



REPUBLIC OF KENYA



**Akeyo v Nyarera (Suing as the Legal Representative of Selina Aoko Mbeche) (Civil Appeal (Application) E256 of 2023) [2025] KECA 408 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KECA 408 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL (APPLICATION) E256 OF 2023  
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA  
FEBRUARY 28, 2025**

**BETWEEN**

**LUCY AKEYO OGINGA ALIAS LUCY AKEYO MINWANGO ..... APPLICANT**

**AND**

**CALEB OCHIENG NYARERA (SUING AS THE LEGAL REPRESENTATIVE OF SELINA AOKO MBECHE) ..... RESPONDENT**

*(An application for stay of execution from the Judgment and Decree of the Environment and Land Court at Homabay (G.M.A. Ong'ondo, J.) dated 16th October, 2023 in Case No. 24 of 2021)*

**RULING**

1. The genesis of this matter that now finds its way before us by way of a Notice of motion is that by the applicant, Lucy Akeyo Oginga [Lucy], moved the High Court seeking a declaration that Selina Mbeche [Selina] did not purchase L.R. No. Kanyada/Kotieno/Katuma "B"/686 [suit land], the rectification of the land register of the suit land, general damages, and costs of the suit. It was Lucy's case that in the year 2005, she discovered that the title to the suit land got lost, reported the incident to the police, and was issued with a police abstract.
2. In response, Selina filed a statement of defence and counterclaimed that the suit land was legally sold and transferred in her favour by Lucy and that she had been in occupation of the same without interruption save for trespass at the instance of the appellant.
3. In its determination, the trial court dismissed Lucy's suit for lack of merit, allowed Selina's counterclaim, granted eviction orders and a permanent injunction against Lucy from interfering with the suit land, and ordered Lucy to pay Selina Kshs.500,000/= as general damages for trespass.
4. Dissatisfied, the appellant preferred the 1<sup>st</sup> appeal before the Environment and Land Court "ELC" and in his determination, the learned judge found no fault in the trial court's decision and dismissed the appeal.



5. The applicant is now before this Court with a notice of motion dated 14<sup>th</sup> November 2023 brought under rule 5[2][b] of the Court of Appeal Rules, seeking a stay of execution of the decree dated 16<sup>th</sup> June 2021 given in Homabay CMCC No. 35 of 2018, an order restraining the respondent from interfering with the applicants' occupation and possession of pending the hearing and determination of the intended appeal.
6. The application is premised on the grounds that being aggrieved with the decision of the trial court, the applicant preferred an appeal against it vide Homabay ELCA No. 24 of 2021, which appeal was on 15<sup>th</sup> January, 2023 dismissed.
7. Dissatisfied with the decision, the applicant is before this court on a second appeal. The applicant is apprehensive that unless the orders sought are stayed, she faces imminent eviction and will suffer irreparable loss and immense suffering.
8. That the applicant is willing to comply with the orders and directions given by the court.
9. The application is opposed by a replying affidavit sworn by Caleb Ochieng Nyarera, the respondent herein and the legal administrator of the estate of the deceased. He deposes that on 13<sup>th</sup> June, 1998 the applicant and the deceased entered into an agreement for the purchase of the suit land at an agreed consideration of Kshs. 30,000/=.
10. That a sale agreement was duly executed upon payment of the full purchase price, and the transfer documents were duly signed. All the necessary steps were taken, and the applicant surrendered the original title, which was thereafter canceled by the Land Registrar, who then processed and issued the deceased with a title deed in respect of the suit land.
11. Sometimes later, the applicant filed Homabay ELC No. 35 of 2018, claiming the suit land which the subordinate court heard and dismissed it with costs and issued eviction orders against the applicant. Dissatisfied, the applicant appealed to the superior court vide Homabay ELCA No. E035 of 2021 and also sought a stay of execution. The appeal was heard and, in a judgment dated 15<sup>th</sup> February, 2023, the appeal was dismissed with costs. Upon dismissal of the appeal, the applicant sought a stay of execution, which orders were declined, prompting the respondent to execute the judgment and decree of the subordinate court evicting the applicant on 24<sup>th</sup> November 2023. Upon eviction, the respondent has taken possession and occupation of the suit land.
12. That the applicant has failed in the instant appeal to satisfy the twin limbs required in the grant of the prayers sought and has failed to highlight the arguable points and how the appeal will be rendered nugatory in the event that the orders sought are not granted.
13. To support the application, the applicant submits that the intended appeal is arguable for reasons that, in his determination, the learned judge failed to analyze the evidence tendered and failed to consider the provisions of section 3[3] of the Law of Contract Act and relied on the statement of Selina who had passed on by the time the suit was being heard.
14. On the nugatory aspect, the appellant contended that unless the orders sought are granted, the applicant will be evicted from the suit land and will suffer irreparable loss and damage. The applicant relies on the case of the Re Estate of Harish Chandra Hindocha [Deceased] [2021] eKLR.

