



Ubora Housing Co-operative Society Limited v Tripple Two Properties Limited & 5 others; Munyao & another (Interested Party) (Civil Appeal E244 of 2021) [2021] KECA 91 (KLR) (22 October 2021) (Ruling)

Neutral citation: [2021] KECA 91 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E244 OF 2021
J MOHAMMED, A MBOGHOLI-MSAGHA & HA OMONDI, JJA
OCTOBER 22, 2021**

BETWEEN

UBORA HOUSING CO-OPERATIVE SOCIETY LIMITED APPLICANT

AND

TRIPPLE TWO PROPERTIES LIMITED 1ST RESPONDENT

GEOFFREY MAKANYA ASANYO 2ND RESPONDENT

MISORI CONSTRUCTION COMPANY LTD 3RD RESPONDENT

ZABLON MABEA 4TH RESPONDENT

NATIONAL LAND COMMISSION 5TH RESPONDENT

HONORABLE ATTORNEY GENERAL 6TH RESPONDENT

AND

ANCUT MUUMBI MUNYAO INTERESTED PARTY

PETER NZYIMI MUTUA INTERESTED PARTY

(An application from the judgment of the Environment and Land Court at Nairobi (E. O. Obaga, J) dated on 16th June, 2021 in ELC No. 225/2011 as consolidated with Machakos ELC No. 277 of 2010)

RULING

1 The Notice of Motion Application dated 23rd June, 2021 is brought under Certificate of Urgency and pursuant Rules 1 (2) 5 (2) (b) & 47 of [Court of Appeal Rules 2010](#).



The Applicant seeks orders that:

- (i) The application be certified as urgent.
- (ii) The 1st, 2nd, 4th to 6th respondents be and are hereby restrained by themselves, their agents, servants, employees and or anyone claiming under them from evicting the applicant/appellant, or its members trespassing selling encroaching, alienating and/or destroying the property known as L.R. No.337/1631 (L.R No74968) (the suit property) situated in Mavoko Municipality pending the hearing and determination of this application.
- (iii) The 1st, 2nd, 4th to 6th respondents be and are hereby restrained by themselves, their agents, servants, employees and or anyone claiming under them from evicting the applicant/appellant or its members trespassing selling encroaching, alienating and/or destroying the property known as L.R. No. 337/1631 (I.R No.74968) situated in Mavoko Municipality pending the hearing and determination of this appeal.
- (iv) Costs of the application be provided for.
- (v) Any such other appropriate order as this honorable court may deem fit to grant in the interest of justice.

2 The Application is supported by a certificate in support of urgency, an affidavit in support of urgency and a supporting affidavit sworn by the applicant dated 9th July, 2021.

3 The parties were directed to file written submissions for hearing on 7th September, 2021.

4 The grounds in support of the application are as follows:

- i. That the applicant/appellants and its members will be evicted from their homes where they have been enjoying quiet possession together with their families since 2009.
- ii. That the applicant/appellant and its members will suffer irreparable harm whose compensation by way of damages would not be adequate and the applicant/appellant will thereby be denied full recourse to its legal remedies.
- iii. That if the respondents are allowed to go ahead and deal with the suit property, both the applicant/appellant's proprietary rights and constitutional rights will be severely prejudiced as it would render the appeal nugatory and would have the effect of denying the applicant/appellant's right over the suit property.
- iv. The 1st respondent may gain forceful entry into the suit property, demolish the homes which the applicant/appellant's members have developed over the years massive five-bedroom maisonettes.
- v. That the family members of the applicant/appellants consisting of children and elderly persons, women and persons with disabilities are likely to be thrown out and rendered homeless.
- vi. That the effect of the impugned judgment is to the effect that the interim orders granted by the Environmental and Land Court to the applicant stands



vacated leaving the applicant with no protection against any dealing in the suit property.

- vii. That the crux of the appeal herein hinges on the 1st respondent's application, processing, and issuance of a title in disregard to the existing title held by the applicant/ appellant since 2009.
- viii. That the issuance of the grant No. 13063 L.R. No.337/1631 to the 1st respondent notwithstanding that the suit property was not available but in actual possession and enjoyment of the 2nd interested parties who are members of the appellant and the 1st interested party is tainted with illegality, corruption, and fraud.

5 Whether the Applicant has satisfied the requirements necessary for granting an order for stay of execution. The Supreme Court in Civil Application 12/15-*Deynes Muriithi & 4 Other v LSK & Another* [2016] eKLR stated that Rule 5 (2) (b) applications arise at an interlocutory stage and the orders issued thereunder are for the purpose of protecting the subject matter of an appeal, the Court of Appeal having yet to finally determine the appeal.

6 In the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 Others*, Sup. Court App 16/2015 [2015]eKLR [23] It is clear to us that Rule 5(2) (b) is essentially a tool for preservation. It safeguards the substratum of the appeal in consonance with principles developed over the years.”

