



REPUBLIC OF KENYA



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Ngugi & 8 others v Kenya Planters Co-operative Union Limited & 6 others (Civil Application 13 & 14 of 2018 (Consolidated)) [2022] KECA 1328 (KLR) (2 December 2022) (Ruling)

Neutral citation: [2022] KECA 1328 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 13 & 14 OF 2018 (CONSOLIDATED)
MSA MAKHANDIA, AK MURGOR & F TUIYOT, JJA
DECEMBER 2, 2022**

BETWEEN

**DAVID NJEHIAH NGUGI 1ST APPLICANT
NYONYO FARM LIMITED 2ND APPLICANT
LILIAN WANGARI MUIGAI 3RD APPLICANT
PATRICK MURIUKI NJOGU 4TH APPLICANT
MARY WANGARI MURIITHI 5TH APPLICANT
JOSHUA MBUGUA NJUGUNA 6TH APPLICANT
MOSES GITHINJI MWANGI 7TH APPLICANT
SALOME WANGECHI WACHIRA 8TH APPLICANT**

AND

**KENYA PLANTERS CO-OPERATIVE UNION LIMITED 1ST RESPONDENT
KENYA COMMERCIAL BANK LIMITED 2ND RESPONDENT
HARVEN GADHOKE 3RD RESPONDENT
DANIEL MUTISYA NDONYE 4TH RESPONDENT
ROBERT KINUTHIA MUNGAI T/A KAHONOKI ESTATE .. 5TH RESPONDENT
FIKAH ACRES LIMITED 6TH RESPONDENT**

**AS CONSOLIDATED WITH
CIVIL APPLICATION 14 OF 2018**

BETWEEN



ROBERT KINUTHIA MUNGAI APPLICANT

AND

KENYA PLANTERS CO-OPERTIVE UNION 1ST RESPONDENT

FIKAH ACRES LIMITED 2ND RESPONDENT

(Being an application for an injunction pending the hearing and determination of an intended appeal from the Ruling of the Environment and Land Court (Obaga, J) dated 22nd January, 2018 in Nairobi ELC case No 779 of 2009 as consolidated with ELC case No 1469 of 2016)

RULING

1. When these two applications, being Civil Application No 13 & 14 all of 2018 came up for hearing on June 3, 2022, we ordered for their consolidation and for hearing together as they arose from the same ruling and order of the Environment and Land Court (“the ELC”) and sought more or less the same prayers. The applicants were all interested parties in the suit before the ELC.
2. Both applications are said to be brought under rule 5(2)(b) of the Court of Appeal Rules and it is prayed in the main that this Court orders stay of further proceedings in Nairobi ELC No 779 of 2009 and ELC No 1469 of 2016 and that the 2nd respondent by itself, agents, employees, and or servants be restrained by a temporary injunction from entering into, wasting, damaging, alienating, sale, removal or disposal or in any other manner dealing with properties known as LR No 1363/10; LR No 1363/11; LR No 1363/12; LR No 1363/13; LR No 1363/14; LR No 1363/15; LR No 1363/16; LR No 1363/22; LR No 1363/23; LR No 1363/24; LR No 1363/25; LR No 1363/26; LR No 1363/27; LR No 1363/28 & LR No 1363/33 pending hearing and determination of the appeal.
3. The history of this dispute is that the 1st respondent obtained several credit facilities from the 2nd respondent between the years 1992 and 2007 and as at October 19, 2009, the loan facility stood at Kshs 643,978,558 plus market guarantees of Kshs 77,040,000 and a general guarantee of Kshs 3,568,000. This was against a charge over a parcel of land known as LR No 209/8658 which charge kept mutating following execution of further charges upon the addition of further credit facilities. The 5th respondent who is the applicant in Civil Application No 14 of 2018 was the owner of an agricultural farm measuring 1,238 acres or thereabouts popularly known as Kahonoki Estate referred to as LR No 1363/2. He became indebted to the 1st respondent as a result of the 1st respondent taking over the 5th respondent’s debts with the Agricultural Finance Corporation of Kshs 868,383.45 and that from the National Bank of Kenya of Kshs 527,069.50. Through a mortgage dated November 28, 1984, the 5th respondent assigned all that parcel of land to the 1st respondent in order to secure payment of the debt. The 5th respondent, however, later decided to subdivide the parcel into thirty plots and agreed with the 1st respondent that part of the plots would go towards clearing the remaining debt of Kshs 48,000,000 owed by him and the remaining would revert to him. The parcels of land assigned to the 1st respondent were: LR Numbers 1363/7, 1363/9, 1363/10; 1363/11; 1363/12; 1363/13; 1363/14; 1363/15; 1363/16; 1363/22; 1363/23; 1363/24; 1363/25; 1363/26;1363/27; 1363/28 & 1363/33. However, before the transfers were effected to either the 1st respondent or the 5th respondent, the 1st respondent was placed under receivership by the 2nd respondent and the 3rd and 4th respondents were appointed as receiver managers over the property. This resulted in suits being filed. Among the suits filed was Nairobi Civil Case No 779 of 2009 by the 1st respondent against the 2nd to 5th respondents



and Nairobi HCCC No 542 of 1991 which became ELC No 1469 of 2016 between the 5th respondent and the 1st respondent.

