

**IN THE COURT OF APPEAL
AT NYERI**

**(CORAM: JAMILA MOHAMMED, KIMARU & MUCHELULE, JJ.A)
CIVIL APPLICATION NO. E068 OF 2022**

**BETWEEN
GOERGE MUCHIRA GATHUMBI.....APPLICANT
AND**

MONICAH NJOKI GATHUMBI.....RESPONDENT

(Being an application for an order of injunction and stay pending the lodging and determination of an intended appeal from the ruling and order of the Environment and Land Court at Kerugoya (Cherono, J.) dated 22nd July, 2022

in
ELC Appeal No. E003 of 2022)

RULING OF THE COURT

1. Before the Court is a notice of motion dated 12th August, 2022, made under **Rule 5(2)(b)** of the **Court of Appeal Rules** and **Section 3** of the **Appellate Jurisdiction Act**, substantively seeking that this Court grant: an order of injunction restraining the respondent against evicting, interfering or disturbing the quiet possession and occupation of the applicant, with respect to half portion of **L.R. No Kabare/Ngiroche/454** (*the suit property*); and an order for stay of the Ruling dated 22nd July, 2022, delivered by the superior court (Cherono J.), pending hearing and determination of the intended appeal.

2. The application is supported by grounds on the face of the application and a supporting affidavit sworn on 20th March, 2023, together with annexures thereto. It's the applicant's case that the respondent is his biological sister, and that their late father, **Gathumbi Gatonye** (*the deceased*), was the initial registered owner of the suit property measuring 1.21 hectares. The applicant averred that during the lifetime of the deceased, the respondent was registered as a joint owner of the suit property. He asserted that he challenged this registration before a court of law, when the respondent filed a suit seeking, *inter alia*, to be declared the legal owner of the suit property. The applicant deposed that the trial court (Francis Andayi, CM), in a Judgment dated 19th May, 2016, determined the case in his favour. He deposed that the Judgment of the Magistrate's court was subsequently set aside by the High Court (Cherono J.) in a Judgment dated 8th November, 2019. The said setting aside was on the basis of a technicality. The matter was re-tried, and the trial court (Kithuku, CM), in a judgment dated 27th January 2022, ruled in favour of the respondent. She was consequently registered as the sole proprietor of the suit property.

3. The applicant contends that he challenged the decision of the Magistrate's court (Kithuku, CM) before the High Court at Kerugoya, *vide* memorandum of appeal lodged on 23rd February, 2022. He deposed that on 4th April 2022, he filed an application before the said High Court seeking to be granted orders staying execution of the Judgment, in relation to the judgment of the trial magistrates' court that he sought to appeal against to the High Court. The applicant averred that the respondent filed a cross-appeal in the appeal, and a replying affidavit, in response to his application for stay of execution, dated 9th April 2022 and 18th April 2022, respectively. It was the applicant's contention that the High Court (Cherono J.) dismissed his application, in a ruling dated 22nd July, 2022. It is that dismissal that provoked the filing of this application. The applicant asserts that his intended appeal raises triable issues with high chances of success, and that if the orders sought are denied, his appeal, if successful, will be rendered nugatory.
4. The application was opposed in a replying affidavit sworn by the respondent on 30th September, 2022. According to the respondent, the deceased allocated her the suit property,

and

that the applicant was given another piece of land, L. R. No.

Kabare/Mikara/163, measuring 6 acres. The respondent contends that the applicant has no arguable appeal, and that she has not evicted him from the suit property, despite the trial court directing him to vacate from it within a period of sixty days of the date of judgment. The respondent averred that since the death of their father, she has been rendered destitute, despite having inherited the suit property, yet the appellant was allocated his own parcel of land. She deponed that the applicant has not established how his appeal will be rendered nugatory, if orders sought are not granted.

