



**Mbaru & 12 others v Mombasa County Government & 20 others (Civil Application E020 of 2021) [2021] KECA 136 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 136 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E020 OF 2021  
A MBOGHOLI-MSAGHA, SG KAIRU & P NYAMWEYA, JJA  
NOVEMBER 5, 2021**

**BETWEEN**

**JUSTUS CHAI MBARU & 12 OTHERS ..... APPLICANT**

**AND**

**MOMBASA COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**BUXTON POINT APARTMENTS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**KHALIFA MOHAMED & 17 OTHERS ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application from the Ruling of Environment and Land Court at Mombasa (S. Munyao, J.) delivered on 3rd March 2021 in Mombasa Environment and Land Petition No. 28 of 2020)*

**RULING**

- 1 The applicants filed this application seeking orders of injunction restraining the 1st and 2nd respondents by themselves, their employees, servants and agents from interfering with the applicants' quiet possession and enjoyment of all the properties known as Plot Nos. Mombasa/Block XVII/625, Mombasa/Block XVII/985 and Mombasa/Block XVII/981; more specifically that the 1st and 2nd respondent be directed not to take any further action on the demolition or construction of any structures on the suit property pending the intended appeal by the applicants.
- 2 The application is premised on the grounds that applicants filed Mombasa ELC Petition No. 28 of 2018 against the respondents which was dismissed on 3rd March 2021 and the 1st and 2nd respondents allowed to carry out demolition of the 520 units on the suit property (Buxton Estate). The eviction of the applicants took place on 4th March 2021 and the 1st and 2nd respondent commenced demolition



- by way of removal of the doors and windows of the 520 units and fenced off the entire 14 acres, restricting entry and exit therefrom.
- 3 It is the applicants' case as follows; The buildings thereon are still intact. The applicants have already filed their record of appeal and are ready to prosecute the appeal without any delay and the appeal raises very serious issues of law. Even though the applicants have been evicted, the issue of ownership and right to occupy the suit properties is yet to be determined on appeal. The applicants stand to suffer irreparable damage and once construction works are carried out by the 1st and 2nd respondents, the same will render the appeal nugatory.
  - 4 The court is under a duty to preserve the substratum of the intended appeal and that the applicants have an undoubted right of appeal which ought to be protected by the court. The applicants, in their appeal, have disclosed serious grounds of appeal which clearly prove that the appeal is arguable. That the application has been made without unreasonable or inordinate delay and it is in the interests of equity and justice that the application be granted as prayed.
  - 5 Through a replying affidavit sworn by Dr June J. Mwajuma, the Chief Officer, Lands Housing, Physical Planning and Urban Renewal of the 1st respondent, the 1st respondent opposed the application. Dr Mwajuma deponed that there was no forcible eviction of any of the residents of Buxton Estate; but, on the dismissal of the applicant's petition, the residents agreed to a relocation plan formulated by the 1st and 3rd respondents, 488 of the tenants including the 8 of the applicants, either by themselves or through their spouses, voluntarily executed Tenancy Termination Agreements and collected their agreed ex gratia payments.
  - 6 It was only after such voluntary exit by the former residents that the demolition commenced by removal of doors and windows on 5th March 2021 and as at 9th March all the former residents had left apart from the personnel carrying out the demolition. Dr Mwajuma deponed that this application has been overtaken by events since the applicants forfeited their rights by executing the Tenancy Termination Agreements, voluntarily exiting and accepting the ex gratia termination payment.
  - 7 Dr Mwajuma contended that no useful purpose will be served by maintaining the partially demolished buildings to simply waste away, but it will be irresponsible to do so, especially since it was uncovered that asbestos had been used in the roofs of the buildings. The commencement of the demolition of the buildings was actually quite fortuitous as the health hazard presented by the asbestos meant that the buildings are not fit for human habitation and should be brought down in the interest of public health and safety as soon as practicable. The 3rd respondent identified and contracted a licensed specialist to carry out the removal and disposal of the asbestos with the approval of NEMA.
  - 8 Dr Mwajuma further deponed that the applicants have failed to disclose that a separate petition Mombasa Petition No. E017 of 2021 with the 13th applicant as the lead petitioner was lodged in the High Court at Mombasa seeking similar injunctive relief as the present application. This amounted to playing lottery with the judicial process on the part of the applicants.
  - 9 In addition Dr Mwajuma deponed that the appeal is not arguable and that the grounds of appeal raised by the applicants are frivolous in that there was no credible challenge to the superior court's conclusion that most of the grounds on which the petition was predicated was res judicata; that the doctrine of ex turpi causa non oritur actio was subservient to that of res judicata; and that there was adequate public participation in respect to the relocation of the residents of Buxton Estate.
  - 10 The 2nd respondent also opposed the application through a replying affidavit sworn by Ahmed Badawy, its Chief Executive Officer. Mr. Badawy contended that the application has failed to meet the threshold for the grant of an injunction in that the applicants have failed to establish a prima facie



case with a probability of success; the applicants have failed to demonstrate that they would suffer irreparable losses that cannot be compensated by damages; and that the balance of convenience tilts in favour of the 2nd respondent as it stand to suffer grave harm and financial losses should the orders sought be granted, and because no undertaking as to damages has been provided by the applicants.

