



REPUBLIC OF KENYA



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**Joho v Doshi & 4 others (Civil Application 29 of 2020)
[2021] KECA 137 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 137 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 29 OF 2020
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
NOVEMBER 5, 2021**

BETWEEN

ALI HASSAN JOHO APPLICANT

AND

ASHOK LABSHANKER DOSHI 1ST RESPONDENT

PRATIBHA ASHOK DOSHI 2ND RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 3RD RESPONDENT

BENARD OCHIENG OGUTU 4TH RESPONDENT

NATIONAL LAND COMMISSION 5TH RESPONDENT

(An application for stay of proceedings and execution pending appeal arising from the ruling and order of the Environment & Land Court at Mombasa (Munyao Sila, J.) dated 12th February 2020 and 22nd April 2020 in ELC Case No. 33 of 2019)

RULING

1. In his application dated 20th May 2020 presented under Rule 5(2)(b) of the *Court of Appeal Rules* among other provisions, the applicant, Ali Hassan Joho, seeks orders of stay of proceeding and execution of the order of contempt given by the Environment and Land Court (ELC), Munyao Sila, J. on 12th February 2020.
2. The background, in brief, is that Ashok Labshanker Doshi and Pratibha Ashok Doshi, the 1st and 2nd respondents respectively, filed suit against the County Government of Mombasa and Bernard Ochieng Ogotu, the 3rd and 4th respondents respectively, seeking a declaration that they are the owners of the property known as MN/VI/3458, situated in Chamgamwe, Mombasa County. In the suit, the 1st and 2nd respondents asserted that officers of the County Government of Mombasa joined with the



4th respondent in wrongfully invading the property and vandalizing it claiming that the 1st and 2nd respondents had grabbed the property from Chamgamwe Secondary School. In the same suit, they sought an order of permanent injunction to restrain the 3rd and 4th respondents from interfering with the property.

3. In the interim, pending the hearing of an application for temporary orders that the 1st and 2nd respondents filed simultaneously with the suit, the ELC issued orders on 6th March 2019 that were extended on 9th April 2019 preventing interference with the property. Those orders were to last until 27th June 2019 when the application for interim relief was scheduled to be heard inter parties. According to the 1st and 2nd respondents, on 10th May 2019, and notwithstanding that there were orders in force preventing interference with the property, the applicant and the 4th respondent accompanied by other leaders from the County Government of Mombasa, County Askaris and about 100 hired goons, invaded the property, broke down the gate, and held a public rally on the property claiming that the 1st and 2nd respondents were land grabbers.
4. Soon thereafter, the 1st and 2nd respondents presented an application to the ELC dated 17th May 2019 seeking orders that:

“Ali Hassan Joho who is the Governor of the [3rd respondent] herein, Jaffer Suleiman Moshesh who is the Chief Officer in the Department of Lands, Planning and Housing of the [3rd respondent] and Benard Ochieng Ogutu, the [4th respondent] herein, jointly and severally be summoned by this Court to show cause why they should not be committed to civil jail for six months for disobeying this Honourable Court’s order made on 6th March 2019 and amended on 9th April 2019.”

5. After hearing and considering that application, in which the present applicant does not appear to have participated, the learned Judge of the ELC delivered a ruling on 12th February 2020 in which he found the applicant and the 4th respondent to have acted in disobedience of the orders of the court. He directed them to attend court on a date to be fixed for purposes of mitigation.
6. Aggrieved, the applicant, through the firm of Balala & Abed Advocates, presented an application dated 20th February 2020 before the same court seeking the setting aside of the ruling of 12th February 2020. On the same date, the said firm of advocates lodged a notice of appeal dated 19th February 2020 on behalf of the County Government of Mombasa.
7. After hearing the parties on the applicant’s application dated 20th February 2020, the learned Judge declined to set aside the orders given on 12th February 2020 and dismissed the application in a ruling given on 22nd April 2020. Dissatisfied, the applicant, through the said firm of Balala & Abed Advocates, lodged a notice of appeal dated 23rd April 2020 signifying his intention to appeal against the ruling of 22nd April 2020.
8. On 20th May 2020, the applicant lodged the present application in which he seeks an order to stay proceedings before the lower court as well as an order to stay execution of the order made on 12th February 2020. The prayer is in the following terms:

