



REPUBLIC OF KENYA



**Aono & another v Ochola & 2 others (Environment and Land Appeal E034 of 2021) [2023] KEELC 711 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 711 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E034 OF 2021  
SO OKONG'O, J  
FEBRUARY 9, 2023**

**BETWEEN**

**LEONIDA SANGONDA AONO ..... 1<sup>ST</sup> APPELLANT**

**GEORGE ODHIAMBO AONO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BERTRAND LUBANGA GAYWA ..... 1<sup>ST</sup> RESPONDENT**

**ELISHA OTIENO OCHOLA ..... 2<sup>ND</sup> RESPONDENT**

**KENGA KALUME NURU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The appellants filed a suit against the respondents in this court on September 6, 2016 namely, Kisumu ELCC No 237 of 2016. The suit was transferred to the lower court sometime in 2018 where it was given a new case number namely, Kisumu CMC ELC No 28 of 2018. In their plaint filed in this court, the appellants averred that all that parcel of land known as Kisumu/Chiga/2 (hereinafter referred to as “the suit property”) was at all material times registered in the name of Henry Aono Onyuro, deceased (hereinafter referred to only as “the deceased”). The appellants averred that the 1<sup>st</sup> appellant was the wife of the deceased while the 2<sup>nd</sup> appellant was his son. The appellants averred that they were the legal representatives of the estate of the deceased.
2. The appellants averred that the deceased died on October 25, 1984 and that prior to and after the death of the deceased they were using the suit property for cultivation. The appellants averred that on August 31, 2016, they discovered that the 1<sup>st</sup> respondent had caused the suit property to be registered in his name on March 5, 1992 and that the property was subsequently transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on April 27, 2004 and October 16, 2013 respectively. The appellants averred that the respondents caused the suit property to be transferred to their names after the death of the deceased before a Grant of Letters of Administration in respect of his estate had been issued.



3. The appellants sought judgment against the respondents for a declaration that the suit property was illegally and fraudulently transferred to the respondents and an order for the rectification of the register of the property by the cancellation of the entries thereon relating to the respondents and the restoration of the property to the name of the deceased as the proprietor thereof.
4. The suit was defended by the 3<sup>rd</sup> respondent only. The 3<sup>rd</sup> respondent averred that he purchased the suit property from the 2<sup>nd</sup> respondent in good faith and was given a title and possession thereof. The 3<sup>rd</sup> respondent averred that the suit against him was malicious and did not disclose any reasonable cause of action. The 3<sup>rd</sup> respondent averred that he was a bona fide purchaser of the suit property without notice of any defect in its title. The 3<sup>rd</sup> respondent averred that he had been in possession of the suit property since he acquired the same and that at no time was it used for agricultural purposes as claimed by the appellants. The 3<sup>rd</sup> respondent denied that he acquired the suit property fraudulently.
5. Following the transfer of the suit to the lower court, the lower court heard the same and rendered a judgment on May 12, 2021. The lower court made a finding that the appellants had not proved their case to the required standard and dismissed the suit with costs to the 3<sup>rd</sup> respondent. The court held that the appellants had failed to prove that the 3<sup>rd</sup> respondent acquired the suit property fraudulently. The court found that the 3<sup>rd</sup> respondent had demonstrated that he was a bona fide purchaser of the suit property without notice of any defect in its title and that if there was any fraud, he was not a party to the same.
6. The appellants were aggrieved by the said decision and filed the present appeal on May 31, 2021. The appellants have challenged the decision of the lower court on several grounds set out in their memorandum of appeal. The appellants have contended among others that the lower court misapprehended and/or ignored their prayer for a declaration that the suit property was illegally and fraudulently transferred to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents despite having before it evidence showing that the 1<sup>st</sup> respondent purportedly acquired the suit property from the deceased without a Grant of Letters of Administration. The appellants have also contended that the lower court failed to appreciate that the 1<sup>st</sup> respondent lacked the capacity to sell the suit property as he did not have a valid title to the property that he could pass to the 2<sup>nd</sup> respondent and subsequently to the 3<sup>rd</sup> respondent. The appellants have contended further that the lower court failed to appreciate that the title that was held by the 1<sup>st</sup> respondent was tainted with illegality the same having been acquired through unprocedural process. The appellants have contended also that the lower court failed to appreciate that the 1<sup>st</sup> and 2<sup>nd</sup> respondents having failed to defend the suit, the allegations that were made against them by the appellants were uncontroverted and vitiated the 3<sup>rd</sup> respondent's title. The appellants have asked the court to set aside the decision of the lower court and to substitute the same with an order granting the prayers that the appellants had sought in the lower court. The appellants have already filed a record of appeal and what remains is directions on the hearing of the appeal.
7. What is now before me is a Notice of Motion application dated December 8, 2022 seeking a temporary injunction restraining the 3<sup>rd</sup> respondent from selling, disposing of, transferring, charging or in any way dealing with the suit property pending the hearing and determination of the appeal. The application which is supported by the affidavit of the 2<sup>nd</sup> appellant sworn on December 7, 2022 has been brought on several grounds. In summary, the appellants have averred that they were dissatisfied with the decision of the lower court and have appealed against the same to this court. The appellants have averred that while the appeal is pending, the 3<sup>rd</sup> respondent has brought surveyors to the suit property which is an indication that he intendeds to subdivide and sell the said property. The appellants have contended that if the suit property is sold or charged, their appeal would be rendered nugatory. The appellants have contended that their appeal has a very good chance of success.