4. The applicants came into the picture as purchasers from the 5th respondent who claimed to have occupied their respective parcels of land, and only learnt later that during the pendency of the above suits in the trial court, the 1st respondent caused a transfer of the properties to the 6th interested party. Vide an application dated December 18, 2014, the applicants sought to be declared as the legal owners of the subdivided plots and the register be rectified to reflect that fact. The 1st respondent equally had an application seeking for review of the court orders that had granted status quo on the parcel of land in 2014 dated February 17, 2015. The applications were heard concurrently. The 5th applicant's application was dismissed on grounds of non-disclosure of material facts when it had presented its case that granted him the orders in 2014. The ELC found that the 5th respondent having disposed of some of the properties pursuant to an agreement that enabled the 1st respondent to dispose of the said properties to the interested parties, could not turn around to seek the aforesaid reliefs. The 5th respondent was advised if so minded, to institute proceedings for fraud and join the Registrar of Lands in the same.
5. Being dissatisfied with the said ruling, the applicants filed an application dated August 5, 2016 before the same court seeking for orders of temporary injunction against the 6th respondent from entering into, wasting, damaging, alienation, sale, removal or disposal or in any other manner dealing with the subdivided parcels of land aforesaid, pending hearing and determination of the application and the determination of the counterclaim by the 5th respondent among other prayers. The said application was dismissed for being *res judicata*.

It is the dismissal of the above application that prompted the applicants to file the notice of appeal dated January 29, 2018 and thereafter the instant applications.

The applicants in Civil Application No 13 of 2018 have annexed in the application a draft memorandum of appeal in which they raise complaints against the impugned ruling to the effect that the learned judge erred in holding that: the applicants' presence in the suit was of no greater value in determining the issues in controversy; and, that by him allowing one party to introduce documents after the matter had been reserved for judgment, was against the principles of natural justice as it was prejudicial to the applicants. On the nugatory aspect, the applicants state that the threat to evict them is real and even criminal charges have been preferred against them in an effort to have them evicted. On his part, the applicant in Civil Application No 14 of 2018 stated that the appeal was arguable as the judge erred in making a finding that the injunction in Nairobi ELC No 1469 of 2016 was compromised whereas there was no iota of evidence to back up such a finding. On the nugatory aspect, the applicant states that the order of injunction sought is to prevent further subdivision and transfer by the respondents as to allow the same to proceed will convolute the matter further and render it difficult to reverse the actions.

6. The application is opposed by the respondents through the replying affidavit of the general manager of the 6th respondent one, Stephen Gitau Kinene. He deposes that the intended appeal is not arguable as the issue in dispute in the ELC suits was whether or not the mortgage taken out by the 5th respondent against the suit properties would be settled by the payment of certain sums of money. Joinder of the applicants to the suit will not facilitate its settlement or determination. That the court had addressed their grievance in the judgment of Odunga, J (as he then was) where they were advised to take action under their separate agreements. On the nugatory aspect, the respondent deposed that the applicants' cause of action lay with the 5th respondent and they were not prevented from claiming against the said respondent and above all, they had not proved that they were in possession of the suit property.



For an applicant to succeed in an application for stay of proceedings and or injunction pending appeal, two principles must be satisfied. The applicants must show that there is an arguable appeal and if they succeed on that limb, they must go further and also show that the appeal, if filed, or the intended appeal would be rendered nugatory if the orders sought are not granted. These principles have been recognized in various pronouncements of this court such as in the case of *Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR*.

We have taken into consideration the above threshold and agree with both applicants that the issues to be raised on appeal, which we find no need to rehash, warrant the court's interrogation. In the result, we are satisfied that both applicants intended appeals are therefore not frivolous, but arguable. We reiterate that one arguable point will suffice and need not eventually succeed at the hearing.

7. As to the nugatory aspect, it has not been demonstrated that the suit properties are in any danger of being disposed off and or that they are in the applicants' possession. There has been a considerable time lapse since they were registered in the 6th respondent's name and therefore an injunction or even stay of proceedings, if granted will be an exercise in futility. We have perused the ruling of the ELC delivered on January 22, 2018, where the learned judge of the ELC was categorical that the issue of grant of any injunction was *res judicata* as the same had been dealt with substantively by Odunga, J (as he then was). The applicants are asking for an injunction against the respondents to stop any further subdivision and transfer of the parcels of land to other persons. The applicants in Civil Application No 13 of 2018, however, have not explained the steps they have taken after the free advice in the judgment of Odunga, J (as he then was) that their recourse can be found in suing the 5th respondent directly. We are not convinced that they can claim again for any order against all the respondents when ideally, they would have taken steps and isolated their case against each of the respondents as advised by Odunga, J (as then he was).
8. We are not persuaded that if the application is declined, the applicants may never recoup the loss they may suffer if the appeal succeeds, as there is nothing in their possession. We are further not persuaded that in all the circumstances of this case if what is being sought to be stopped takes place, will be irreversible and would also render the appeal nugatory.

Accordingly, both Civil Application No 13 and 14 of 2018 as consolidated are hereby dismissed with costs to the respondents.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A K MURGOR

.....

JUDGE OF APPEAL

F TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

