



**Said v Abdulsheikh & 2 others (Civil Application E042 of 2022)
[2022] KECA 1379 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1379 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E042 OF 2022
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
DECEMBER 16, 2022**

BETWEEN

SWALEH OMAR SAID APPLICANT

AND

KHALID SALIM ABDULSHEIKH 1ST RESPONDENT

FIRST COMMUNITY BANK LIMITED 2ND RESPONDENT

LAND REGISTRAR MOMBASA 3RD RESPONDENT

(An application for stay of execution of the judgment and/or decree of the Environment & Land Court at Mombasa (Munyao Sila, J.) delivered on 7th June 2022 in ELC Case No. 347 of 2017 and of any other consequential orders arising from there pending the hearing and determination of this application)

RULING

1. In his suit before the Environment and Land Court (ELC), Swaleh Omar Said, the applicant, claimed that Khalid Salim Abdulsheikh, the 1st respondent who was his agent, stole his documents and transferred to himself the applicant's properties known as title numbers Mombasa block xxix/76 and Mombasa/block xvii/136 (the properties) and charged them to First Community Bank Limited, the 2nd respondent (the bank). In that suit, the applicant sought judgment for, among other reliefs, an order that the transfers of the properties in favour of the 1st respondent dated June 29, 2011 and July 14, 2010 be declared fraudulent and the same be cancelled; and order to restrain the respondent from collecting rent, transferring, selling or otherwise dealing with the properties.
2. The 1st respondent on his part averred that he purchased the properties from the applicant and paid the full purchase price financed by the bank after which he demolished a structure that was there and erected a storey building. The 1st respondent counterclaimed for an order of vacant possession in



respect of Mombasa/block xvii/136 where he claimed that the applicant had failed to vacate despite having sold the same to him.

3. After conducting a trial, the ELC (Munyao Sila, J) in a judgment delivered on June 7, 2022 found that the applicant had a sale agreement with the 1st respondent in respect of the properties and that the contract was fully performed and the purchase price paid in full and the properties properly transferred and charged to the bank. The judge rejected, as incredible, the assertion by the applicant that the 1st respondent had stolen his title documents in respect of the properties. In the same judgment, the court allowed the 1st respondent's counterclaim and ordered the applicant to give vacant possession within 30 days of the judgment, and in default the 1st respondent would be at liberty to evict him in accordance with the law.
4. Dissatisfied, and intending to appeal that judgment before this court, the applicant filed a notice of appeal dated June 8, 2022 on the strength of which the present application dated June 30, 2022 is hinged. In that application made under rule 5(2)(b) of the [Court of Appeal Rules, 2022](#), the applicant seeks an order of stay of execution of the judgment pending the hearing and determination of his appeal. He also seeks an order of injunction to restrain the 1st respondent from "harassing, evicting, disposing, transferring, interfering, collecting rent and or interfering with the quiet occupation of the applicants and occupants of houses" on the properties pending the hearing and determination of the appeal.
5. During the virtual hearing of the application before us on July 26, 2022, the parties were represented by learned counsel. Mr Wachenje, who held brief for Mr Mwarandu for the applicant. Mr Okanga appeared for the 1st respondent. Mr Wafula appeared for the bank. The Attorney General was served with notice of hearing on behalf of the 3rd respondent but did not participate in the application.
6. Addressing the court in support of the application, Mr Wachenje referred to the grounds on the face of the application, the applicant's supporting affidavit and his written submissions and authorities and submitted that the intended appeal is arguable; that among other grievances to be pursued on appeal are that trial judge failed to consider that the sale agreement was not dated or attested; that no evidence of payment of the purchase price was presented; that despite acknowledging that the transfer documents did not accord with the law the judge failed to invalidate them.
7. It was submitted for the applicant that unless the orders sought are granted, the appeal will be rendered nugatory as the applicant was given 30 days to vacate; that his family will be deprived of a home and the substratum of the appeal will be destroyed if the judgment is executed and the appeal ultimately succeeds.
8. In opposition, Mr Okanga for the 1st respondent referred to the replying affidavit sworn by the 1st respondent and his written submissions in urging that the present application is an abuse of process of the court; that the applicant filed a similar application dated June 15, 2022 before the ELC which was scheduled for hearing before that court on July 27, 2022 and in respect of which orders of status quo had been granted; that in any event the applicant has not demonstrated any threat of eviction.
9. Mr Wafula for the bank, in opposing the application referred to a replying affidavit sworn by Claris Ogombo, a legal officer of the bank in submitting that the application is an abuse of the court process; that the applicant deliberately withheld from this court the fact that a similar application was pending before the ELC with a hearing date for July 27, 2022; that the claim by the applicant that there was imminent eviction was unfounded as the ELC had already issued an order for maintenance of status quo. It was submitted that the applicant should first exhaust his remedies before the lower court.



10. Mr Wachenje did not dispute that there is a similar application pending before the ELC but stated that the orders of status quo that had been given by the ELC had not been extended. He did not dispute that the application before that court was scheduled for hearing the day after on July 27, 2022.
11. We have considered the application, the affidavits, the submissions and the authorities cited. The principles on which the court exercises its discretion in applications of this nature are established and well summarized in *Stanley Kangethe Kinyanjui v Tony Ketter and 5 others* [2013] eKLR. The applicant is required to demonstrate that the appeal or intended appeal is arguable and that if the orders sought are declined and eventually the appeal is successful, it will be tantamount to a pyrrhic victory. Having considered the rival arguments, and bearing in mind that an arguable appeal is not one that will necessarily succeed but one that is worth of the court’s consideration, and mindful also that a single arguable point suffices, we are persuaded, having regard to the grounds of appeal set out in the supporting affidavit, some of which we have as set out above, that the appeal is not frivolous. It is arguable.
12. As to whether the applicant has fulfilled the second criteria and demonstrated that the appeal will be rendered nugatory if we decline to grant the orders sought, two things concern us. First, the present application is dated June 30, 2022. By the time this application was presented, the applicant had, by an earlier application dated June 15, 2022, sought similar orders of stay of execution before the ELC. The applicant did not in his application before us disclose that it had a pending application before the ELC. That, as counsel for the 1st respondent submitted, is a material fact that should have been disclosed to the court.
13. Secondly, the applicant omitted to disclose that on June 16, 2022, the ELC while fixing a date for the hearing of the applicant’s application dated June 15, 2022 made an order that “status quo be maintained”. This again is a material fact that the applicant forgot to disclose.
14. We agree with counsel for the respondent that failure to disclose material facts when seeking a discretionary relief disentitles the applicant to such relief. See for instance *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 others* [1995] eKLR and also *Bao Investments & Office Management Services Ltd v Housing Finance Co of Kenya Ltd* [2006] eKLR citing with approval from the old English case of *R v The Kensington Tax Commissioners, Ex Parte Princes Edmond De Polignac* [1917] 1KB 486.
15. Moreover, apart from engaging in what appears to be forum shopping in filing similar applications before different courts, the court should not act in vain where, as here, it would appear the applicant is already the beneficiary of an order protecting him. As counsel for the respondents submitted, it has not been demonstrated that there is any imminent threat or danger of eviction.
16. The application therefore fails and is dismissed with costs to the 1st and 2nd respondents.

Dated and delivered at Mombasa this 16th day of December 2022.

S. GATEMBU KAIRU, FCIArb

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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