5. The respondent, without leave of court, filed a further affidavit dated 9th October, 2023. During the hearing of the application, the applicant did not oppose its admission on record. The respondent averred that after expiry of the sixty-day period in which the applicant was ordered by the trial court to vacate the suit property, she lodged an application seeking orders to evict the applicant, which orders were granted by the trial court. The respondent stated that the applicant has since vacated the suit property. She asserted that the instant application was yet another attempt by the applicant to deny her the fruits of her

judgment. She deposed that this application has been

overtaken by events as she has already taken possession of the suit property.

6. The application was canvassed by way of written submissions of both parties which were orally highlighted during the plenary hearing. Counsel for the applicant, **Mr. Wambugu**, in his submissions reiterated the averments contained in the applicant's supporting affidavit. Counsel submitted that if the applicant's application is not allowed, he stands the risk of being evicted from the suit property. Counsel contended that the suit property is subject to customary trust, and that the respondent is holding it in trust for the applicant. Counsel expressed fear that the respondent may dispose of the suit property, if the orders for stay and injunctive reliefs are not issued by this court. It will render the applicant's appeal nugatory, if successful. In the circumstances, he urged us to allow the application.
7. Counsel for the respondent, **Mr. Kosgei**, on his part, submitted that eviction orders against the applicant were issued by the trial court on 18th April, 2023, and that the applicant had since evicted from the suit property. Counsel stated that the trial

court determined that the allegations of fraud on the part of
the

respondent with regard to registration of the suit property, were unsubstantiated. Counsel pointed out that the appeal before this court, as filed by the applicant, was incompetent, as the applicant failed to seek or obtain leave of court prior to lodging the appeal, as required by **Section 75(1)(h)** of the **Civil Procedure Act**, as read with **Order 43** of the **Civil Procedure Rules**. **Mr. Kosgei** contended that the dismissal of an application for stay is a negative order, incapable of being stayed by this Court. Counsel for the respondent submitted that the applicant has failed to establish that his appeal is arguable, and that the same would be rendered nugatory, if orders sought are not granted. He urged that the injunctive reliefs cannot be issued by the Court to stop that which has already taken place. He invited us to dismiss the application in its entirety.

- 8.** We have considered the application, the grounds in support thereof, the replying and further affidavits, the submissions, the authorities cited and the law. The principles for granting an order for stay of execution, injunction or stay of proceedings under **Rule 5(2)(b)** of this Court's Rules are well settled. This Court in the case of **Trust Bank**

Limited and Another v.

Investech Bank Limited and 3 Others [2000] eKLR

delineated the jurisdiction of this Court in such an application 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...”

9. On the first principle of whether the appeal is arguable, this Court in **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others** (2013) eKLR observed that:

“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. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

10. From the foregoing, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court, and one which is not frivolous. A

single *bona*

fide arguable ground of appeal is sufficient to satisfy this prerequisite. See **R.F.S. v J.D.S. [2013] eKLR.**

11. It is further important to note that, in dealing with applications under **Rule 5(2)(b)**, this Court exercises original jurisdiction, which exercise does not constitute an appeal from the trial judge's decision to this Court. This was the holding of this Court in **Montague Charles Ruben & 9 others vs Peter Charles Nderitu & Another [1989] eKLR.** The Court in that case observed as follows:

“In dealing with rule 5(2)(b) applicants, this Court exercises original jurisdiction and this has been so stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court, the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds de novo (anew) on the propriety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial judge’s discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous, or put the other way round, he must satisfy the court that he has an arguable appeal.”

12. Applying the above threshold to the applicant's submissions, we hold that the decision by the Environment and Land

Court(ELC), with respect to whether or not to grant a stay order, is essentially a decision delivered in exercise of the discretion of that Court. It is clear to this Court that the applicant's intended appeal is a challenge of the exercise of discretion by the ELC, and as such, this Court lacks jurisdiction to entertain the same.