“That there be a stay of proceedings and execution of the Order of contempt of 12th February 2020 in ELC 33 of 2019 delivered by the Honourable Justice Sila Munyao pending the hearing and determination of the appeal from that decision and the decision of refusal to set aside the decision in the ruling of 22nd April 2020.



9. Urging the application before us, learned counsel Mr. Mohamed Ali for the applicant referred to the grounds in support of the application, the supporting affidavit and the submissions and authorities. He submitted that the intended appeal is arguable; that for instance there is the question whether the Judge erred in failing to consider that the applicant was not a party to the proceedings that culminated in the orders of 12th February 2020; that having regard to Article 176 of the Constitution and Section 2 and 6 of the County Governments Act, 2012, the Judge erred in concluding that all employees, agents and all persons acting at the behest of the County Government of Mombasa are bound by the court order; that before making the orders against the applicant, the High Court should have been satisfied beyond any shadow of doubt that the applicant committed the alleged contempt with full knowledge or notice of existence of the order of the court.
10. As to whether the intended appeal will be rendered nugatory unless the orders sought are granted, counsel submitted that the enforcement of the impugned orders will result in deprivation of liberty which will prevent the applicant from discharging his functions and that the harm would be irreversible. Counsel cited extensively from past decisions of the Court in that regard.
11. The application was supported by the 3rd respondent, the County Government of Mombasa appearing through learned counsel Mr. Tajbhai.
12. In opposition to the application, Mr. Oluga learned counsel for the 1st and 2nd respondents relied on a replying affidavit sworn by Ashok Labshanker Doshi, the 1st respondent and on grounds of opposition, written submissions and supporting authorities which he highlighted. It was submitted that the applicant's application is incompetent; that the applicant was not a party to the proceedings before the lower court and therefore has no right to appeal nor to file the present application; that not having been a party in the proceedings before the lower court, the applicant should have sought leave to be made a party to the proceedings in the first instance before seeking any redress; that while the orders sought to be stayed were given on 12th February 2020, the intended appeal is against a subsequent order given on 22nd April 2020; that there is in any case no proper notice of appeal in relation to the orders given on 12th February 2020.
13. It was urged that the purported notice of appeal dated 19th February 2020 in relation to the ruling of 12th February 2020 is irregular; that though filed by the firm of Balala & Abed Advocates on behalf of the 3rd respondent, County Government of Mombasa, that firm does not act for the 3rd respondent which is represented by the County Attorney and no notice of change of advocates was filed; that while in the draft memorandum of appeal the applicant indicates that he intends to appeal against the orders of 22nd April 2020, he nonetheless seeks to stay orders given on 12th February 2020 with respect to which there is no appeal; and that the orders given on 22nd April 2020 are not capable of being stayed as they are not positive orders.
14. It was submitted further that the intended appeal is frivolous and lacks merit; that the claim that the applicant was condemned unheard is baseless as the County Attorney made oral and written submissions on his behalf; that the claim that the applicant was not heard is equally baseless as the applicant, as the Governor of the 3rd respondent, was bound by the orders in that capacity and it is impossible to serve each employee of the 3rd respondent.
15. We have considered the application, the affidavits, the submissions, and the authorities cited. Under Rule(5)(2)(b) of the Court of Appeals which the applicant has invoked in this application, the Court may, in any civil proceedings, where a notice of appeal has 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. As correctly stated by counsel on both sides, to succeed in an application of this nature



the applicant must demonstrate that the intended appeal is arguable and that if the orders sought are not granted, the intended appeal would be rendered nugatory if the appeal succeeds. See for example *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR*.

