an arguable appeal, so is the issue whether there was in existence judgment against the 1st respondent in which adverse orders were made against her. These are triable issues. We are satisfied that the applicant has met the first principle.

16. In regard to the second principle of whether the appeal will be rendered nugatory if the order for stay is not granted and the appeal succeeds; we are guided by the decision in *Stanley Kangethe Kinyanjui vs. Tonny Keter & others* [2013] eKLR where the court stated as follows in regard to what constitutes nugatory:

xii. “The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

xii. 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 party aggrieved.

ix. Where it is alleged by the applicant that the appeal will be rendered nugatory on account of the respondent’s impecuniosity, the onus shifts to the latter to rebut by evidence the claim.”

17. The subject matter of this case is land. Applying the above principles, we have considered that what the applicant seeks to prevent is the execution of the judgment of the High Court judgment. The decree is annexed to this application. The first order in it is ‘a mandatory injunction ordering the applicant to forthwith pull down and remove from the said construction and remove all their property of whatever nature as well as their workmen, servants or agents from the said property.’ We are persuaded that if what the applicant seeks to prevent is carried out, it will not be reversible. The applicant raised the issue of impecuniosity on the part of the 1st respondents, which was not controverted, as the 1st respondent did not address it. In the circumstances we find it is necessary to preserve the substratum of the appeal.

18. In the result, we grant the application dated 10th November 2021 in the following terms:

1. It is ordered that the parties in this case maintain the status quo on the suit land as is pertaining on the ground on the date of this ruling, in particular there be no pulling down of any structures or construction structures or demolition or removal of property belonging to the applicant from the suit land pending the hearing and determination of the appeal.



2. The costs of the application will abide the outcome of the appeal.

DELIVERED AND DATED 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

