



Abuga & 5 others (Sued as Trustees, Official and Agents of the Seventh Day Adventist Church Millennium) v General & 3 others (Civil Application E154 of 2023) [2024] KECA 833 (KLR) (19 July 2024) (Ruling)

Neutral citation: [2024] KECA 833 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E154 OF 2023
HM OKWENGU, SG KAIRU & HA OMONDI, JJA
JULY 19, 2024**

BETWEEN

**JOSHUA ABUGA 1ST APPLICANT
PAMELA ISENSI 2ND APPLICANT
REBECCA MBOYA 3RD APPLICANT
PETERSON ONDICHO 4TH APPLICANT
FRED NYAKUNDI 5TH APPLICANT
PETER OYARO 6TH APPLICANT
SUED AS TRUSTEES, OFFICIAL AND AGENTS OF THE SEVENTH DAY
ADVENTIST CHURCH MILLENNIUM**

AND

**HON. THE ATTORNEY GENERAL 1ST RESPONDENT
KELVIN KIMULU (SUED AS GUARDIAN AD LITEM OF THE
CHILDREN AT KISII CHILDREN HOME CHILD WELFARE SOCIETY OF
KENYA) 2ND RESPONDENT
CHILD WELFARE SOCIETY OF KENYA, KISII BRANCH ... 3RD RESPONDENT
CHILD WELFARE SOCIETY OF KENYA 4TH RESPONDENT**

(Application for a temporary injunction pending the hearing and determination of an appeal from the ruling of Page 2 of 9 the Environment and Land Court of Kenya at Kisii (J.M. Mutungi, J) delivered on 21st September 2023, in Kisii ELC Case No. 220 of 2017)



RULING

1. The Notice of Motion dated 5th December, 2023 which is now before us originates from a ruling dated 3rd November, 2022 which was delivered by the Environment and Land Court (ELC) at Kisii. In the ruling the learned judge ordered the immediate eviction of the applicants from LR. Kisii Municipality/Block III/153 that had been converted into LR. No. Kisii Municipality/Block III/649.
2. The applicants filed a motion before the learned judge for review of the ruling of 3rd November 2022 maintaining that the execution ought to have been specifically directed at LR. No. Kisii Municipality/Block III/153 (hereafter Block III/153) which measures only an area of 0.6309 Ha, and not LR. No. Kisii Municipality/Block III/649 (hereinafter Block III/649) which measures approximately 1.429 Ha.
3. Upon hearing the motion, the ELC delivered a ruling on 21st September, 2023 dismissing the motion as devoid of merit. The applicants initiated an appeal from the ruling through a notice of appeal that it filed in this Court. This was followed up with the current notice of motion seeking an order of injunction restraining the respondents, their servants or agents from evicting the applicants or in any way interfering with their occupation of Block III/649 pending the hearing and determination of the intended appeal. In the alternative the applicants sought an order of maintenance of status quo as regards a section of Block III/649 measuring 1.429 pending the hearing and determination of the appeal.
4. The applicant's notice of motion is supported by an affidavit sworn by one of the applicants Peterson Ondicho in which he reiterates the above background to the notice of motion, and pleads that the applicants face imminent eviction from Block III/649 in which they have been in occupation for more than a decade, and which property is of religious and sentimental value. In addition, the applicants represent a church with a huge following who have been using the premises, and who will suffer irreparable loss if the orders sought are not issued. Consequently, the applicants urged that the intended appeal will be rendered nugatory in the absence of the orders sought.
5. In his affidavit in support of urgency, the applicant's advocate Enock Moturi Nyang'acha has added that the 1st Applicant is the lawful owner of Block III/153 measuring 0.6309 Ha. and this property shares a boundary with a piece of land measuring 0.132 Ha, known as Kisii/Municipality/UNS plot which was allotted to the applicant by the Gusii County Council vide a letter dated 25th June 2011, that following a dispute between 1st respondent and the applicants, judgment was entered in favour of the 1st respondent over Block III/153 but now the 1st respondent has moved the court and obtained an eviction order against the applicant in regard to Block III/649 which property is much bigger than Block III/153 and was never subject of the litigation, it is maintained that the applicants have an arguable appeal with high chances of success. The applicants also filed written submissions in which they reiterated the same facts and urged the court to grant the prayers sought.
6. The respondents filed a replying affidavit through Irene Mureithi (Irene) the Executive Director of the 3rd respondent Child Welfare Society of Kenya. In the detailed affidavit, Irene swore that the 3rd respondent is the lawful registered proprietor of Block III/649; that the property is used as a charitable institution where vulnerable children who are rescued are provided with a home; that the applicants had at some stage sought and were granted a temporary worshipping space within the property; and that after being hosted for a while, the applicants started engaging in subversive and fraudulent acts and manipulation of the records with a view to grabbing the land.



