



**Kibunja & another v Karanja & 5 others (Civil Application NAI E101 of 2022) [2025] KECA 21 (KLR) (17 January 2025) (Ruling)**

Neutral citation: [2025] KECA 21 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION NAI E101 OF 2022  
W KARANJA, FA OCHIENG & LK KIMARU, JJA  
JANUARY 17, 2025**

**BETWEEN**

**JOSEPH MUIGAI KIBUNJA ..... 1<sup>ST</sup> APPLICANT**

**JEREMIAH KIHONGE KIMANI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOSEPH KABUGI KARANJA ..... 1<sup>ST</sup> RESPONDENT**

**BENSON MUGO MUKUNYA ..... 2<sup>ND</sup> RESPONDENT**

**JOYCE WAMBUI LANGAT ..... 3<sup>RD</sup> RESPONDENT**

**MILKA KANENE NDUNG’U ..... 4<sup>TH</sup> RESPONDENT**

**BERNARD LEITICH, LAND REGISTRAR, THIKA ..... 5<sup>TH</sup> RESPONDENT**

**SAMUEL MAGANA MUIGAI ..... 6<sup>TH</sup> RESPONDENT**

*(Being an application for stay of further execution of the Ruling of the Environment Land Court at Nairobi (Mbugua, J.) delivered on 10th day of November, 2021 and subsequent order in E. L.C. No. 1289 of 2014)*

**RULING**

1. By a notice of motion made under section 3(1), 3A (1) (2) and 3B of the [Appellate Jurisdiction Act](#), Rules 5(2)(b) and 42 of the [Court of Appeal Rules](#), the applicants Joseph Muigai Kibunja and Jeremiah Kihunge Kimani have prayed that:
  1. (Spent)
  2. That there be a stay of further execution of the Ruling delivered by the Honourable Court of Nairobi in ELC Case No. 1289 of 2014 by the Hon. Lady Justice Lucy Mbugua on 10.11.21



and all consequential orders issued thereafter pending the hearing and determination of the application inter-partes.

3. That there be a stay of execution aforementioned rulings pending the hearing and determination of the intended appeal.”
2. The application is supported by the annexed affidavit of Joseph Mungai Kibunja and the grounds stated on the face of the application. In summary, the applicants state they purchased the parcel of Land known as Location 16/Kimandia/Wanyaga/1263 (suit property) measuring 1.215 hectares on 12<sup>th</sup> September 2019. This parcel was a subdivision of a larger parcel of land known as Location 16/Kimandi/Wanyaga/755. The applicants have brought the application in their capacity as Trustees of African Christian Church and Schools (ACC&S) Kimandi. They aver that they purchased the suit property from Thika Credit Traders Ltd for a purchase consideration of Kshs.12,000,000/-. The applicants state that they had the suit property transferred to them and were duly registered as the owners thereof. They took possession of the same.
3. They were however surprised to learn that the Environment and Land Court in Nairobi had on 11<sup>th</sup> November, 2021 issued an order “nullifying and revoking” the subdivision and the resultant titles emanating from the original title No. Location 16/Kimandi- Luanyaga/755. The applicants complain that they were not privy nor were they parties to the court proceedings that resulted in the said verdict. They are aggrieved that they were condemned unheard. Their effort to have the decision reviewed and set aside was disallowed by the Environment and Land Court hence their appeal to this Court.
4. The applicants plead with this Court to stay the execution of the said Ruling of the Environment and Land Court pending the hearing of the intended appeal. They contend that they have an arguable appeal which has overwhelming chances of success. They were afraid that if the order craved for is not granted, it will render their intended appeal nugatory since there was a possibility that the suit property may be alienated or disposed of or the character and nature of the same changed before the appeal is heard and determined.
5. During the hearing of the application, this Court heard oral submission made by learned counsel Mr. Agwata for the applicants, Mr. Onger, learned counsel for the 1st respondents and Prof Kiama, learned counsel for the 2<sup>nd</sup> respondent. Counsel relied on the pleadings filed and their written submission and list of authorities. They essentially relied on the facts as set out above.
6. This Court has carefully considered the application. The applicants have essentially invoked this Court’s jurisdiction under Rule 5(2)(b) of the *Court of Appeal Rules*. The principles guiding this Court in determining such application are well settled. In *Trust Bank Limited & Another vs. Investech Bank Ltd & 3 Others* [2000] KLR, this Court held thus:

“The jurisdiction of the court under rule 5(2) (b) aforestated, 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, or 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.”
7. In the present application, it was clear from the pleadings and the Ruling of the Environment and Land Court that the applicants herein were not parties to the proceedings before the Environment and Land Court when a consent was recorded between the parties on 4<sup>th</sup> December 2018 compromising the suit in respect of the original parcel of land. The said consent by the parties was adopted as the order of the court. The essence of their consent order was that the original parcel of land being Land Reference No. Location 16/Kimandi-Wanyaga/775 was to be subdivided into three parcels of land



and then transferred to the respective parties in the suit. The subdivision was done but contrary, and in contravention of the consent order, one of the parties who was not entitled to the said portion sold the suit parcel of land to the applicants. It was the subsequent complaint by the aggrieved party who was entitled to the suit parcel of land as per the consent order that resulted in the nullification of the applicant's title. From the ruling of the Environment and Land Court it was apparent that the applicants had been evicted from the suit parcel of land by the time they went to the said court for seeking appropriate reliefs. Their application seeking to set aside or review the said orders was dismissed, hence this application.

8. From our evaluation of the facts of this application, and having perused the draft memorandum of appeal in which the applicants plead, inter alia, that they were condemned without being given a hearing, we are prepared to say that the applicants have an arguable appeal even though they will have to surmount the legal hurdle that they purchased the suit property in contravention of an existing court order. As held by the Court in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR:

“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.”

9. The applicants have therefore established the first limb in their bid to be granted the order of stay that they have craved before this Court.
10. As regards the second limb, i.e. the nugatory aspect, it was clear from the facts of the case that the applicants have already been evicted from the suit property. The applicants sought to be joined as third parties in the proceedings before the Environment and Land Court. The application was allowed but the other orders that they craved for were dismissed. This Court, therefore, cannot reverse an execution process that has already taken place.
11. In any event the order that the applicants seek to stay is a negative order which cannot be stayed as there is nothing to stay when the application was dismissed. In *Raymond M. Omboga v Austine Pyan Maranga* [2010] eKLR, Makhandia J (as he then was) held thus:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no of execution of such order...”

We agree with the above reasoning which applies in equal measure to this application.

12. The applicants have stated the amount they paid for the purchase of the suit land. It is clear to this Court that where an amount sought in a claim can be quantified, damages in an available remedy, including but not limited to the refund of the purchase consideration. In our considered view, the applicants have failed to establish the second limb, i.e. that the appeal would be rendered nugatory if the order of stay of execution craved for is not granted.
13. Since the applicants were required to establish the two limbs, and having failed to establish one of the limbs, the application fails. It is hereby dismissed. The costs shall be paid by the applicants to the 1<sup>st</sup> respondent since the 2<sup>nd</sup> respondent supported the application. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2025.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**F. OCHIENG'**

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**JUDGE OF APPEAL**

**L. KIMARU**

..... **JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

