



**Chengo v Odida (Civil Appeal (Application) E571 of 2021)
[2022] KECA 1320 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1320 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E571 OF 2021
AK MURGOR, S OLE KANTAI & JM MATIVO, JJA
DECEMBER 2, 2022**

BETWEEN

MARTIN CHENGO APPELLANT

AND

VITALIS OTIEGO ODIDA RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Komingoi, J.) dated 11th June, 2020 and Ruling dated 17th February, 2022 in ELC Case No. 648 of 2014)

RULING

1. By two similar motions said to be brought under section 3A, 3 (1), (2), 7 of the [Appellate Jurisdiction Act](#), rules 4, 5 (2) (b) and 42 of the [Court of Appeal Rules](#) the applicant Martin Chengo prays in the main that we stay execution of the judgment and order delivered on June 11, 2020 and further orders issued on February 17, 2022 by Komingoi, J in Nairobi Environment and Land Court (ELC) Case No 648 of 2014. It is said *inter alia* in grounds in support of the motion and in a supporting affidavit by the applicant that ELC in the said judgment issued a declaration that the respondent Vitalis Otiego Odida continue to be registered as proprietor of all that parcel of land known as House No MG 281 situate on LR No 209/20594 Nairobi South B in Nairobi County ('the suit property'); an order was issued restraining the applicant from trespassing, alienating, constructing or continuing with construction of any structures or interfering with the respondent's quiet possession over the suit property and an order was made directing the applicant to reconstruct a demolished wall that marks the boundary between the respondent's property and that of the applicant and remove structures and foundations that the applicant had erected in the suit property. The respondent was awarded general damages in the sum of Ksh 200,000 for trespass. It is said that the applicant has an arguable appeal which he wishes to prosecute and such appeal would be rendered nugatory if interim relief is not granted; that an appeal has been filed. The applicant says on grounds 3, 4 and 5 in support of the motion:



3. That I have an arguable appeal which it seeks to prosecute which appeal would be rendered nugatory absent grant of the interim orders sought herein. That I have already filed a notice of appeal in this matter, prepared and filed a memorandum of appeal together with its record of appeal in the matter herein.
 4. That currently I am exposed to grave irreparable harm and losses that would render the appeal nugatory should the injunctive orders sought herein are not granted, as:
 - a. The respondent has since proceeded to extract the impugned orders and proceeded to cite, the applicant for contempt of court and pursuant to the superior court's ruling issued on February 17, 2022 the applicant is required to purge the contempt within Thirty (30) days from February 17, 2022 failure to which the applicant can be fined Kshs 200,000/= or in default a jail term of four (4) months for failure to comply with the court's impugned orders/ judgment.
 - b. The applicant will be exposed to insurmountable loss and damage through demolition of all the developments made on the property and/or the payment of damages for trespass defeating the purpose of the appeal altogether.
 5. That unless this application is certified urgent and the orders sought herein granted ex parte in the first instance, there is a real likelihood that the applicant herein would not have purged the contempt as ordered by the superior court on February 17, 2022 and the applicant will be fined a sum of Kshs 200,000/= or in default a jail term of four (4) months for failure to comply with the orders of the court owing to the present appeal which has a high chance of success.'
2. The respondent filed 'grounds of opposition' but these are not provided for by the rules of this court. The parties filed written submission and lists of authorities which we have considered.
 3. When the application came up for hearing on a virtual platform on September 6, 2022 learned counsel Mr Alakonya appeared for the applicant while learned counsel Mr Makori appeared for the respondent. In an oral highlight of the same counsel for the applicant submitted that the grounds raised in memorandum of appeal challenging the judgment and a ruling are arguable. According to counsel a concrete wall separating the respondent's (suit) property and that of the applicant was held to constitute the boundary for the respective properties and that the effect of the judgment was that the applicant was ordered to reconstruct the wall before the suit at ELC was filed. It was admitted that the applicant had brought down the wall. According to the applicant reconstructing the wall would be at considerable cost which the respondent may be unable to refund if the appeal succeeds.
 4. Mr Makori, in opposing the application, posed the question: Is the applicant deserving of the orders sought? He answered that question by submitting that judgment had been delivered on June 11, 2020 but the applicant did not move ELC or this court with any application but only did so after an application to cite him for contempt of court had been made and orders issued. The applicant was given an opportunity to comply with orders in the judgment or be fined or jailed. According to counsel the applicant had demolished a wall without court orders and had failed and refused to reconstruct it even after being ordered to do so by ELC.

We have considered the motion and submissions made.

5. The principles that guide grant of orders in an application of this nature are well known. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. Such an applicant must in addition



show that the appeal would be rendered nugatory absent stay – *Charter House Bank Limited v Central Bank of Kenya & 2 Others [2007] eKLR*.

We have perused grounds of appeal set out in memorandum of appeal in the record of appeal filed for the applicant by his lawyers and are satisfied that the same are arguable.

What about the 2nd limb of the said principle which an applicant must satisfy to succeed in an application like this one?

6. As correctly submitted by counsel for the respondent the applicant demolished a concrete wall which formed the boundary between two properties. He did not have a court order authorizing him to do that. He was ordered to reconstruct the same by ELC after a hearing. He has not done so and has been cited for contempt. He has not purged contempt. Such a party, in our considered view, cannot be entitled to remedy of stay of execution pending appeal. The appeal will not be rendered nugatory if we refuse stay. The applicant having failed to satisfy this limb of the said principles the application fails and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

AK MURGOR

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JUDGE OF APPEAL

Sole KANTAI

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JUDGE OF APPEAL

JM MATIVO

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

