



Kamoche & 34 others v Aberdare Investment Limited; Kenya Commercial Bank (Third party); Kiarie (Interested Party) (Civil Appeal (Application) 279 of 2018) [2021] KECA 194 (KLR) (5 November 2021) (Ruling)

Neutral citation: [2021] KECA 194 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 279 OF 2018
F SICHALE, PO KIAGE & J MOHAMMED, JJA
NOVEMBER 5, 2021**

BETWEEN

PAUL NYANJUI KAMOCHE & 34 OTHERS APPLICANT

AND

ABERDARE INVESTMENT LIMITED RESPONDENT

AND

KENYA COMMERCIAL BANK THIRD PARTY

AND

WILSON KIARIE INTERESTED PARTY

(Being an application for an injunction pending the hearing and determination of the appeal against the ruling and order of the Environment and Land Court of Kenya at Nairobi (Obaga, J.) dated 15th October, 2020 in ELC No. 342 of 2013)

RULING

Background

1. The application before the Court dated 26th October, 2020 has been brought under Rule 5(2)(b) of the [Court of Appeal Rules](#). The applicant herein seeks the Court to issue the following orders in the main:

1. That pending the hearing and determination of NAI ELC NO. 342 OF 2013, the 1st Respondent herein be and is hereby restrained from fencing off, developing and/or in any other way dealing with the suit property.



2. That costs be in the cause.

2. The genesis of events that led to this application was a suit (Nai Milimani) ELC No. 342 of 2013 filed by respondent in the Environment and Land Court (ELC) against the applicants seeking in the main an order of eviction on the grounds that the applicants had illegally occupied a property known as LR. No. 4953/2157 (the suit property). Aberdare Investment Limited, Kenya Commercial Bank and Wilson Kiarie are the respondent, the Third Party and the Interested Party respectively.
3. The respondent and the third party filed two separate applications seeking that the applicants deposit security for costs. By a ruling delivered on 13th June 2018, Obaga, J. ordered the applicants to pay a combined security for costs of Kshs. 10,000,000.00 within 90 days failing which the respondent and the third party were at liberty to apply for dismissal of the counterclaim as per Order 26 Rule 5(1) of the Civil Procedure Rules.
4. On 28th March 2019, when the applicants failed to deposit the security for costs as ordered, the respondent applied for dismissal of the counter claim. The learned Judge dismissed the applicants' counterclaim which prompted the applicants to file a motion dated 14th January, 2020 seeking a temporary injunction against the respondent restraining it or its agents from developing or dealing with the suit property in any way pending the determination of the suit. By a ruling delivered on 15th October, 2020, the learned Judge dismissed the application with costs.
5. Aggrieved, the applicant filed the instant motion based on 8 grounds and supported by an affidavit sworn by Ezekiel Mulandi, (Ezekiel), the 24th applicant herein. He deposed that the respondent has proceeded to construct and make deep excavations on the suit property with the aim of altering it; that he and the other applicants are apprehensive that the respondent will evict them from the suit property and this will compromise the subject matter of the appeal. The applicants urged us to issue the injunctive relief to preserve the substratum of the appeal.
6. In opposition, the respondent filed a replying affidavit sworn by John Njaaga Wango, the Managing Director who contended that:

the orders sought herein can only be issued by the High Court are therefore an abuse of the Court process; the applicants must first comply with the order of the ELC before this Court can grant them an audience; that the applicants have neither given a reason for their non-compliance with the court order nor sought an extension of time for the same from the High Court; and that this application is another attempt to delay the conclusion of the matter and keep the respondent in court in perpetuity. The respondent urged us to dismiss this application with costs as it has no merit.

Determination

7. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction of this Court under Rule 5(2)(b) of this Court's Rules **is discretionary and guided by the interests of justice.**
8. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled as was observed by this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is



arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

9. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. In *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR this Court described an arguable appeal in the following terms:

“vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.

viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

10. We have carefully considered the grounds set out in the motion. In our view, it is arguable inter alia who is the rightful owner of the suit property. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the appeal is arguable.

11. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the appeal succeeds, in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* (supra) this Court stated that:

“ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

12. In determining whether or not an appeal will be rendered nugatory the Court has to consider the conflicting claims of both parties and each case has to be considered on its merits. We find that in the circumstances of the instant application, even though the applicant can be compensated in damages, the applicants face the risk of being evicted from their homes and thus face undue hardship. In *Jim Wachira Kabiru v Susan Wangui Karanja & 2 others* [2015] eKLR this Court stated as follows:

“The applicant is full of valid apprehension that the property could, unless this Court intervenes, be sold, transferred, conveyed or otherwise dealt with to the applicant’s detriment. Were such a fear to materialize, the property would be beyond the reach of the applicant and the appeal would be a mere going-through-the motions. Such a result should not be countenanced by a court of law and equity which ought to preserve the substratum of its proceedings.”

13. In the circumstances of the instant application, we are persuaded that the applicant has demonstrated an arguable appeal which will be rendered nugatory if the orders sought are not granted.

14. From the circumstances of the application before us, we are satisfied that the applicant has satisfied the twin principles for the grant of an injunction pending the hearing and determination of the appeal in



accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in the case of *Stanley Kange'the Kinyanjui* (supra).

15. The upshot is that the application dated 26th October, 2020 is allowed. Costs shall abide the outcome of the appeal.

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

P.O KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

