



Soy Developers Limited v Kenagri Products Ltd & 4 others (Civil Application E227 of 2021) [2021] KECA 25 (KLR) (23 September 2021) (Ruling)

Neutral citation: [2021] KECA 25 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E227 OF 2021
RN NAMBUYE, W KARANJA & AK MURGOR, JJA
SEPTEMBER 23, 2021**

BETWEEN

SOY DEVELOPERS LIMITED APPLICANT

AND

KENAGRI PRODUCTS LTD 1ST RESPONDENT

DEPOSIT PROTECTION FUND BOARD (AS LIQUIDATORS OF POST BANK CREDIT LIMITED (IN LIQUIDATION)) 2ND RESPONDENT

A.S.L LIMITED 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

M/S CYPERR PROJECT INTERNATIONAL LIMITED 5TH RESPONDENT

(An appeal from the decision of the High Court of Kenya (E. Obaga, J.) dated 15th April, 2021 in Nairobi ELC No. 132 of 2015)

RULING

1. Before us is a Notice of Motion dated 23rd April, 2021 brought under Rules 5(2)(b) and 41 of the *Court of Appeal Rules*, substantively seeking an interim order of injunction restraining the 3rd respondent either by themselves, their agents, servants, assigns or any other person from selling, disposing, entering, or encroaching, trespassing, working or disposing the suit property known as LR No. 209/11151 situate at Upper Hill so as to preserve the substratum of the suit. In the alternative, an order for maintenance of status quo of the decision of Hon. E. O. Obaga, J. dated and delivered on 15th April, 2021 in Nairobi, Environment and Land Court ELC Case No. 132 of 2015 pending hearing and determination of the Milimani ELC No. 132 of 2015 and, lastly, that the applicant be awarded costs of the application.



2. The motion is supported by grounds on its body and a supporting and supplementary affidavits of Sammy Boit Arap Kogo, described as a director/shareholder of the applicant, sworn on 23rd April, 2021 and 16th June, 2021 respectively. It has been opposed by a replying affidavit of Shakhhalaga Khwa Jirongo, described as a director of the 1st and 5th respondents, sworn on 17th May, 2021 together with annexures thereto and a replying affidavit of Kartik Patel, described as the group financial controller of the 3rd respondent, sworn on 5th May, 2021 together with annexures thereto. It was canvassed through rival pleadings, written submissions and legal authorities filed by advocates for the respective parties, without their attendance or oral highlighting at the conclusion of which we considered the said pleadings, submissions and legal authorities relied upon by the parties in support of their respective opposing positions herein and made interim orders as follows:
 1. The application dated 23rd April, 2021 be and is hereby dismissed.
 2. Reasons for dismissal reserved pending delivery of the ruling on 23rd July, 2021.
 3. Costs of the application to abide delivery of the ruling on 23rd July, 2021.
3. The background to the application albeit in summary form is that the applicant filed in the Environment and Land Court ELC No. 132 of 2015 against the respondents simultaneously with a notice of motion seeking a temporary injunction and an order of maintenance of status quo to restrain the respondents from advertising for sale the suit property known as LR No.209/11151 pending the hearing and determination of the suit. The motion was canvassed before the trial court through rival pleadings and written submissions at the conclusion of which the learned Judge, E. O. Obaga, J. evaluated the record considered it in light of the rival positions before the court and dismissed the motion on 15th April, 2021 with costs to the 3rd respondent.
4. The applicants were aggrieved and filed a notice of appeal on 16th April, 2021 on which the application under our consideration is anchored.
5. Supporting the application, the applicant avers and submits that they have satisfied the twin prerequisites for granting relief under the above rule. In support of the first prerequisite, the applicants rely on the memorandum of appeal filed in Civil Appeal No. E227 of 2021 in which the application under consideration is filed. The memorandum of appeal contains fourteen (14) grounds of appeal. In summary, the applicants intend to fault the learned Judge for inter alia: exceeding his jurisdiction by delving into issues which none of the parties had raised in the application and therefore acted *per incuriam*; failing to interrogate the principles that govern the grant of temporary injunctions; concluding that the applicant had not established a prima facie case; for ignoring the fact that the appellant had demonstrated that it had an arguable case with high chances of success; by reaching a verdict that the failure to grant the applicant a temporary injunction would not occasion irreparable harm to the applicant; that if the applicant succeeded at the end of the suit, it could adequately get compensated; by ignoring the fact that the balance of convenience dictated that the substratum of the suit be preserved to avoid unnecessary litigation in trying to recover the market value of the subject property after it had been disposed of and by reaching a conclusion that ELC No 132 of 2015 would not be rendered nugatory if the prayer for the interim injunction was not granted and the subject property sold. They also intend to argue that by holding as he did, the Judge failed to appreciate that the suit was at its conclusive stages and that it was only important to preserve the substratum of the suit. The learned Judge also erred when he held that the 3rd respondent had been declared the rightful owner of LR Number 209/11151 by the High Court in ELC 567 of 2008 Darelle Limited vs. ASL Limited & Johnstone Kiplimo Chemos consolidated with ELC No 24 of 2008 ASL Limited vs. Johnston Kiplimo Chemos vs. The Attorney General, between third parties who were fraudulently