7. Irene explained that the applicants' nefarious activities caused the respondents to file a suit, that is, Kisii ELC Case No. 220 of 2017 and obtain a permanent injunction restraining the applicants from trespassing and interfering with the respondents' property which was Block III/153 (converted to/ Block III/649). In the judgment in ELC 220 of 2017 which was delivered on 13th May 2019, the ELC issued an order of eviction against the applicants, and ordered them to vacate Block III/649 (previously Block III/153). The applicants appealed to this Court, against that judgment, but the appeal was dismissed in Civil Appeal No 152 of 2019.
8. Irene deposed that in an effort to circumvent the judgment of the ELC and the Court of Appeal, the applicants filed another suit, that is, Kisii ELC Case No 9 of 2021 in the name of Seventh Day Adventist Church (EA) Ltd, but the respondents, in a ruling delivered on 2nd February 2022, successfully raised a preliminary objection and obtained an order to strike out the suit for being res judicata. She added that on 3rd November, 2022 the respondents obtained orders of eviction against the applicants; that the applicants through an application dated 20th April 2023 sought to have the orders of 3rd November 2022 reviewed, and that this is the application that was dismissed on 21st September 2023, setting the stage for the current application dated 5th December 2023.
9. In their written submissions, the respondents maintained that the intended appeal is not arguable, as the application dated 20th April 2023 was simply another attempt by the applicants to circumvent the judgments of the ELC and the Court of Appeal; that the dispute regarding the ownership and eviction of the applicants from Block III/153 (now converted into Block III/649), was conclusively determined in Kisii ELC No. 9 of 2021, and Kisii ELC 220 of 2017, and affirmed by the Court of Appeal in Civil Appeal No. 152 of 2019; and that the applicants' intended appeal is frivolous and only intended to delay, obstruct and defeat the realization of the court judgment and decrees issued against them.
10. The hearing of the application was canvassed before us through a virtual hearing in which Mr. Godia appeared for the applicant and Mr. Otieno appeared for the respondent. Each counsel made oral submissions urging the court to find in favour of his client
11. In *Madhupaper International Limited v Kerr* [1985] eKLR this Court dealing with an application for order of injunction under Rule 5(2)(b) of the *Court of appeal Rules* stated:

“..... The test we have to apply to this particular application to this court is whether or not the company has made out its claim for an injunction to preserve its property until the appeal is heard, Or is it an application which ought to fail because the appeal is frivolous or it would be worse for the company if the injunction went forth or for any other reason”
12. In *Stanley Kangethe Kinyanjui V Tony Ketter & 5 others* [2013] eKLR this Court set out the principles to be applied in an application under Rule 5(2)(b) as follows:

“.... This Court, in accordance with precedent, has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be nugatory if these interim orders were denied.....

 - (v) An applicant must satisfy the court on both of the twin principles.
 - 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.

13. What we must therefore first determine, is whether the applicant has satisfied the test with regard to arguability and that is not just that the intended appeal is capable of being argued, but that the intended appeal is not frivolous. This requires the Court to go beyond just considering whether the appeal is one capable of ventilation, but whether the arguments are groundless, lack substance, or the appeal is intended to achieving an ulterior motive such as to delay the finalization of the litigation process or simply just to annoy.
14. Given the background to this case where the applicants suit was actually dismissed for being res judicata, and the fact that the applicants have not filed any appeal against the judgment dated 3rd November, 2022, in which their suit was dismissed, the intended appeal against the order declining to review the orders that were issued by the Court pursuant to that judgment lacks substance. More so, since the matters deposed to by Irene on the plea of res judicata, in her detailed replying affidavit, remain undisputed as no further affidavit was filed by the applicants. In light of the judgments delivered in favour of the respondents and against the applicants, it is evident that the applicants motion is frivolous because it is nothing more than a further attempt by the applicants to delay the respondents from realizing the fruits of their judgment.
15. The applicant having failed to satisfy the first requirement of arguability, and since it is imperative that they satisfy both limbs of the twin principle of arguability and the nugatory aspect, we do not find it necessary to delve into the nugatory aspect as it is evident that the application dated 5th December 2023 fails. It is therefore dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF JULY, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

