



**Swaleh & another v Aziz (Civil Application E023 of 2022)
[2022] KECA 1203 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1203 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E023 OF 2022
AK MURGOR, P NYAMWEYA & JW LESSIT, JJA
NOVEMBER 4, 2022**

BETWEEN

FATMA SWALEH 1ST APPLICANT

ABDULHAKIM MAZRUI 2ND APPLICANT

AND

HASSAN ABDULKADIR AZIZ RESPONDENT

(Being an application for stay of execution of the judgment and decree delivered by Hon. Charles Ndegwa, Senior Principal Magistrate on 1st July 2021 in Mombasa Chief Magistrate's Court ELC Case No. 1117 of 2017 pending the hearing and determination of the applicants intended appeal against the ruling delivered by Hon. Matheka, J of the Environment and Land Court delivered on 8th December 2021 in ELC Appeal No. 43 of 2021)

RULING

1. The respondent Hassan Abdulkadir Azziz filed a suit before the Mombasa Chief Magistrate's Court in CMCC No. 1117 of 2017 against the 2nd applicant Abdulhalik Mazrui, and one Abdi Ali Mohamed [who is not a party in this appeal, hereinafter co-defendant]. In the amended plaint, the respondent sought three orders: orders of injunction restraining the applicants from trespassing or interfering with respondent's quiet possession of the suit property Plot No. 842/II/MN; demolition of illegal structures; eviction of the applicant from suit land and vacant possession be given to the respondent; and, costs.
2. The brief facts of the case before the trial court were that the respondent according to the learned trial Magistrate, was a beneficial owner of the suit property having inherited it from his deceased father. The respondent's complaint was that the 2nd applicant applied for and obtained permission from the County Government of Mombasa to repair his house and carry out alterations to the house; that without seeking his consent, the applicant proceeded to carry out alterations on the house, erected a



fence around the property and started digging a borehole, and that in the process, he had encroached on the neighbouring sub-plot. When the County Government of Mombasa did not act on the respondent's complaint, he opted to file the suit in the CM's Court aforesaid.

3. The trial court found that the applicant had not consulted nor obtained the respondent's consent before carrying out the alterations and so entered judgment in favour of the respondent and gave the 2nd applicant and his co-defendant three [3] months within which to remove the house without land, together with all other developments from the suit property, and in default, 'the respondent shall be at liberty to evict' the 2nd applicant and the co-defendant from the suit property upon expiry of the three months given.
4. Being aggrieved by the trial court's decision, the applicant and his co-defendant moved to the Environment and Land Court [herein after ELC] seeking an order for stay of execution of the judgment and the decree pending an intended appeal. The applicants questioned whether the respondent was their landlord and thus challenged his capacity to sue them; the applicants' contention was that since the termination of their tenancy over the suit property was neither pleaded nor canvassed before the trial court, the order for vacant possession, removal of the applicants' entire house from the suit property and eviction could not lie, and that they stood to suffer substantial loss if stay was not granted. The ELC in a ruling delivered on the 8th December 2021 dismissed the application with costs on grounds that the applicants had on their part not adduced any evidence to show ownership of the suit property. The ELC found that the applicants had failed to show that their intended appeal was arguable, and that if successful it would be rendered nugatory if orders sought were not granted.
5. Aggrieved by the ruling of the ELC, the 2nd applicant, joined by the 1st applicant as co-owner of the house without land have now moved to this Court by way of a Notice of Motion dated 22nd March 2022, brought pursuant to Rule 5 (2) (b) of the *Court of Appeal Rules*, Section 3A, 3B of the *Appellate Jurisdiction Act* and Article 159 of *the Constitution* seeking an order of stay of execution of the judgment and decree of the CM's Court pending an appeal against the ruling of the ELC.
6. The application is premised on seven grounds on the face of the application and is supported further by an affidavit sworn by the 1st applicant of even date. Inter alia, the applicants contend that there is imminent danger that the respondent will proceed and demolish the applicants' houses and other developments erected on the suit property; that the intended appeal raises fundamental questions of law and fact and is therefore arguable; that the ELC ruling delved into the appeal and therefore gave a flawed ruling marred by grave contradictions; that the intended appeal would be rendered nugatory if orders sought are not granted as the respondent was not the registered owner of the suit property and further that he is a man of straw who would not be in a position to pay the applicants the value of the developments standing on the suit property were their appeal to succeed.
7. The application is opposed. The respondent has sworn a replying affidavit filed in court on 13th May 2022. The respondent avers that being a successful litigant he is entitled to enjoy the fruits of his judgment; that as his tenant, the applicants continued occupation of the suit property was subject to his consent; that he was the registered owner of the suit property; that the applicants failed to disclose that a similar application they made before the ELC was dismissed on 24th March 2022 and the current application was a third attempt, that the applicants did not have an arguable appeal; that the applicants had another place to live in Bondeni area; and that the applicants being tenants cannot question his title.
8. The application was heard virtually before us on the 18th May 2022. Learned counsel Mr. Mark Mwanzia was present for the applicants, while learned counsel Mr. Martin Tindi was present for the respondent. Each counsel relied on their filed written submissions. Mr. Mwanzia's submissions are