8. The application is opposed by the 3<sup>rd</sup> respondent through a replying affidavit sworn on December 20, 2022. The 3<sup>rd</sup> respondent has contended that the application is based on falsehoods and that the same is incompetent and bad in law. The 3<sup>rd</sup> respondent has averred that the application has been brought several months after the appeal was filed and that the same is an afterthought. The 3<sup>rd</sup> respondent has averred that he is a bona fide purchaser of the suit property without notice of any defect in its title and as such he has an absolute right to use the property. The 3<sup>rd</sup> respondent has averred that there is no evidence placed before the court showing that he has been taking surveyors to the suit property with an intention of selling or charging the same to warrant the court's intervention. The 3<sup>rd</sup> respondent has urged the court to dismiss the application with costs.
9. The application was heard on February 1, 2023. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the 3<sup>rd</sup> respondent in opposition to the application. Finally, I have considered the submissions by the advocates for the parties.
10. Order 42 Rule 6 (6) of the *Civil Procedure Rules* empowers this court to grant a temporary injunction on terms it deems fit so long as the procedure for filing an appeal from a subordinate court has been complied with. It provides as follows:

“(6) Notwithstanding anything contained in sub rule (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 subordinate Court or tribunal has been complied with.”
11. The principles that this court applies on applications for injunction pending appeal 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.
12. In an application made under Rule 5(2)(b) of the Court of Appeal Rules, the Court of Appeal stated as follows in *Trust Bank Limited and Another v Investech Bank Limited and 3 Others* [2000] eKLR :

“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...”
13. 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*



14. I am satisfied from the judgment of the lower court and the grounds of appeal put forward by the appellants that they have an arguable appeal. The appellants adduced evidence before the lower court showing that the deceased who was the first registered owner of the suit property died on October 25, 1984. The appellants also adduced evidence showing that the 1<sup>st</sup> respondent was registered as the owner of the suit property on March 5, 1992 after the death of the deceased. The appellants adduced further evidence showing that they were the legal representatives of the estate of the deceased and that as at March 5, 1992 when the 1<sup>st</sup> respondent got registered as the owner of the suit property, a grant of letters of administration in respect of the estate of the deceased had not been issued.
15. Sections 45 and 82(b)(ii) of the *Law of Succession Act*, Chapter 160 Laws of Kenya prohibits and criminalizes any dealing with the property of a deceased person before a Grant of Probate or Letters of Administration in respect of his estate has been issued and confirmed by the court. It follows therefore that the transfer of the suit property to the 1<sup>st</sup> respondent was illegal, null and void. The 1<sup>st</sup> respondent was therefore a holder of a void title that could only have been obtained by him through fraud. That being the case, it is arguable whether the 1<sup>st</sup> respondent could transfer a valid title to the 2<sup>nd</sup> respondent while he had none and whether the 2<sup>nd</sup> respondent could in turn transfer a valid title in respect of the suit property to the 3<sup>rd</sup> respondent. It is therefore arguable whether the lower court was right in holding that the 3<sup>rd</sup> respondent acquired a valid title from the 2<sup>nd</sup> respondent.
16. I am also satisfied that the appellants’ appeal may be rendered nugatory should they succeed if the order sought is not granted. The 3<sup>rd</sup> respondent is the registered proprietor of the suit property. The 3<sup>rd</sup> respondent unless restrained by the court is at liberty in the exercise of his proprietary rights to deal with the suit property in any manner deemed fit including selling, charging or leasing the same. If the property is sold, it will be put beyond the reach of the appellants in the event that they succeed in this appeal. It is therefore necessary to preserve the property pending the hearing and determination of the appeal.
17. In the final analysis, I find merit in the appellants’ Notice of Motion application dated December 8, 2022. The order that commends itself to me in the circumstances is one that would preserve the suit property while not hindering the use of the property by the 3<sup>rd</sup> respondent pending the hearing of the appeal. I therefore, order that, pending the hearing and determination of this appeal or further orders by the court, there shall be an inhibition inhibiting the registration of any other or further dealings with all that parcel of land known as Kisumu/Chiga/2. For the avoidance of doubt, the 3<sup>rd</sup> respondent is restrained from disposing of, selling, transferring or charging the suit property. The costs of the application shall be in the cause.

**Dated and Delivered at Kisumu on this 9<sup>th</sup> day of February 2023**

**S OKONG’O**

**JUDGE**

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

N/A for the Appellants

Mr Wesonga for the 3<sup>rd</sup> Respondent

**Ms J Omondi-Court Assistant**