13. Further, we hold that the ruling of the High Court, which the applicant seeks to appeal against, merely dismissed his application for stay of execution, with costs to the respondent. A reading of the ruling by the Superior Court established that the learned Judge did not order any of the parties to do any act, or refrain from doing any act, or pay any sum. As has been stated in a long line of cases decided by this Court, such an order constitutes a negative order which is incapable of execution, save in respect of the issue of costs.

14. The East Africa Court of Appeal, the predecessor of this Court, in the case of **Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR** held as follows:

“...this Court may have power, in a proper

case to order a temporary injunction to issue if the Court “thinks just” to do so in the exercise of its jurisdiction to order a stay of execution. But what is there to be executed under the judgment, the subject of the intended appeal?

The High Court has merely dismissed the suit, with costs... In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.

15. It is our finding that the present application seeks to stay a negative order which we have no jurisdiction to grant.

16. It was the respondent's submission that the applicant, in blatant violation of **Section 75 (1)** of the **Civil Procedure Act**, as read together with **Order 43** of the **Civil Procedure Rules**, the applicant failed to seek leave of Court, before filing the intended appeal. **Section 75 (1)** of the Act prescribes instances in which an appeal lies as a matter of right, against an order of the court. It provides thus:

“An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted:

a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;

b) an order on an award stated in the form of a special case;

c) an order modifying or correcting an award;

d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

e) an order filing or refusing to file an award in an arbitration without the intervention of the court;

f) an order under section 64;

g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

h) any order made under rules from which an appeal is expressly allowed by rules.”

17. Section 75 set out above is to be read together with **Order 43 Rule 1** of the **Civil Procedure Rules**, which sets out the orders in respect of which appeals lie as of right. In this case, the Superior Court dismissed the applicant’s application by virtue of the fact that the application did not meet the requirements set out under **Order 42 Rule 6** of the **Civil Procedure Rules** for grant of an order for stay of execution. We hold that, having read **Section 75** of the **Civil Procedure Act**, as well as **Order 43** of the **Civil Procedure Rules**, we find no provision that confers upon the applicant an automatic right of appeal to

this Court. The instant application by the applicant, does not

indicate that leave to appeal was obtained from the ELC before he filed the notice of appeal dated 26th July, 2022.

18. In **Peter Nyaga Muvake v Joseph Mutunga [2015]**

eKLR, this Court observed as follows:

“As to whether the appeal is competent, there is no contest that the appeal arises from the decision of Mabeya J made under Order 42 Rule 6 of the Civil Procedure Rules. Section 75 of the Civil Procedure Act, Cap 21, stipulates the thematic orders from which appeals lie as of right. Appeals from other orders lie only with the leave of the court. An order made under Order 42 Rule 6 is not exempt from the requirement of leave. It does not lie as of right.

In this case, the applicant did not seek or obtain leave to appeal against the decision of Mabeya

J. As the effect of this is that no appeal lies without such leave, this Court would have no jurisdiction to entertain, hear or determine the applicant’s appeal. Without leave of the High Court, the applicant was not entitled to give notice of appeal. Where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules, the procurement of leave to appeal is a sine qua non to the lodging of the notice of appeal. Without leave, there can be no valid notice of appeal. And without a valid notice of appeal, the jurisdiction of this

court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has

not been sought and obtained is dead in the water.”

19. From the foregoing, we are satisfied that the applicant did not have an automatic right of appeal to this Court. He ought to have sought leave of court before filing the notice of appeal. As such, no arguable appeal exists if there is no proper appeal before this Court.
20. In view of the above, we hold that we do not have the requisite jurisdiction to consider the application as there is no valid notice of appeal on record.
21. The applicant’s application dated 12th August, 2022, is without merit. It is hereby dismissed with costs to the respondent.

Dated and delivered at Nyeri this 13th day of March, 2026.

JAMILA MOHAMMED

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**JUDGE OF
APPEAL**

L. KIMARU

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**JUDGE OF
APPEAL**

A.O. MUCHELULE

.....

**JUDGE OF
APPEAL**

*I certify that this is
a true copy of the*

original
Signed
DEPUTY REGISTRAR