- 11 In addition he stated that the orders sought in the application have been overtaken by events as the buildings in the suit property have been demolished by the 1st respondent and the 2nd respondent has commenced construction on the suit property on the faith of the judgment that is the subject of the applicants' intended appeal. Further, the construction on the suit property has already commenced and is at 10% and there are third parties with legal beneficial interest over the suit property who have executed sale agreements with the 2nd respondent.
- 12 The first phase of the project consisting of 500 houses according to Mr. Badawy has already been sold out to members of the public, and that the competing public interest of the project's aim to provide affordable housing trumps the private interest of the 13 applicants. He stated that the 2nd respondent has also entered into contracts with other stakeholders in the project and any injunction will tremendously affect the rights, interests and obligations of these third parties.
- 13 It is the 2nd respondent's case that the applicants have come to court with unclean hands as they failed to disclose material facts thereby misleading the court. The applicants are on a fishing expedition, having petitioned the Senate and having instituted another suit Mombasa Petition E017 of 2021. The 2nd respondent and Mombasa residents stand to suffer huge financial losses unless the applicants give security equivalent to the value of the project.
- 14 The 4th to 21st respondents filed grounds of opposition to the application that mirrored the averments of the 1st and 2nd respondents. The application was disposed of by way of written submissions that were thereafter highlighted in open court by the parties' respective counsel.
- 15 Mr Gikandi, counsel for the applicants, submitted that the application met the threshold required under Rule 5 (2) (b) of the [Court of Appeal Rules](#) for the orders sought to be granted. Counsel submitted that the applicants had an arguable appeal in that their appeal raised the issue of whether the suit property was public land leased to the 1st respondent by the Government; and whether the alienation of the suit property to create a public private partnership for the benefit of the 1st and 2nd respondents ought to have been approved by the Government and approved by the 3rd respondent pursuant to Article 67 of the Constitution and Section 52 (a) of the [National Land Commission Act](#).
- 16 Counsel submitted that the other key triable issue was whether the trial court rightly held that the petition was res judicata yet the issue of whether it was the Government of Kenya or the 1st respondent who owned the suit property was not decided in any other matter; and yet the applicants had pleaded that the actions of the respondents amounted to fraud and res judicata cannot be used to defeat a claim based on fraud as per the doctrine of ex turpi causa non oritur actio.
- 17 It was submitted further that the applicants brought the petition as citizens challenging the legality of the public private partnership project on the strength of Article 67 of the Constitution. That the applicants could properly file the petition regardless of whether their connection to the suit property was as tenants of the 1st respondent was terminated and regardless of the fact that some applicants had received ex gratia payment.
- 18 The applicants submit that the appeal would be rendered nugatory should the orders sought not be granted. Counsel pointed to the 2nd respondent's averment that it had already entered into a number of Sale Agreements with third parties.



- 19 Counsel contended that the respondents had not produced any evidence to demonstrate that the demolition was complete. It was further submitted that should the 2nd respondent be allowed to continue the project pending the appeal, the character of the suit property would be forever changed. That should the applicants appeal be successful, so many third parties would suffer losses related to the demolition of the houses they had invested in. Lastly, that it was in the public interest for the orders to be granted and the status quo on the ground to be maintained pending the outcome of the appeal.
- 20 Mr Amoko, counsel for the 1st respondent, submitted that the application has been overtaken by events, the former residents of Buxton Estate having voluntarily exited the flats they occupied and collected the agreed ex gratia payments. That it was after this voluntary exit that demolition commenced, which demolition was suspended upon the discovery of asbestos. After the safe removal of the asbestos under NEMA's supervision, the demolition was completed and construction of new units has commenced. Mr Amoko questioned the functional utility of the relief sought in the application and submitted that courts do not act in vain. Counsel relied on the cases of *Kaushik Panchamatia & 3 others v Prime Bank Limited & another [2020] eKLR* and *Raphael Kakene Muloki & another v Cabinet Secretary of Lands & 2 others [2021] eKLR*. Counsel also questioned whether the applicants can seek relief from this court that is inconsistent with their obligation to exit the premises they occupied pursuant to the Tenancy Termination Agreement they executed.
- 21 It is the 1st respondent's case that the applicants have been playing lottery with the judicial process by seeking the same relief from different courts. That a separate petition Mombasa Petition E017 of 2021 with the 13th applicant as the lead petitioner was lodged in the High Court seeking similar injunctive relief pending its hearing and determination. This was an abuse of process that must not be countenanced. Counsel cited the case of *Parag Bhabwanjigbhai Savani v Jitu Tribhovanshai Savani & 2 others [2017] eKLR*. Counsel contended that the applicants' appeal was not arguable whether on the grounds set in their Memorandum of Appeal or at all.
- 22 Ms Abdalla, counsel for the 2nd respondent, submitted that the applicants' appeal fails to disclose any plausible argument in that the appellants seek to establish the proprietorship of the suit property yet they have no proprietorship interest in the land.
- 23 Counsel submitted that the appellants are not in possession of the suit property; that the units thereon have been demolished and a new development has commenced.
- 24 Like the 1st respondent, the 2nd respondent submitted that the application had been overtaken by events and bona fide third parties now have legal rights over the suit property by virtue of executed sale agreements; and that the 1st and 2nd respondents stand to suffer should the project be stopped in any manner.
- 25 Counsel contended that the applicants have not demonstrated how the orders sought will preserve anything in light of the current status quo and, if the orders are not granted, that the applicants cannot be adequately compensated in damage should their appeal succeed.
- 26 Mr Abubakar, counsel for the 4th – 21st respondents, submitted that the interest of the applicants in the suit property was that of tenancy and not ownership. Counsel noted that there were two groups of former tenants, the applicants and the respondents who are agreeable to the project proceeding. Counsel submitted that the orders sought are based on dishonesty since the applicants agreed to exit the property and received ex gratia payments; in addition to the fact that the applicants have another matter pending in court seeking the same orders.
- 27 At the outset, we shall first address the respondents' contention that the applicants have sought similar orders for injunctive relief through a separate interlocutory application in a different case,



