Kaithia v Kavila & another (Civil Application E302 of 2020)
[2024] KECA 1614 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KECA 1614 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E302 OF 2020

DK MUSINGA, MSA MAKHANDIA & S OLE KANTAI, JJA

NOVEMBER 8, 2024

BETWEEN

CHRISTOPHER MWONGELA KAITHIA ..... APPLICANT

AND

FRED KIIO KAVILA ..... 1ST RESPONDENT

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES .... 2ND RESPONDENT

(Being an application for stay of execution pending appeal from the Judgment of the Environment and Land Court at Nairobi (Komingoi, J.) dated 18th July 2019 in ELC Case No. 517 of 2013)

RULING

1. The applicant seeks a multiplicity of orders through this omnibus notice of motion dated September 29, 2020 which is brought under rule 5 (2)(b) and 41 of the Rules of this Court, and Articles 49 and 159 (2)(d) of *the Constitution*. The main orders sought are; stay of execution of the judgment entered in ELC Case No. 517 of 2013 on 18th July 2019 pending hearing of an intended appeal; leave to appeal out of time from the said judgment; and in the alternative, this Court be pleased to order a retrial of the suit before a different judge other than Komingoi, J. who heard it and rendered the impugned judgment.

2. Before we go into the crux of the application, we must point out that the Rules of this Court expressly stipulate matters that are within the purview of a 3-Judge Bench and those that should go before a single judge for hearing and determination. The prayer for leave to file the appeal out of time ought to be heard by a single judge. It is improper to file an omnibus application such as this one. We shall therefore not consider the prayer for leave to appeal out of time.

3. A brief background to this application is that the 1st respondent filed suit against the applicant and the 2nd respondent, to wit, Nairobi ELC Suit No. 517 of 2013, seeking a declaration that he was the owner of the property known as L.R. No. NBI/BLK 211190/00/92 Tassia Estate, Nairobi (the suit property). He also sought an order of a permanent injunction against the applicant and the 2nd respondent to restrain them from dealing with the suit property in any manner that would be detrimental to his interest therein.

4. The trial court (Komingoi, J.) vide a judgment delivered on 18th July 2019 held, inter alia, that the applicant had neglected to file a defence within the stipulated period and did not participate in the proceedings before court. The 1st respondent's case, by way of his testimony, documentary evidence and the testimony of one Pius Musa Sila, an Investment Officer with the 2nd respondent, was therefore uncontroverted. The court issued an order of a permanent injunction as prayed; a declaration that the 1st respondent was the owner of the suit property; awarded him damages for trespass which it assessed at Kshs.300,000; as well as costs of the suit.

5. On 16th September 2020 the trial court issued further orders pursuant to an application by the 1st respondent dated 6th August 2020. The court directed the applicant to demolish the illegal perimeter wall erected on the suit property and to give vacant possession thereof, failing which the 1st respondent would be at liberty to demolish the said wall under the supervision of the Officer Commanding Station, Embakasi Police Station.

6. The applicant intends to lodge an appeal against the decision of the trial court delivered on 18th July 2019 as evinced by the notice of appeal dated 29th September 2020. In his application and affidavit in support thereof, he contends that the matter before the trial court proceeded without his participation. He blames one Messrs Robert Gichimu, an advocate whom he had instructed to handle the matter on his behalf, who allegedly failed to act on the said instructions.

7. As per the memorandum of appeal annexed to the affidavit sworn by the applicant, the learned judge is faulted for allowing the matter to proceed in the absence of the applicant and without sufficient proof of service upon the applicant; finding that the 1st respondent's case was uncontroverted; finding that the 1st respondent was the rightful owner of the suit property; declaring the applicant a trespasser without hearing him; awarding the 1st respondent damages for trespass; and holding that the 1st respondent had proved his case on a balance of probability as against the applicant, who was not heard on merit.

8. He avers that the impugned judgment was obtained irregularly; without according him a fair hearing; and that he only came to learn about it after it had been delivered. He contends that his intended appeal is arguable.

9. On nugatory aspect, he avers that the trial court did not issue any order staying execution of the impugned judgment. He is therefore apprehensive that the 1st respondent may move in and carry out execution against him, which event will render the intended appeal nugatory and occasion him irreparable loss and damage.

10. The applicant filed submissions dated 15th October 2020 reiterating the averments in the application and the applicable principles in an application under rule 5(2)(b).

11. The application was opposed by the 1st respondent through a replying affidavit sworn by Joel M. Kabaiku, his advocate. He averred that the applicant was at all times aware of the suit before the trial court; that his advocates were at all times on record for him, including on the day of delivery of judgment; that the impugned judgment was not obtained irregularly as alleged, given that the matter was heard, determined and judgment rendered, with all the parties represented by their respective

advocates; and that if the applicant was not made aware of the proceedings and judgment in good time, his remedy lies as against his then advocate. We were therefore urged to find that the application is without merit and dismiss it with costs.

12. The 1st respondent filed submissions dated 28th October 2020 reiterating the averments in the replying affidavit, urging us to find that the twin test for an application under rule 5 (2)(b) had not been satisfied.

13. At the hearing hereof, learned counsel Mr. Kabaiku appeared for the 1st respondent. There was no appearance for the applicant and the 2nd respondent, though duly served with hearing notices. The Court however noted that the applicant had filed submissions.

14. Responding to a question posed by the Court on the current status of the suit property, Mr. Kabaiku stated that the same had been sold and transferred to a third party.

15. We have considered the application, the replying affidavit, submissions, as well as the applicable law. In an application of this nature, an applicant must satisfy this Court that the appeal or the intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR. Even one arguable ground of appeal will suffice. See Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.

16. The applicant contends that he was not accorded a fair hearing by the trial court and that the impugned judgment was obtained without his participation, and was therefore irregularly obtained. *The Constitution* guarantees the right to fair hearing. Whether or not the applicant was denied this right by the trial court, or whether it is his advocate who failed to attend court can only be determined on appeal after this Court has gone through the entire proceedings of the trial court. In the circumstances, we are satisfied that the intended appeal is arguable.

17. On nugatory aspect, the 1st respondent's advocate told this Court that the suit property has already been sold and transferred to a third party. In essence, therefore, what the applicant seeks to stop has already crystallized. We would be acting in futility if we were to grant an order of stay of execution of the impugned judgment. This Court in Jaribu Holdings Ltd vs Kenya Commercial Bank Ltd [2008] eKLR, held thus:

> " The application before us is for an order of stay of execution of a specific decree. As the applicant concedes through its counsel on record that the decree sought to be stayed has in fact been executed, regularly or otherwise, we see nothing to stay... It will not be within reason for us to grant an order of stay of a decree which we know and the applicant itself concedes has been executed. The general policy of the law is that courts should not act in futility."

18. As the applicant has satisfied only one of the two mandatory limbs required in this kind of applications, the application fails and is accordingly dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

D. K. MUSINGA, (P.)

..... JUDGE OF APPEAL

ASIKE MAKHANDIA

..... JUDGE OF APPEAL

S. ole KANTAI

…….. JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.