



Attorney General & 2 others v Pandhal & 4 others (Environment and Land Appeal E012 of 2024) [2024] KEELC 6283 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6283 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E012 OF 2024
SO OKONG'O, J
SEPTEMBER 25, 2024**

BETWEEN

**THE HON ATTORNEY GENERAL 1ST APPELLANT
THE KISUMU COUNTY LAND REGISTRAR 2ND APPELLANT
JOAB ATINGA 3RD APPELLANT**

AND

**ISHWINDER HARJEET PANDHAL 1ST RESPONDENT
EDWIN ZAKAYO OTIENO ODERA 2ND RESPONDENT
PAGE INVESTMENT COMPANY LIMITED 3RD RESPONDENT
EUNICE AKOTH OKUMI 4TH RESPONDENT
ROMANUS OCHEGE AKOTH 5TH RESPONDENT**

(Being an appeal from the ruling delivered on 15th February 2024 by Hon. E.A. Obina (SPM) in Kisumu CMC ELC No. E152 of 2023, Ishwinder Harjeet Pandhal v. Page Investment Co. Ltd. & 6 Others)

RULING

1. The 1st Respondent brought a suit in the lower court against the Appellants and the 2nd to 5th Respondents namely, Kisumu CMC ELC No. E152 of 2023, Ishwinder Harjeet Pandhal v. Page Investment Co. Ltd. & 6 Others (hereinafter referred to as “the lower court”) seeking among others a permanent order of injunction restraining the Appellants and the 2nd to 5th Respondents from alienating, wasting, interfering with trees, selling, or dealing with all that parcel of land known as Kisumu/Municipality Block 11/164 (hereinafter referred to as “the suit property”), and an order of eviction of the Appellants and the 2nd to 5th Respondents from the suit property. The 1st Respondent



- averred that he was the beneficial owner of the suit property and that the Appellants and the 2nd to 5th Respondents had trespassed on the suit property thereby causing him great loss.
2. Together with the plaint, the 1st Respondent filed a Notice of Motion Application dated 24th October 2023 seeking; an interim order for the eviction of the tenants specifically the 5th Respondent from the suit property, an order that the 2nd Appellant discloses the status of the suit property to the 1st Respondent and files a report to that effect in court, a temporary injunction restraining the Appellants and the 2nd to 5th Respondents from fencing or alienating, wasting, entering, encumbering or dealing in any manner with the suit property, and an order that the O.C.S Kondele Police Station does ensure compliance with the order. The 1st Respondent's application was brought on several grounds. The 1st Respondent averred that he purchased the suit property through his deceased father, Harjeet Singh Pandal(deceased). The 1st Respondent averred that the 3rd Appellant and the 5th Respondent had threatened to forcefully continue residing on the suit property without the consent of the 1st Respondent. The 1st Respondent averred that the 2nd Appellant had failed to disclose to the 1st Respondent the registration status of the suit property although the 1st Respondent had a title. The 1st Respondent averred that the 3rd Respondent herein had failed to hand over to the 1st Respondent vacant possession of the property after selling the same to him. The 1st Respondent averred that the illegal conduct of the Appellants and the 2nd to 5th Respondents was likely to breed violence. The 1st Respondent averred that the Appellants and the 2nd to 5th Respondents were likely to change the character of the suit property unless the orders he had sought were granted.
 3. The Appellants herein filed a defence dated 18th March 2024 to the 1st Respondent's suit. The Appellants averred that the suit property together with the house standing thereon was and had always been the property of the Government of Kenya and was assigned to the State Department of Housing and Urban Development. The Appellants averred that the 3rd Appellant was a civil servant and that the suit property was leased to him by the Government on 20th January 2021 at a monthly rent of Kshs. 16,000/-. The Appellants denied that they had trespassed on the suit property as claimed by the 1st Respondent. The Appellants averred that the suit property was not alienated by the Government for private use and as such remained the property of the Government.
 4. The Appellants also opposed the 1st Respondent's application through affidavit sworn by Geoffrey Onyango Nyangi on 15th November 2023. In the affidavit, Geoffrey Onyango Nyangi stated that he was the Kisumu County Director of Housing in the Department of Housing and Urban Development. He stated that the suit property was Government property and that the same was assigned to the State Department of Housing and Urban Development. He stated that the suit property was not subjected to a Boarding Process to enable its alienation as a private property and as such it remained the property of the Government. He stated that the 3rd Appellant was a civil servant and that he applied to be allocated the house as a tenant and the same was allocated to him on 20th January 2021. The Appellant averred that the 3rd Appellant was paying a monthly rent of Kshs. 16,000/- which was being deducted from his salary.
 5. The lower court heard the application and made a ruling on 15th February 2024. In the ruling, the lower court ordered the tenant who was in occupation of the suit property to vacate and hand over possession of the same to the 1st Respondent. The court also ordered the 2nd Appellant to file a report on the status of the suit property. The court made a further order restraining the Appellants and the 2nd to 5th Respondents from interfering with the 1st Respondent's occupation of the suit property pending the hearing and determination of the suit, and that the issue of the ownership of the property be determined at the hearing of the suit.



