



**Thamaini v Wangai & 2 others (Environment & Land Case
E246 of 2021) [2022] KEELC 3654 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3654 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E246 OF 2021**

EK WABWOTO, J

MAY 5, 2022

BETWEEN

EPHRAIM MIANO THAMAINI APPLICANT

AND

NANCY WANJIRU WANGAI 1ST RESPONDENT

ELINA MWAYITSI NAKAYA 2ND RESPONDENT

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES 3RD
RESPONDENT**

RULING

1. In his application dated April 8, 2022, the applicant, seeks an order of stay of execution of the ruling and decree of this Court delivered on March 28, 2022 pending the hearing and determination of his appeal against that ruling. In the said application, the applicant also seeks orders to the effect that the order of stay that would be issued do operate as a reinstatement of the conservatory interim orders made on July 29, 2021 by Hon. Lady Justice L. Komogoi which had also been extended from time to time prior to the point which the suit was struck out.
2. The applicant is dissatisfied with the ruling which struck out the suit with costs to the 1st and 2nd Respondents. It is the applicant's contention that as per the consequences of the said ruling, the 1st Respondent may at any time proceed to execute the decree and orders that were issued in Nairobi ELC No. 554 of 2008, *Nancy Wanjiru Wangai vs NSSF* and Others and evict him or demolish his property.
3. Learned counsel for the applicant Mr. Amimo submitted that the applicant has already filed a notice and memorandum of appeal before the Court of Appeal vide Nairobi Civil Application No. E255 of 2022 challenging the said ruling and that the applicant has an arguable appeal which will be rendered nugatory unless this court grants the orders sought. Counsel also argued that the 1st Respondent had



- already commenced the process of execution and demolition *vide* a notice that expires on April 18, 2022.
4. Counsel also pointed out that the applicant stands to suffer irreparable loss and damage should the order of stay of execution sought herein not be granted.
 5. Learned counsel for the 3rd respondent, Ms. Muthee did not oppose the application.
 6. Opposing the application, learned counsel Mr. Thuku for the 1st respondent referred to the grounds of opposition dated 20th April 2022 and submitted that the nature of the orders issued by this court *vide* its ruling delivered on March 28, 2022, is not one that is capable of being stayed since it's a negative order considering that the suit had been struck out. Counsel also added that the application is incompetent and frivolous since the court was already functus officio and there was no suit upon which an order for stay could be granted. He further submitted that the Applicant ought to pursue his application before the Court of Appeal.
 7. Learned counsel for the 2nd respondent, Mr. Aloo, in opposition to the application submitted that the application is an abuse of the court process, any issuance of stay would be delaying the 1st Defendant's right to property and that the demolition that they sought to stay had been made pursuant to an earlier order issued in a different matter.
 8. I have considered the application and submissions by counsel. In an application of this nature, an applicant should demonstrate that he has an arguable appeal and that if the orders sought are not granted the appeal will be rendered nugatory. In [*Isbmael Kagunyi Thande v Housing Finance of Kenya Ltd*](#) Civil Application No. Nai 157 of 2006 this Court stated:

“These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”
 9. As regards the question whether the applicant has established an arguable appeal, I am unable to conclude, at this point, that the applicant's appeal is frivolous. As we are aware, an arguable appeal is not one that must necessarily succeed, (See [*Dennis Mogambi Mong'are vs. Attorney General & others*](#) [2012] eKLR).
 10. As to whether the intended appeal will be rendered nugatory unless we grant the orders sought, I am alive to the objective of such an application. As stated by Githinji, JA in [*Equity Bank Limited v West Link Mbo Limited*](#) Civil Application No. Nai 78 of 2011, the object is the “preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals”.
 11. In this case, what the court did *vide* the ruling delivered on March 28, 2022 was to struck out the suit for being an abuse of the court process in view of the fact that the same was related to another suit Nairobi Elc No. E258 of 2020. In effect, there is no suit in existence, the same having been struck out. There is therefore merit in the argument by counsel for the 1st and 2nd respondents that the order issued on March 28, 2022 is not one that lends itself to an order for stay, at least to the extent that the applicant's suit was struck out for being an abuse of the court process. The Court of Appeal decision



in the case of *Kaushik Panchamatia & 3 other vs Prime Bank Limited & Another* [2020] eKLR stated as much and as the Court reiterated and which I fully adopt, that;

“...that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.”

12. I am therefore not satisfied that the applicant has demonstrated any merit in the application and for the reasons outlined, I decline to grant the orders sought in the application dated April 8, 2022. The same is dismissed with no orders as to costs.

13. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MAY 2022.

E. K. WABWOTO

JUDGE

In the Virtual Presence of:-

Mr. Amimo for the Applicant.

Mr. Thuku for the 1st Respondent

N/A for the 2nd Respondent.

Ms. Muthee for the 3rd Respondent.

Court Assistant: Caroline Nafuna.

E. K. WABWOTO

JUDGE