dated 6th May, 2022 and are accompanied by a list and bundle of authorities of even date. Mr. Tindi's written submissions are dated 16th May, 2022 and are accompanied by a list and bundle of authorities of even date.

9. 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.”

10. 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 v Tony Ketter & Others* [2013] eKLR.

11. Mr. Mwanzia relied on the decisions in *Multimedia University & Another v Professor Gitile N. Naituli* [2014] eKLR and *Stanley Kangethe Kinyanjui v Tony Keter & Others* [2013] eKLR for the proposition that the applicants have satisfied the two principles for granting orders under Rule 5 (2) (b) of the Court of Appeal Rules. On arguability of the intended appeal, counsel submitted that despite finding that the learned trial Magistrate unilaterally issued serious orders for vacant possession and removal of the applicants' entire house despite the fact that the termination of the applicants' tenancy was never an issue that was pleaded nor contended during trial, the learned ELC still went ahead and held that the applicants did not have an arguable appeal. That the grant of orders that were not prayed for is in itself an arguable appeal.

12. Mr. Tindi for the respondent submitted that the applicants owned a house without land, that the land on which the house stood was registered in the respondent's name, and that in the circumstances he had the locus to file the suit before the trial court. On arguability, counsel urged that the applicants were trespassers to the suit property on account of the fact the current land laws no longer recognizes the concept of house without land, and that therefore their application should fail as the law was not in their favour.

13. This Court in *Somak Travels Ltd v 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.”

14. We have considered this aspect of whether the appeal is arguable or not. In this application, the applicants have annexed a Memorandum of Appeal to this Court which we have considered. We are satisfied that the appeal raises triable issues that ought to be argued fully before the court. We are satisfied that the appeal is not frivolous. For instance, it is arguable whether the learned ELC did not



delve into the appeal making final determinations of the substantive issues at an interlocutory stage, including the issue of whether the respondent had title to the suit property and whether he had capacity to sue. The issue raised by the respondent to oppose the application to the effect that the concept of houses without land is not recognized in law is also an arguable one.

15. On the nugatory aspect, Mr. Mwanzia submitted that there was imminent danger of the applicants house and various developments on the suit property being demolished and of the applicants being evicted from the suit property which would destroy the substratum of the appeal, and cost the applicants enormous loss and render them homeless, Further, Mr. Mwanzia urged that the respondent was a man of straw and it was doubtful that he was in a position to compensate the applicants for the loss and damages incurred if the appeal were to succeed and orders of stay were granted.
16. On the nugatory aspect, Mr. Tindi for the respondent relied on the decision in *Caneland Ltd. Malkit Singhpandhal & Another v Delphis Bank Ltd* [2000] eKLR for the proposition that the onus was on the applicants to satisfy the court that the respondent was a man of straw. That authority does not fit the circumstances of this case as the respondent in the cited case was a bank.
17. As to whether the appeal will be rendered nugatory if the orders sought are not granted and the appeal ultimately succeeds, we bear in mind the pronouncement by the Court in Stanley Kangethe Kinyanjui v Tony Ketter & others , supra, that “in considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.”
18. In this case, the applicants have shown that they are in danger of being evicted and that their house was in imminent danger of being demolished. That if the orders sought are not granted and the appeal were to succeeds the substratum of the appeal will be lost and the appeal rendered nugatory. We are satisfied that the applicants are deserving of orders that will preserve the substratum of the appeal pending the hearing and determination of their appeal.
19. The result is that the application dated 22nd March 2022 succeeds and is allowed. Costs in the intended appeal.

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

A.K. MURGOR

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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