6. The Appellants were dissatisfied with the said ruling and orders of the lower court and filed this appeal through a memorandum of appeal dated 15th March 2024. Together with the memorandum of appeal, the Appellants filed a Notice of Motion Application dated 19th March 2024 brought under section 76 (h) of the *Civil Procedure Act* and Order 42 Rule 6 of the Civil Procedure Rules. The Appellants sought an order that pending the hearing and determination of the application and the appeal, the 1st Respondent by himself, his servants or agents or otherwise howsoever be restrained from dismantling and wasting the equipment erected on or disposing of, alienating, transferring, charging, leasing or in any manner whatsoever dealing with the suit property. The Appellants also sought an order of stay of execution of the lower court ruling pending the hearing and determination of the appeal.
7. The Application which was supported by the Affidavit of Geoffrey Onyango Nyangi sworn on 18th March 2024 was brought on several grounds. The Appellants averred that the lower court ordered the tenant on the suit property to hand over possession of the same to the 1st Respondent while the 1st Respondent was not the owner of the suit property which he claimed to have purchased through his deceased father, Harjeet Singh Prudman.
8. The Appellants averred that there was no evidence that a Grant of Letters of Administration in respect of the estate of the deceased had been issued to the 1st Respondent which could have given him the locus standi to institute the lower court suit. The Appellants averred that since the 1st Respondent had no capacity to bring the suit, he was not deserving the orders granted by the lower court. The Appellants averred further that the suit property was owned by and was in the possession of the Government which had allocated the same to the 3rd Appellant who was a civil servant working in the Ministry of Interior and National Coordination Department of National Intelligence Service (NIS).
9. The Appellants averred that the lower court orders were final as the effect thereof was to essentially evict the 3rd Appellant from the suit property before the determination of the issue of the ownership of the suit property which was highly contested. The Appellants averred that the lower court erred in granting final orders at an interlocutory stage. The Appellants averred that the 1st Respondent had already moved to dismantle the fence that the Government had put up around the suit property and had replaced it with an iron sheet fence in readiness to erect a stone perimeter wall.
10. The Appellants averred that the appeal raised arguable issues and had high chances of success. The Appellants averred that if the stay of execution sought was denied, it would render the appeal nugatory and the Appellants who represent the Ministry of Housing which was a public institution would suffer irreparable loss. The Appellants averred that the 1st Respondent would not be prejudiced in any way if the orders sought were granted.
11. The Application was opposed by the 1st Respondent through a replying affidavit sworn on 5th July 2024. The 1st Respondent contended that the Appellants' appeal was frivolous and a waste of the court's time. The 1st Respondent reiterated that he was a beneficial owner of the suit property the same having been purchased and registered in the name of his deceased father to hold on his behalf. The 1st Respondent averred that the suit property was transferred and registered in his name pursuant to the succession proceedings that were undertaken in Succession Cause No. E273 of 2022. The 1st Respondent averred that no evidence was placed before the court showing that the suit property was owned by the Government. The 1st Respondent averred that the orders of 15th February 2024 were lawfully and rightly issued by the lower court. The 1st Respondent urged the court to dismiss the appeal.
12. The application was argued by way of written submissions. The Appellants filed submissions dated 24th July 2024. The Appellants submitted that the 1st Respondent lacked the capacity to institute the lower court suit. The Appellants submitted that the 1st Respondent who approached the lower court



as the beneficial owner of the suit property failed to tender evidence showing that he had the authority to act on behalf of the estate of his deceased father.

13. The Appellants submitted that the order for possession that was granted by the lower court was in the nature of a mandatory injunction. The Appellants submitted that the conditions to be satisfied before a mandatory injunction can be granted at an interlocutory stage are very stringent. The Appellants submitted that a mandatory injunction can be granted at an interlocutory stage only in special circumstances that was not established by the 1st Respondent. The Appellants cited *Hezron Kamau Gichuru. Kianjoya Enterprises Ltd & Another* [2022] eKLR and *Mburu v Kibara & 2 Others* (Environment & Land Case 237 of 2021) [2022] KEELC 3226 (KLR) (28th July 2022) (Ruling) in support of this submission. The Appellants submitted that it was not appropriate for the lower court to grant a mandatory injunction before determining the complex issues that had been pleaded by the parties.
14. The 1st Respondent did not file submissions in respect of the Appellants' stay application. The 1st Respondent's submissions dated 22nd April 2024 were in respect of the main appeal which is not before the court for consideration. In the said submissions, the 1st Respondent supported the lower court ruling and orders of 15th February 2024 and urged the court to dismiss the appeal with costs.