claiming ownership of the suit property to which proceedings the applicant was not a party and was therefore not bound by any determinations arising therefrom.

6. Turning to the satisfaction of the second prerequisite, the applicant asserts that if the relief sought is not granted, the respondent will proceed to sell the suit property to a third party thus rendering the substratum of the intended appeal out of reach of the applicants, consequently rendering the applicants appeal nugatory should it ultimately succeed.
7. In support of their submissions, the applicants have relied on the following authorities: *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* on the principles/propositions that an arguable ground of appeal is not one which must necessarily succeed but it should be one which is not frivolous and that a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable; *Dennis Mogambi Mang'are vs. Attorney General & 3 Others* ; on the definition of what the court considers to be an arguable appeal and the need for the Court to exercise its discretion in such a manner so as to prevent an appeal/intended appeal from being rendered nugatory should it ultimately succeed; *Shimmers Plaza Limited vs. National Bank of Kenya Limited , Stanbic Bank Kenya Limited vs. Kenya Revenue Authority , Teachers Service Commission vs. Kenya National Union of Teachers & 3 Others* are all for the propositions that an appeal would be rendered nugatory in instances where the substratum of the appeal is likely to be transferred to third parties and put beyond the reach of the applicant should the appeal succeed and of the importance of the court to maintain the status quo orders for purposes of preserving the subject matter.
8. The 1st and 5th respondents are not opposed to prayer 3 of the motion being allowed in so far as the same is for the preservation of the suit property pending hearing of the High Court case.
9. The 3rd respondent's case on the other hand is that it is the proprietor of the suit property with an indefeasible title and hence has the right to use and enjoy the same to the exclusion of all others. It submits that the appeal is neither arguable nor will the same be rendered nugatory as the 3rd respondent is capable of compensating the applicant in damages should the appeal ultimately succeed. Further, that in a judgment delivered by the Environment and Land Court (Gacheru, J.) on 29th May, 2021 in ELC No. 567 of 2008 consolidated with ELC No. 24 of 2008, the 3rd respondent was declared the absolute and indefeasible owner of the suit property. The court further held that the 2nd respondent was entitled to exercise its statutory power of sale and that the same was properly exercised, matters not disclosed by the applicant herein who in the 3rd respondent's opinion is guilty of non-disclosure of material facts relevant to the determination of the application under consideration. They are therefore undeserving of the court's exercise of its discretionary power in their favour and urged for the application to be dismissed with costs to them.
10. Our invitation to intervene on behalf of the applicants has been invoked substantively under Rule 5(2) (b) of the Court's Rules. It provides:

“5(2)(b) in any civil proceedings, where a notice of appeal had been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”
11. The principles that guide the Court in the discharge of its mandate under the said Rule and which we fully adopt are as crystallized by the Court in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR. These require an applicant to demonstrate that the appeal or the intended appeal is arguable and second, that the appeal will be rendered nugatory should it ultimately succeed after the substratum of the appeal is no more or out of reach of the successful appellant.