[“27] Rule 5 (2) (b) of the Court of Appeal Rules is derived Article 164(3) of the Constitution. It illuminated the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of the appeal/intended appeal.”

7 This Court has set out the parameters to be met for an order of stay to be granted in an application under Rule 5 (2) (b). In the case of *Alferd Mincha Ndubi v Standard Limited* [2020] eKLR. This court quoted with approval the case of *Ishmael Kangunyi Thande vs Housing Finance Company of Kenya Limited* Civ. Appl No. Nai 157/2006 to succeed in an application in 5 (2) (b) the applicant has to establish that: -

- i. The Appeal is arguable.
- ii. The Appeal is likely to be rendered nugatory if the injunction is not granted and Appeal succeeds

8 These principles were restated by this Court *Multi Media University & Another v Prof. Gitile N. Naituli* (2014) eKLR ‘...from the long line of decided cases on Rule 5(2)(b) the jurisprudence is underlined in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others* (2013) eKLR as follows:

- i. In dealing with Rule 5 (2) (b) the court exercises original and discretionary jurisdiction.
- ii. The discretion is wide and unfettered if it is just to do so.
- iii. Court becomes seized of the matter only after Notice of Appeal is filed under Rule 75.
- iv. In considering whether the appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.



- v. An applicant must satisfy the twin principles.
- vi. Whether appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
- vii. Arguable appeal is not one that will necessarily succeed but one which ought to be argued fully before court and is not frivolous.
- viii. The court must not make a definitive/final finding as to facts of law in an application under Rule 5 (2) (b).
- ix. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party.

A. Is the Appeal arguable?

- 9 In the case of *Wasike vs Swala* [1984] 591 this Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court.
- 10 In the case of *Attorney General v Okiya Omtata & Anor* [2019] eKLR this Court held “the principles for our consideration in exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay is well settled. Firstly, the applicant must satisfy that it has an arguable appeal. However, this is not to say that the appeal will necessarily succeed but suffice that the appeal is not idle or frivolous.”
- 11 This Court has held in *Co-operative Bank of Kenya Ltd v Banking Insurance and Finance Union Kenya* [2014] eKLR ‘it is sufficient that the issues raised are arguable.’ In *Kisumu Civil Appeal 74/2016, George O. Gache & Anor vs Judith Akinyi Bonyo & Others* this Court stated ‘at this stage the court is not expected to inquire into the merits of the case and whether or not the appeal will succeed. It is sufficient that the applicant has met the threshold as existence of a single bona fide issue is sufficient.’
- 12 On the issue of an arguable appeal, perusal of the Memorandum of Appeal herein dated 23rd June, 2021 raises some arguable points. One of the arguable issues, in the Memorandum of Appeal addresses the issuance of title to the 1st respondent, despite there being no challenge having been raised against the applicant’s title. There is also the question regarding the applicant having possession and enjoyment of the suit property, and the legality of the 1st respondent’s title, particularly the procedure leading to the 1st respondent taking over the applicant’s title, as well as ownership of the suit property.

B. Will the Appeal be rendered nugatory should the injunction not be granted?

- 13 On the appeal being rendered nugatory, this Court has held in the case of *Reliance Bank Limited v Norlake Investment Limited* [2002] 1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides. (see also *Oraro & Rachier Advocates vs Co-operative Bank of Kenya* [1999] LLR 1118.
- 14 In the case of *African Safari Club Limited vs Safe Rentals Limited*, Nai. Civ. App 53/2010 this court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal



footing in so far as is practicable.” In this the court is to decide which party’s hardship is greater.

- 15 With the above in mind, and the applicant having stated that its members would suffer irreparable harm and loss should the orders sought not be granted. This Court stated in *Eso Kenya Limited v Mark Makwata Okiya* Civil Appeal No. 69 of 1991, ...as it is settled law, that where the remedy sought for can be compensated by an award of damages, then the equitable relief of injunction is not available.
- 16 We note that the 1st respondent already has title in its name, but not in possession. From the record, although the suit property changed hands in June, the applicants have not yet been evicted. If the application is not allowed, the substratum of the suit would be destroyed, and render the appeal nugatory.
- 17 In the circumstances the applicant has demonstrated an arguable aspect of the appeal and that it would be rendered nugatory if the instant application is dismissed and the appeal succeeds.
- 18 We find therefore that the applicant is entitled to the prayers sought, and order that the 1st, 2nd, 4th to 6th respondents be and are hereby restrained by themselves, their agents, servants, employees and or anyone claiming under them from evicting the applicant or its members, trespassing, selling encroaching, alienating and/or destroying the property known as L.R. No.337/1631 (L.R No.74968) situated in Mavoko Municipality pending the hearing and determination of the intended appeal

The costs of the application shall abide by the determination of the appeal

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

J. MOHAMMED

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