Analysis and Determination

Order 42 Rule 6(1), (2) and (6) of the Civil Procedure Rules provides as follows:

6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under sub Rule (1) unless: -
 - a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without undue delay; and
 - b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

15. The Appellants' appeal has two limbs. The first limb is seeking an injunction pending appeal while the second limb is seeking a stay of execution pending appeal. The principles that this court apply on applications for an injunction pending appeal to this court are not different from those applied by the Court of Appeal on applications for an injunction pending the hearing of appeals to that court under



Rule 5(2)(b) of the former Court of Appeal Rules and Rule 43 of the Court of Appeal Rules 2022. The jurisdiction to grant an injunction pending appeal is discretionary and is guided by the interests of justice. In the exercise of this discretion, the court must be satisfied that the appeal before it is arguable and that if the order sought is not granted and the appeal succeeds, the appeal will be rendered nugatory.

16. In *Trust Bank Limited and Another v Investech Bank Limited and 3 Others* [2000] eKLR the Court of Appeal stated 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...”

17. In *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR the same court stated 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.*”

18. I am satisfied from the grounds of appeal put forward by the Appellants against the ruling of the lower court that they have an arguable appeal. It is arguable whether the lower court exercised its discretion properly when it granted a final order of eviction/possession sought in the plaint at an interlocutory stage before the determination of the contentious issue of the ownership of the suit property. It is also arguable whether the 1st Respondent’s suit that was brought in his personal capacity as the beneficial owner of the suit property which he claimed was owned by his deceased father was competent to warrant the grant of the orders the subject of the present appeal. I am also persuaded that the Appellants’ appeal is likely to be rendered nugatory if the injunction sought is not granted. If the 1st Respondent takes possession of the suit property and demolishes the house which is standing thereon, even if the Appellants succeed on the pending appeal, they would not be able to restore the suit property to the same state in which it was before such demolition. The 1st Respondent once he takes possession of the suit property may also sell the property to a third party thereby putting the same beyond the reach of the Appellants. The injunction sought is therefore necessary to prevent the appeal if successful from being rendered nugatory.

19. On the limb of the application seeking a stay of execution pending appeal, the following is my view: In *Kenya Shell Limited v Karuga* [1982 – 1988] I KAR 1018 the court stated that:

“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”



20. I am persuaded that the Appellants' application was brought without unreasonable delay. The ruling of the lower court was delivered on 15th February 2024 and the application herein was filed on 15th March 2024. I am also satisfied that the Appellants are likely to suffer substantial loss if the stay sought is not granted. It is not disputed that the 3rd Appellant is residing on the suit property. It is also not disputed that in the ruling of the lower court which is the subject of this appeal, the court has ordered that the 3rd Appellant vacate the suit property and hand over the same to the 1st Respondent. The effect of this order is that unless the stay sought is granted, the 3rd Appellant risks being evicted from the suit property. That said I do not think that the Appellants would suffer any loss if the 2nd Appellant files a report in the lower court on the registration status of the suit property. On the issue of security, the 1st Respondent has not raised the same. I believe that the Appellants are capable of satisfying the lower court order should their appeal fail.

Conclusion

21. In conclusion, I find merit in the Appellants' Notice of Motion application dated 19th March 2024. That said, this court is alive to the fact that this is an interlocutory appeal and that the main suit is pending determination before the lower court. This court will therefore frame its final orders in the application in such a manner that they will not hinder the progress of the main suit or embarrass or tie the hands of the lower court in whatever final order/s it may wish to issue upon the hearing of the suit. I therefore make the following orders in the matter;

1. The execution of the orders numbered 1, 3 and 5 in the orders issued by Hon. E.A. Obina SPM on 15th February 2024 in Kisumu CMC ELC No. E152 of 2023, Ishwinder Harjeet Pandhal v. Page Investment Co. Ltd. & 6 Others is stayed pending the hearing and determination of this appeal or the final judgment of the court in Kisumu CMC ELC No. E152 of 2023, Ishwinder Harjeet Pandhal v Page Investment Co. Ltd. & 6 Others whichever comes earlier.
2. An injunction is issued restraining the 1st Respondent by himself, his servants or agents or otherwise howsoever from dismantling and wasting the equipment erected on or disposing of, alienating, transferring, charging, leasing or in any manner whatsoever dealing with all that property known as KISU/HOU/HG/15 Milimani Estate, Kisumu also known as Kisumu Municipality/Block 11/164 pending the hearing and determination of this appeal or the final judgment of the court in Kisumu CMC ELC No. E152 of 2023, Ishwinder Harjeet Pandhal v. Page Investment Co. Ltd. & 6 Others whichever comes earlier.
3. If the term of the stay and the injunction granted herein comes to an end as a result of the final judgment in Kisumu CMC ELC No. E152 of 2023, Ishwinder Harjeet Pandhal v. Page Investment Co. Ltd. & 6 Others and the Appellants are aggrieved by such judgment, they would be at liberty to seek a stay of execution of such judgment and/or injunction in fresh appeal proceedings.
4. Each Party shall bear its costs of the application.

DELIVERED AND DATED AT KISUMU ON THIS 25TH DAY OF SEPTEMBER 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Appellants



N/A for the 1st Respondent
Ms. J. Omondi-Court Assistant

