



**Nyari House Limited v Muthaiga North Residents Association & 2 others (Civil Application 325 of 2019) [2021] KECA 204 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 204 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 325 OF 2019  
MK KOOME, MSA MAKHANDIA & F SICHALE, JJA  
NOVEMBER 5, 2021**

**BETWEEN**

**NYARI HOUSE LIMITED ..... APPLICANT**

**AND**

**MUTHAIGA NORTH RESIDENTS ASSOCIATION ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT**

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

*(Being an application for stay of execution of the orders of the Environment and Land Court at Nairobi (E. O. Obaga, J) dated 15th January 2018 in ELC CASE NO. 115 OF 2015)*

**RULING**

1. The dispute between the parties, a precursor to application that is subject of this ruling landed before the Environment and Land Court in Nairobi (ELC) by way of a petition by the 1<sup>st</sup> respondent against the applicant. The 1<sup>st</sup> respondent sought conservatory orders against the applicant and the 2<sup>nd</sup> respondent from entering, transferring or building on property known as LR No. 28181 Nairobi, the suit property” and issuing approval license to develop the suit property respectively. The court heard the motion and granted conservatory orders against the applicant and the 2<sup>nd</sup> respondent herein. Aggrieved by this decision, the applicant filed a notice of appeal and moved this court by a motion on notice seeking in the main, that we stay all the proceedings in the ELC pending the hearing and determination of the intended appeal.
2. In the grounds supporting of the motion and the supporting affidavit by Daniel Kamita Gichuhi the Director of the applicant, it is said that the ELC declined to order stay of its proceedings; that the suit was scheduled for mention to confirm filing of submissions on the petition on the 22<sup>nd</sup> October



2019; that its intended appeal was arguable and had high likelihood of success; that the respondents would not suffer any prejudice; that if the orders are not granted the intended appeal shall be rendered nugatory, amongst many other grounds.

3. Grounds of opposition dated 17<sup>th</sup> March, 2020 were filed in which it was argued, that the applicant had not demonstrated that it has an arguable appeal with a likelihood of success; that it shall not suffer any prejudice if order for stay is not granted; that the intended development is on public land and therefore the suit ought to proceed to its conclusion.

The application was to be canvassed by way of written submissions. The applicant failed to file its written submissions despite a reminder by email dated 9<sup>th</sup> March 2021 by the Deputy Registrar of this Court.

4. The 1<sup>st</sup> respondent in its submissions maintained that the applicant did not have an arguable appeal so as to enable this court to grant stay of proceedings. The subject matter in the petition before the High Court is on the validity of the title deed issued in respect on the public land which was a matter of public interest. The court should therefore decline stay and allow the petition to proceed to conclusion
5. On whether the appeal shall be rendered nugatory, it was urged that the petition was yet to be concluded and that no final declaration on the validity of the title had been issued. The intended appeal was subject to an interlocutory application. The respondent referred us to the case of *Benson Khwatenge Wafula v. Director of Public Prosecutions & Others [2020] eKLR* in support of its submissions
6. We have considered the application, the grounds of opposition, the submission and authorities cited. The application is premised on Rule 5(2)(b) of this *Court's Rules*.
7. The purpose of this rule is to preserve the substratum of the appeal. The principles that apply to applications of this nature are well known. For the applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same thing as saying that the appeal is not frivolous. Such an applicant must, in addition demonstrate that the appeal would be rendered nugatory absent stay. See *Stanley Kang'ethe Kinyanjui v. Tony Ketter & Others [2013] eKLR*.
8. We have perused the record, the grounds set forth in the draft Memorandum of Appeal hinges on the notice of motion application dated 12<sup>th</sup> May 2017 whose grounds were not for review but rather on appeal and that the judge erred in holding there was no error on the face of the record. The conservatory orders issued against the applicant and the 2<sup>nd</sup> respondent was to preserve the suit property. The interest of the applicant who alleges to have been granted the suit property after surrendering the same is against the 1<sup>st</sup> respondent's interest of being put to public use and not private use. We find the grounds not arguable.
9. What about the nugatory aspect! The applicant has failed to demonstrate the kind of loss it shall suffer absent of stay. The applicant averred on the grounds on the face of the motion that the main petition in the Environment and Land Court was scheduled for mention on 22<sup>nd</sup> October 2019 to confirm the filing of the parties respective written submissions. It may well be that the petition has proceeded to hearing and conclusion Thus the question of the intended appeal being rendered nugatory does arise.
10. Further we may be acting in vain if we were to grant the prayer when the horse has already bolted. This Court has a duty to further the overriding objective, which includes a just and expeditious disposal of suits. In the circumstances of this case the aforesaid objectives would not have been met were we to allow the application. In the premises the Motion fails and is dismissed with costs to the 1<sup>st</sup> respondent.



DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2021.

M. K. KOOME

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

