



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: SICHALE, J. MOHAMMED & KANTAI, J.J.A.)

CIVIL APPLICATION NO. 51 OF 2020

BETWEEN

NORMAN MWANGI WAMBUGU t/a

KEJA INN BAR & RESTAURANT.....1ST APPLICANT

ANN WAMBOI.....2ND APPLICANT

AND

GROUP POWER COMPANY LIMITED.....RESPONDENT

(Being an application for an injunction pending an intended appeal

against the ruling of the Environment and Land Court of Kenya at

Eldoret (Odeny, J.) dated 23rd January, 2020 in ELC Appeal No. 40 of 2019)

RULING OF THE COURT

In the Motion brought under **rule 5** of the **Rules of this Court** it is prayed in the main that we issue an injunction against the respondent restraining it from denying access or interfering with the user and occupation by the applicants of a parcel of land known as **Uasin Gishu/Kimumu Settlement Scheme/7042 (“the suit land”)** pending the hearing and determination of the Motion and of an intended appeal. In grounds in support of the application and in a supporting affidavit of the applicant (**Norman Mwangi Wambugu t/a Keja Inn Bar and Restaurant**) it is stated amongst other things that the applicant had filed **Eldoret CM. ELC No. 109 of 2019**; that an accompanying application for injunction was dismissed on 11th October, 2019; that an appeal was lodged being Eldoret ELC Appeal No. 40 of 2019 accompanied by an application for injunction which application was dismissed on 23rd January, 2019 and there followed a Notice of Appeal to this Court; that the intended appeal raises arguable issues including, whether the Judge was right to find that the application was res judicata under **Section 7 Civil Procedure Act** when the High Court, on appeal, had original jurisdiction; at paragraph 16(b) of the affidavit:

“The Learned Judge erred in law and fact in finding that no appeal had been lodged against the decision made on the 19th June, 2019 while the appellants had lodged Eldoret ELC. Appeal No. 40 of 2019 – Norman Mwangi Wambugu T/A. Keja Inn Bar & Restaurant & Another v Group Power Company Limited which was duly on record in accordance with section 79G of the Civil Procedure Act, Cap. 21.”

It is also intended to be taken as a ground of appeal that the Judge was wrong in failing to grant the application despite having concluded that there was need to preserve the substratum of the suit.

There was no replying affidavit when we heard the Motion and we were satisfied that the respondent had been served with a hearing notice for the day.

The principles that apply in an application of this nature are well known. For an applicant to succeed in such an application 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 – See the case of **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR**.

It was prayed in the plaint filed at the Chief Magistrates Court, Eldoret, that a declaration be issued to the effect that an agreement and conveyance of the suit land and the intended eviction of the plaintiff (the applicant here) from the suit land were null and void and vitiated in law; that the defendant's title (Group Power Company Limited) be cancelled and a perpetual injunction be issued restraining the respondent from denying access or interfering with the user and occupation of the suit land. Damages were also sought. An accompanying application for injunction was dismissed.

In the matter before the Environment and Land Court at Eldoret which was an appeal against the ruling of the Magistrate, Odeny, J. stated, amongst other things:

“From the record it is clear that a similar application for injunction was filed in the lower court and the same was heard and determined on 19th June, 2019 of which (sic) the application was dismissed.

There is no appeal against that ruling

That was on 23rd January, 2020.

We note from the record of the Motion that Eldoret ELC No. 40 of 2019 being an appeal against the ruling or order of the Magistrate had been filed on 4th November, 2019. It is arguable in the intended appeal whether the Judge was right to hold that there was no appeal in the circumstances we have enumerated here. An arguable point on appeal is not one that must succeed – See the case of ***Josephine Koki Raymond v Philoma Kanini Mainigi [2018] eKLR.***

On the nugatory aspect it is stated in the plaint that the applicant and his wife Ann Wamboi (the 2nd applicant) are registered as owners of the suit land; that the 1st applicant established a bar and restaurant on the suit land and because of circumstances enumerated in the plaint the respondent intends to evict the applicants from the suit land. The business known as Keja Inn Bar and Restaurant operated by the 1st applicant is a going concern and if the applicants are evicted from the suit land they would suffer substantial loss and the intended appeal would, in those circumstances be rendered nugatory.

For all those reasons the applicants have satisfied the principles under **rule 5(2) (b)** of the **Rules of this Court** and we allow the Motion dated 13th March, 2020. Costs of the Motion will be in the intended appeal.

Dated and delivered at Nairobi this 29th day of January, 2021.

F. SICHALE

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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