12. Before we delve into the merits of the application we find it prudent to deal with a jurisdictional issue namely, whether we have mandate to grant the reliefs sought. This arises from the nature of the reliefs sought in prayer 3 and 4 thereof vide which we are invited to grant a “temporary injunction.” In *Stanbic Bank Kenya vs. Kenya Revenue Authority* [2008] eKLR the court was explicit that under Rule 5(2)(b) of this court’s Rules, this court only has jurisdiction to grant three orders namely, an order staying the proceedings, an order staying execution of the Superior Court orders, and lastly, an injunction order. There is therefore no mandate in the court to grant the “temporary injunction orders” sought for in prayers 3 and 4 of the application. These would have warranted a striking out order had the application not been dismissed at the interlocutory stage.
13. Turning to the alternative prayer 5, it seeks a status quo order pending the hearing and determination of Milimani, ELC No. 132 of 2015. The reliefs we have stated above as falling under our mandate to grant in the exercise of our mandate under Rule 5(2)(b) are meant to operate pending appeal. Herein the prayer as framed seeks status quo pending the hearing of the suit before the High Court and not pending appeal. They therefore purport to vest upon us original jurisdiction over the High Court matter which mandate we do not have.
14. Should we however be wrong on leaning strictly towards procedural justice as opposed to leaning towards substantive justice in deference to upholding the nontechnicality principle in Article 159(2) (d) of the *Constitution of Kenya*, 2010, of which we are obligated to take note of whether expressly invoked by the parties or otherwise, we find it prudent to consider the merits aspect of the application as well.
15. In satisfaction of the first prerequisite, applicants rely on the annexed memorandum of appeal whose contents are already highlighted above and which we find no need to rehash. Our take on the same is that in law an arguable appeal is not one which must necessarily succeed, but one which is not frivolous but raises a bona fide issue that can be argued fully before the Court. See the case of *Joseph Gitabi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others*. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See the case of *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd.*
16. Applying the above threshold to the rival positions herein on this prerequisite, we are satisfied that the grounds set out in the memorandum of appeal contained in the record of appeal are all arguable.
17. As for the satisfaction of the second prerequisite of the appeal already filed being rendered nugatory should it succeed, we find this prerequisite not satisfied. Our reasons arise from the applicants’ failure to controvert the 3rd respondent’s averments in paragraph 6, 7, 8, 9 and 10 of its replying affidavit wherein it is deposed as follows:

“6. THAT in a judgment delivered by the Environment and Land Court (Hon. Lady Justice Gacheru) on 29th May, 2015 in ELC No. 567 of 2008 consolidated with ELC No. 24 of 2008, the 3rd respondent was declared the absolute and indefeasible owner of the suit property. The court further held that 2nd respondent was entitled to exercise its statutory power of sale and that the same was properly exercised. A copy of the said judgment is annexed hereto and marked “KP-1”.

7. That I confirm that the said judgment has neither been set aside nor discharged.

8. THAT in its suit filed at the Environment and Land Court (ELC No. 132 of 2015), the appellant/applicant is challenging the circumstances under which the suit property was charged to the 2nd respondent.



9. THAT I am advised by the 3rd respondent's advocate on record, which I verily believe to be true, that where property is sold pursuant to the exercise of a chargee's statutory power of sale, the chargor's equity of redemption is extinguished and the only remedy lies in seeking damages against the chargor.

10. THAT I therefore verily believe that the sale of the suit property by the 2nd respondent extinguished the applicant's equity of redemption. Accordingly, the applicant no longer has any rights of ownership over the suit property as alleged or at all."

18. In light of the above uncontroverted position, it is our view that, unless and until the status averred to in the above paragraphs is overturned there is nothing capable of being stayed as the orders sought have been overtaken by events. The position in law is that both prerequisites must be satisfied before relief can issue under the said Rule. Since only one prerequisite has been satisfied the application therefore fails.

19. In the result and on the basis of the totality of the above assessment and reasoning, we find no merit in the application. We, therefore, affirm the orders issued by the court on 16th June, 2021. Costs to abide the outcome of the appeal already filed.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

Signed

DEPUTY REGISTRAR

