



**Kikumu v Nthiga & 6 others (Civil Application E041 of 2024)
[2025] KECA 169 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KECA 169 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E041 OF 2024
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
JANUARY 23, 2025**

BETWEEN

CHARITY MARIGU KIKUMU APPLICANT

AND

ELIAKIM SOLOMON NTHIGA 1ST RESPONDENT

CECILIAH WANJIKU NTHIGA 2ND RESPONDENT

MAUREEN NJOKI NTHIGA 3RD RESPONDENT

MUTITI NTHIGA 4TH RESPONDENT

TRUSTEES OF FREE CHARISMATIC GOSPEL MINISTRY .. 5TH RESPONDENT

GICOVI MBUGI 6TH RESPONDENT

OBED NJERU NJAGI 7TH RESPONDENT

(Being an application for stay of execution from the Judgment and Decree of the Environment and Land Court at Embu (A. Kaniaru, J.) dated 11th March, 2024 in E.L.C. Case No. 11 of 2018.)

RULING

1. The applicant Charity Marigu Kikumu has moved us by Motion on notice brought under various provisions of law including rule 5 (2)(b) of The Court of Appeal Rules praying in the main that we be pleased to stay the enforcement and execution of the judgment and decree of the Embu Environment and Land Court ('ELC') delivered by Kaniaru, J. on 11th March, 2024 and make any other orders in the interest of justice. The application is supported by grounds on its face and the applicant's affidavit where it is stated amongst other things that the Judge erred in law in holding that the applicant's father Solomon Kinga (deceased) had legal capacity to transfer the suit premises L.R No. Ngandori/



Kirigi/164 to the 1st respondent Eliakim Solomon Nthiga “despite the evidence on record on his incapacity”; that the Judge erred in law and fact in holding that the applicant had not proved her case that the 1st respondent had illegally had the suit land transferred to him by their late father; that the Judge erred in failing to order cancellation of a transfer of the suit land and subsequent subdivisions; that the Judge erred in holding that the respondents had proved their case as legal registered proprietors of their lands; that the Judge erred in dismissing the applicant’s case. The applicant says that if stay of execution of the said judgment is not ordered the appeal will be rendered nugatory because the 2nd respondent Cecilia Wanjiku Nthiga who is the legal representative of the 1st respondent’s estate will proceed to cause further subdivision of the suit premises to be transferred to other third parties despite the fact that the applicant on behalf of other family members has a legitimate claim to the suit premises; that the consequence is that the applicant will lose substantially since the suit premises is family land and the 1st respondent was to hold the same in trust for the family; that hardship caused to the applicant and her family would be disproportionate to any loss that would be occasioned to the respondents.

2. The applicant depones at paragraphs 8 and 9 of the supporting affidavit:

8. That the 1st Respondent prior to his death on 22nd May, 2018 had secretly caused the transfer of our father’s land to himself, its sub-division and even transfer of the resultant parcels to all the Respondents herein in the year 1999 even before our father’s death despite our father lacking the legal capacity to dispose off the suit premises.
 9. That I only came to learn of these facts of transfer of Ngandori/Kirigi/164 and its subsequent subdivisions and their registration through my sister Martha Njagi and sister in-law Keziah Thaara in March, 2018 when the 2nd Respondent attempted to forcefully evict my sister-in-law Keziah Thaara from the subject land parcel which he is currently in occupation together with our last born brother David Mbogo.”
3. Attached to the application are various documents including the judgment to be appealed and a draft Memorandum of Appeal where 4 grounds of appeal are set out.
 4. There is a replying affidavit of the 2nd respondent Cecilia Wanjiku Nthiga who depones that no execution has taken place; that the suit at ELC was dismissed and no executable relief was granted and that the intended appeal is devoid of merit.
 5. The applicant in written submissions cites the case of Multimedia University & Another vs. Gitile N. Naituli [2014] eKLR where the principles that apply in an application for stay of execution pending appeal were set out.
 6. The applicant submits that she has an arguable appeal as set out in the draft Memorandum of Appeal stating that if the 1st respondent proceeds to “...actualize the judgment ...” the applicant and the rest of the family will be substantially affected causing them hardship. The applicant further submits that if the orders are not granted she and other family members may be evicted from the land.
 7. In written submissions the respondent states that the judgment of ELC is not executable because the suit was dismissed.
 8. When the Motion came up for hearing before us on 15th October, 2024 learned counsel Miss Muthama appeared for the applicant but there was no appearance for the respondents who we were satisfied had been served with a hearing notice on 18th September, 2024. The respondent had filed written submissions which we have summarized in this ruling. Counsel for the applicant relied on written submissions without finding it necessary to highlight the same.



9. The principles that apply in an application for stay of execution pending appeal are well known. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay - see the case cited by the applicant Multimedia University & Another vs. Gitile N. Naituli (supra).
10. We have seen and perused draft Memorandum of Appeal. It is proposed to be argued on appeal that the Judge erred in law and fact in holding that the proposed applicant had not proved her case in light of evidence tendered that the 1st respondent illegally caused the transfer of the suit land with a person who had no legal capacity to transfer; that the Judge erred in law and fact in dismissing the suit without considering its merits, amongst other grounds. We think these are not idle grounds, they are arguable on appeal and as has been held by this Court in previous decisions like Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd Civil Application No. Nai 345 of 2004 an arguable point on appeal is not one which will succeed; it is one that requires full consideration and determination by the Court.
11. What about the nugatory aspect which an applicant must also satisfy in order to succeed?
12. The applicant states that the suit land was transferred to the 1st respondent on an unstated date by their father prior to his death on 22nd May, 2018; that he (the 1st respondent) had then transferred the land to others (the other respondents) in 1999 which was way before the applicant's father's death. So the position is that the land was transferred many years ago to the 1st respondent by the deceased who then subdivided the same and transferred those resultant sub-divisions to others. The title to the suit land ceased to exist many years ago.
13. We also note that the Judge at ELC dismissed the applicant's suit. That is a negative order that is not capable of execution. There is therefore nothing to stay.
14. The applicant has failed to show that the intended appeal would be rendered nugatory if we do not grant orders staying the judgment. The Motion fails and is dismissed with no order on costs as the respondents did not attend the hearing of the Motion.

conclusions

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF JANUARY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL ALI - ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