being Mombasa Petition No. E017 of 2021. An examination of the impugned application as annexed in Dr Mwajuma’s replying affidavit reveals that the orders sought in that application are for a conservatory order to maintain the status quo on the suit property so that no more acts of demolition or construction continue to take place. In the present application the order sought are for an injunction to restrain the respondents from interfering with the applicants’ quiet possession and enjoyment of the suit property.

28 A conservatory order and an interlocutory injunction are two distinct reliefs with clearly different requirements to be satisfied before a court grants the respective reliefs, as elaborated by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR:

“Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

29 It follows therefore that the two applications each seek different reliefs, even though the effect of the granting of the reliefs may lead to the same outcome. This Court therefore ought not to be precluded from interrogating the merit of the present application.

30 Under Rule 5 (2) (b) of the Court of Appeal Rules, this Court exercises unfettered original, independent and discretionary jurisdiction to order a stay of execution, an injunction, or a stay of further proceedings in civil proceedings where a Notice of Appeal has been lodged. The objective of this discretionary power is to preserve the subject matter of the appeal. See *Equity Bank Limited v West Link Mbo Limited* [2013] eKLR.

31 The principles governing the exercise of this discretion are set out in *Bob Morgan Systems Ltd & another v Jones* [2004] eKLR:

“The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly, that unless a stay or injunction is granted his appeal or intended appeal, if successful, will be rendered nugatory.”

32 Regarding the consideration of whether the appeal is arguable, this Court in *Stanley Kang’ethe v Tony Keter & 5 others* [2013] eKLR elaborated as follows:

“vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.*

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. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.*”

33 In the present case, one of the grounds in the applicants’ Memorandum of Appeal is whether the Environment and Land Court rightly found that the petition was res judicata even with regard to the issues of the nature of ownership of the land and the alleged lack of approval of the National Land Commission before the alienation of the land for the public private partnership project. This is an



arguable issue deserving of being argued fully before the court. It follows therefore that the applicants have satisfied the first requirement of having an arguable appeal.

- 34 Regarding whether the appeal would be rendered nugatory should the orders of injunction sought not be granted, this Court is bound to consider the particular circumstances of each case and weigh the consequences of refusal to grant the orders against any suffering the respondent might undergo while awaiting the hearing and determination of the appeal. See *Reliance Bank Limited v Norlake Investments Ltd* [2002]1 EA 227.
- 35 It has not been disputed that the majority of the applicants herein, either by themselves or through their spouses, executed Tenancy Termination Agreements, effectively extinguishing their tenancy of the units within the suit property. Generally, 488 of the 520 tenants signed the Tenancy Termination Agreements and received ex gratia payments.
- 36 It has also not been disputed that all the former residents of Buxton Estate have exited the suit property with the exception of personnel carrying out demolition. Granting of the orders of injunction for the purposes of restraining the respondents from interfering with the applicants' quiet possession and enjoyment of the suit property would be in vain, as the applicants are no longer in possession of the units in question and a majority no longer have a tenancy relationship with the 1st respondent.
- 37 Whereas it may be stated that the applicants have presented an arguable appeal with respect to the legality of the right of the county government ceding the land to a private developer, it remains doubtful how that alone may render their appeal nugatory. This doubt is informed by their previous status as tenants who have vacated the site and where they have accepted payment as stated above.
- 38 Further to the foregoing, it was indicated that there is a right to acquire the premises once construction is completed. We hasten to add that the averment by Dr. Mwanjuma that demolition has been completed and construction is ongoing has not been seriously disputed by the applicants. The applicants may have satisfied the first limb but have not persuaded us that the appeal shall be rendered nugatory if we decline to grant the orders sought.
- 39 The foregoing being the case, the order that commends itself is that this application must fail and is therefore dismissed. The costs of the application shall abide the outcome of the appeal.

Orders accordingly.

**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**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

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

Signed



**DEPUTY REGISTRAR**