16. We are not at this stage dealing with the substantive appeal, and the extensive submissions made by counsel before us will perhaps be more pertinent when the appeal is heard. On our part, we must be guarded in our pronouncements in this ruling, lest we prejudice the determination of the appeal itself. That said, there are two preliminary issues taken by counsel for the 1st and 2nd respondents. The first is that the applicant was not privy to the proceedings in the lower court and cannot therefore appeal the decision of the lower court. Secondly that the applicant has no appeal in relation to the order given on 12th February 2020 as the notice of appeal in that regard is by the 3rd respondent. And finally, that the orders of April 2020 in respect of which the appellant has lodged a notice of appeal are negative orders that are incapable of being stayed.
17. On the first preliminary issue, it will suffice for now to refer to Rule 75(1) of the Court of Appeal Rules which provides that

“Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court...” That provision has room for any person affected by a decision of the lower court and who desires to appeal to this Court to file a notice of appeal notwithstanding that such person was not a party to the proceedings in the lower court. [See for instance, *Commercial Bank of Africa Limited vs. Isaac Kamau Ndirangu, Civil Appeal No. 157 of 1991 [1992] eKLR*]. We are satisfied that the applicant falls within Rule 75(1) of the Court’s rules.

18. As to whether there is a notice of appeal by the applicant in relation to the ruling of 12th February 2020, the notice of appeal exhibited in that regard is filed by the firm of Balala & Abed Advocates for the applicant, though the party indicated as the intended appellant is the 3rd respondent. Counsel for the 1st and 2nd respondents has argued that the notice of appeal in relation to the orders of 22nd April 2020 cannot be the basis for staying execution of the earlier of 12th February 2020 in respect to which there is no notice of appeal by the applicant. We think there is merit in that argument as it accords with the decision of this Court in *Nguruman Ltd vs. Shompole Group Ranch & another [2014] eKLR*. However, in addition to the prayer for an order of stay of execution of the order of 12th February 2020, the applicant has also sought an order for stay of proceedings, which prayer may properly be considered based on the notice of appeal in relation to the impugned order of 22nd April 2020 with respect to which the applicant lodged a notice of appeal.

19. Turning to the substance of the application, the first issue is whether the intended appeal is arguable. As this Court stated in *Dennis Mogambi Mong’are vs. Attorney General & others [2012] eKLR*:

“An arguable appeal is not one that must necessarily succeed; it is simply one that is deserving of the Court’s consideration.”

In his draft memorandum of appeal, the applicant complains that the learned Judge erred in failing to consider that he was not a party to the proceedings. There is also the complaint that the applicant was not served with the application dated 17th May 2019 that culminated in the adverse orders and that the Judge wrongly assumed that the County Attorney of the 3rd respondent represented the applicant. These complaints merit consideration by the Court. We do not think the intended appeal is frivolous. It is indeed arguable.



- 20. As to whether the appeal will be rendered nugatory unless we grant the orders sought, we bear in mind that the object of Rule 5(2)(b) which is “to ensure the just and effective determination of appeals” [per Githinji JA, in *Equity Bank Limited v West Link Mbo Limited Civil Application No. Nai 78 of 2011*]. It was urged, and we are persuaded, that the applicant is at risk of being deprived of his liberty and that the resulting harm, in that event, would be irreversible if the appeal subsequently succeeds.
- 21. Based on the foregoing, we are satisfied that there is merit in the application. We hereby order a stay of proceedings in ELC 33 of 2019 pending the hearing and determination of the applicant’s appeal arising from the ruling of the ELC given on 22nd April 2020. The order of stay of proceedings is conditional upon the applicant filing and serving his memorandum and record of appeal within 45 days from the date of delivery of this ruling failing which the orders granted herein will automatically stand discharged.
- 22. The costs of the application shall be costs in the appeal.

DATED AND DELIVERED AT MOMBASA THIS 5TH DAY OF NOVEMBER 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