In response, the respondent contends that the application has been overtaken by events as the applicant was, on 24<sup>th</sup> November, 2023 evicted from the suit property, and the respondent has already taken occupation. We are invited to consider the case of Nadeem Akana vs. Lucy Wambui Mwangi [2021]



- eKLR and the case of Raphael Kakene Muloki & Another vs. Cabinet Secretary of Lands and 2 Others [2021] eKLR, for the proposition that the application has been overtaken by events.
15. On arguability, the respondent submits that the grounds raised in the draft memorandum of appeal are not arguable as the applicant only faults the learned judge for relying on the deceased's statement and in holding that the applicant signed the transfer forms. The respondent cites in support the case of Governors Ballon Safaris Ltd vs. Skyhip Company Ltd & Another Nairobi CACA No. 32 of 2015 and in the case of Kenya Medical Lab Technicians and Technologists Boards vs. Prime Communications Ltd [2014] eKLR.
  16. With regards to the nugatory aspect, the respondent contends that the applicant has already been evicted from the suit land and the respondent is in occupation as such, the applicant cannot allege that the intended appeal will be rendered nugatory.
  17. Having carefully considered the application, the impugned judgment and decree of the ELC, the submissions by the parties and the authorities cited, the principles on which this Court grants a remedy under rule 5(2)(b) of the Court of Appeal Rules are well settled and comprehensively summarized in the ruling of this Court in Stanley Kang'ethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR. The applicant has to satisfy the Court that the intended appeal is arguable or that it is not frivolous and that unless the relief sought is granted, the appeal will be rendered nugatory if it succeeds.
  18. On the first principle, the Court has to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant to warrant ventilation before this Court. In Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others (supra), this Court described an arguable appeal in the following terms:
    - 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."
  19. The appeal is arguable as the memorandum of appeal raises grounds inter alia whether the learned judge erred when he failed to note that the applicant did not sign the transfer and the consent of the Land Control Board, failed to consider the provisions of Section 3[3] of the Law of Contract, failed to analyze the evidence and in upholding a judgment vitiated by inadmissible evidence.
  20. There is no doubt that the intended appeal raises several arguable points, which are not frivolous. Those points need not succeed when the appeal is heard. It is sufficient that they raise even one issue deserving the considered opinion of the Court. On whether an arguable appeal exists, the Court is not required to say much, lest it prejudices the issue, which is properly the domain of the bench that hears the intended appeal. (See Central Bank of Kenya Deposit Protection Fund Board vs. Uhuru Highway Development Ltd & Others, *CA No. 95 of 1999*).
  21. On the nugatory aspect, again in Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others (supra), this Court stated that:
    - x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible or, if it is not reversible, whether damages will reasonably compensate the party aggrieved.
  22. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties, and each case has to be determined on its merits. In the instant application, the applicant is apprehensive that, granted the go-ahead, she will be evicted from the suit land and will suffer irreparable loss and damage.



- 23. In addition to the above principles, this Court has consistently held that a negative order cannot form the basis for issuing an order of stay of execution. The gravamen of the applicant’s intended appeal is a challenge of the order by G.M.A. Ongondo, J dismissing the applicant’s appeal.
- 24. In the instant application, the applicant has not demonstrated to the Court’s satisfaction the hardship she is likely to suffer should a stay of execution order not be granted. She gained entry into the suit property, which was in possession of the respondent and has already been evicted; and is no longer on the suit land as such, in our considered view, the application is overtaken by events.
- 25. The applicant has failed to satisfy the threshold requirements necessary for applications brought under rule 5 (2)(b) of the rules of this Court, with the result that the Notice of Motion dated 14<sup>th</sup> November, 2023 is unmerited and, as such, fails, and is dismissed with costs to the respondent.

**DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF FEBRUARY, 2025.**

**ASIKE - MAKHANDIA**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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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**

