



**Koech v Mibei (Administrator of the Estate of Joseph Kimibei Rotich) & 7 others (Civil Application E072 of 2021) [2022] KECA 1312 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1312 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E072 OF 2021  
K M'INOTI, J MOHAMMED & S OLE KANTAI, JJA  
DECEMBER 2, 2022**

**BETWEEN**

**JOSEPH KIMENJO KOECH ..... APPLICANT**

**AND**

**KENNETH KIPKURUI MIBEI (ADMINISTRATOR OF THE ESTATE OF  
JOSEPH KIMIBEI ROTICH) ..... 1<sup>ST</sup> RESPONDENT**

**ROSE BEATRICE ROTICH ..... 2<sup>ND</sup> RESPONDENT**

**DEFLA CATHERINE CHEPKIRUI ..... 3<sup>RD</sup> RESPONDENT**

**STELLAH CHEMUTAI ROTICH ..... 4<sup>TH</sup> RESPONDENT**

**LINET CHEPKORIR ROTICH ..... 5<sup>TH</sup> RESPONDENT**

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION .... 6<sup>TH</sup>  
RESPONDENT**

**LAND REGISTRAR, NAKURU ..... 7<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 8<sup>TH</sup> RESPONDENT**

*(Application for stay of execution pending appeal from the ruling and order of the Environment  
& Land Court at Nakuru (Mutungi, J.) dated 15th June 2021 in ELCC No. 45A of 2020)*

**RULING**

1. In his motion on notice dated August 2, 2021, the applicant, Joseph Kimenjo Koech seeks a raft of orders pending appeal from the ruling and order of the Environment and Land Court at Nakuru (Mutungi, J) dated June 15, 2021. Some of the orders that the applicant craves cannot be granted simply because they seek to stay negative orders of the trial court (See *Exclusive Estates Ltd v Kenya Posts & Telecommunications Corporation & another* [2005] 1 EA 53). In all, the applicant seeks:



- i. Stay of execution of the ruling and order of the trial court dated June 15, 2021;
  - ii. Reinstatement of *status quo* orders granted by the trial court prior to the said ruling;
  - iii. Stay of further proceedings in the trial court; and
  - iv. An injunction prohibiting the respondents from charging, selling, disposing, or alienating the properties known as Ngata/Njoro Block 2/6220, 6221, 6222 and 6223 (the suit properties).
2. The background to the application is that on March 4, 2020, the applicant filed a suit for recovery of the suit properties in the Environment and Land Court in Nakuru. He pleaded that he was the registered proprietor of the property known as Njoro/Ngata Block 2/67 (the charged property), of which the suit properties are subdivisions, and that on September 15, 1992, he charged the same in favour of the Industrial & Commercial Development Corporation (ICDC) to guarantee a loan of KShs 300,000.00 to one Philip Kibet Sang. Following default by the principal debtor, the applicant added, ICDC unlawfully and fraudulently sold the charged property to Joseph Kimibei Rotich (deceased) on April 25, 1995 and the deceased was subsequently registered proprietor on August 31, 2001.
  3. The applicant further pleaded the particulars of the alleged fraud and added that the charged property was subsequently subdivided into the suit properties and registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents as beneficiaries of the estate of the deceased. He accordingly prayed for, among others, declarations that the sale and transfer of the charged property was fraudulent, illegal, null and void and that he was the lawful owner of the suit properties, a mandatory injunction to evict the beneficiary respondents from the suit properties, a prohibitory injunction to stop any sale, transfer or alienation of the suit properties, cancellation of titles to the suit properties and reverting the charged property to his name, or in the alternative, award to him of the market value of the charged property.
  4. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents duly filed their defences in which they averred, among other things, that the applicant's suit was time-barred. Subsequently, they filed notices of preliminary objection, in which they contended that the applicant's suit was statute barred under section 7 of the [Limitation of Actions Act](#) because it was filed more than 12 years after the cause of action accrued. After hearing the parties on the preliminary objection, the learned judge concluded that the applicant's suit was indeed time-barred. Accordingly, he sustained the objection and struck out the suit. The applicant was aggrieved and filed a notice of appeal, followed by the application now before us.
  5. In support of the application for stay of execution, proceedings and for orders of injunction, the applicant submitted in his written submission dated November 30, 2021 that his intended appeal was arguable because the learned judge erred by entertaining a preliminary objection that did not raise pure points of law. He contended that the preliminary objection in question raised matters of fact that could only be determined at the hearing of the suit. It was further contended that the learned judge erred by applying section 7 of the [Limitation of Actions Act](#) in isolation and without regard to sections 9 and 13 of the same Act. The applicant added that the learned judge further erred by holding that the doctrine of adverse possession was not applicable in the case, which was an issue of fact. On that basis it was submitted that the intended appeal is not frivolous and ought to be considered by the court because an arguable appeal is not one that must necessarily succeed.
  6. On whether the intended appeal will be rendered nugatory if we do not grant the orders sought by the applicant, it was submitted that the 1<sup>st</sup> to 5<sup>th</sup> respondents were in occupation of the suit properties and were denying the applicant enjoyment thereof, thus exposing him to irreparable loss and damage. It was also urged that in the absence of the orders sought, there was a risk that those respondents may alienate the suit properties or change its character.



7. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents opposed the application *vide* a replying affidavit sworn by the 1<sup>st</sup> respondent on June 24, 2022 and their written submissions of even date. They contended that the intended appeal was not arguable and that other than speculation and his unfounded apprehension, the applicant had not demonstrated how the appeal would be rendered nugatory. These respondents submitted that the applicant had neither alleged nor proved that they intended to alienate the suit properties. It was their submission that they had no intention of alienating the suit properties and that in any event, they would be able to compensate the applicant sufficiently should the need arise, because they were not people of straw.
8. The other respondents did not respond to the application and did not appear during the virtual hearing, although they were duly served with the hearing notice.
9. We have carefully considered the application. As correctly submitted by both the applicant and the 1<sup>st</sup> to 5<sup>th</sup> respondents, to entitle the applicant to the orders he has sought, he must demonstrate that his intended appeal is arguable and that unless the orders are granted, it will be rendered nugatory if it succeeds. (*Githuburi v Jimba Credit Corporation Ltd (No 2)* [1988] KLR 838). Both those considerations must be satisfied and if an applicant establishes only one but fails to satisfy the other, he is not entitled to the orders (*Republic v Kenya Anti-Corruption Commission & 2 others* [2009] KLR 31). An arguable appeal is one which is not frivolous; an appeal raising even one *bonafide* point of law that deserves consideration by the court. An arguable appeal need not necessarily succeed at the hearing, nor does it need to raise a multiplicity of issues (*Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others* [2014] eKLR).
10. Turning to the merits of the application, we agree with the applicant that a preliminary objection is purely a matter of law and cannot be raised where the court is required to establish disputed facts (See *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* [1969] EA 96). A preliminary objection on a point of law proceeds on the basis that the facts as pleaded are not in dispute, and where it is clear from the pleadings that the facts are disputed, then a preliminary objection cannot be properly raised. Indeed, as Law JA observed in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* (*supra*), a plea of limitation is a good example of when a preliminary objection may be properly taken.
11. In this case, the material facts as pleaded by the applicant himself, are not in dispute. First and foremost, this was a suit commenced by a plaintiff, for recovery of land, and not a suit commenced by originating summons for adverse possession. In fact, the 1<sup>st</sup> to 5<sup>th</sup> respondents did not file a counter-claim for adverse possession, which makes the applicant's arguments about adverse possession baseless and totally off the mark.
12. Secondly, from the applicant's own pleadings, the suit property was sold to the deceased by public auction on April 25, 1995 (paragraphs 19 and 20 of the plaintiff). The suit property was registered in the name of the deceased on August 31, 2001 (paragraphs 26 and 32 of the plaintiff). The applicant was aware of all that critical information on August 1, 2002 when he placed a caution on the suit properties (paragraph 26). He then filed the suit on March 4, 2020, some 25 years after the sale of the charged property and some 18 years after he became aware of all the facts and placed a caution on the land.
13. Purely from the applicant's own pleadings, which are not controverted by the respondents' defences, the suit was filed far much more than 12 years after the cause of action accrued. This is contrary to the terms of section 7 of the *Limitation of Actions Act*. We are satisfied that from the applicant's own pleadings and the undisputed material facts, the applicant's suit was clearly time barred and therefore, the intended appeal is not arguable.



14. Having so found, it is not necessary to venture into the second consideration of whether the intended appeal will be rendered nugatory. In the event, the motion on notice dated August 2, 2021 has no merit and is hereby dismissed with costs to the 1<sup>st</sup> to 5<sup>th</sup> respondents. It is so ordered.

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

**K. M'INOTI**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

*Signed*

**DEPUTY REGISTRAR**

