



**Ondijo v Ochola & 2 others (Civil Application E050 of 2024)
[2025] KECA 412 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KECA 412 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E050 OF 2024
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
FEBRUARY 28, 2025**

BETWEEN

ROSELINE ORIMBA ONDIJO APPLICANT

AND

MAURICE OTIENO OCHOLA 1ST RESPONDENT

ROBERT OGOLA OCHOLA 2ND RESPONDENT

WILKISTER ADHIAMBO OTIENO 3RD RESPONDENT

(Being an application for an injunction and stay of execution from the Judgment and Decree of the Environment and Land Court at Homabay (G.M.A. Ong'ondo, J.) dated 9th April, 2024 in Case No.52 of 2021(OS))

RULING

1. In the notice of motion dated 24th April, 2024 brought pursuant to Rule 5(2)(b) of the [Court of Appeal Rules](#), 2022, the applicant, Roseline Orimba Ondijo, sought the following orders:
 - i. That the Honourable Court be pleased to stay execution of the Judgment rendered by Ongondo, J, on the 9th April, 2024 pending the hearing and determination of the applicant's intended appeal.
 - ii. That the respondent herein be restrained by a temporary or a mandatory injunction from using the impugned judgment of the Environment and Land Court delivered on 9th April, 2024 as a smoke screen to lodge another criminal complainant against the applicant herein similar to the one which they had previously lodged against the applicant in Oyugis Principal Magistrate Court Criminal Case No. 252 of 2021 pending the hearing and determination of the applicant's intended appeal.



- iii. That the respondents herein be restrained by a temporary or a mandatory injunction from applying for eviction orders against the applicant from taking possession of the disputed parcel of land known as West-Kasipul/Kodera-Karabach/881 measuring approximately 1.3Ha on the basis of the impugned Judgment of the Environment and Land Court rendered against the applicant herein on the 9th April, 2024 or at all pending the hearing and determination of the applicants intended appeal.
 - iv. That the costs of this application be in the applicant's appeal.
2. The application is premised on the grounds that the intended appeal raises arguable and triable issues as per the draft memorandum of appeal annexed to the application. The applicant is apprehensive that unless the orders sought are granted, the respondent will use the said orders to effect her arrest, prosecution, and conviction rendering the appeal nugatory.
 3. In support of the application, the applicant swore a supporting affidavit dated 24th April, 2024 deposing that she has been on the suit land since 1987, there has been no attempt to evict her, and that the originating summons dated 30th January 2021 was never opposed.
 4. She further deposed that the learned judge erred in finding that the applicant had not taken possession yet on 12th November, 2020, the Succession Court in Homabay High Court Cause No. 83 of 2016 directed that a claim for adverse possession be filed in the Environment and Land Court for the suit land to be registered in her name.
 5. It is further averred that the applicant has been in exclusive possession since 1987. However, the 1st and 2nd respondents illegally had the grant confirmed in their favour, sold the suit land to the 3rd respondent, and conspired with the police at Oyugis police station, who arrested and charged her with the aim of evicting her from the suit land.
 6. The 3rd respondent opposed the application, maintaining that the application is incompetent as it does not meet the criteria for granting the orders sought; that in the impugned judgment, the High Court dismissed with costs the suit filed by the applicant as such, there is no decree capable of being executed to warrant a stay of execution.
 7. In support of the application, it is submitted by Mr. Ngoge learned Counsel for the applicant that what makes the intended appeal arguable is the issue regarding the learned judge's failure to find that the applicant's originating summons was unopposed; and whether in dismissing the summons, the learned judge contravened Articles 10,25,27,48, and 50 of the Constitution and the rules of natural justice; the import of a power of attorney said to have already been registered in the name of the applicant and whether under Section 39(1)(c) of the Law of Succession Act, the 1st and 2nd Respondents were precluded from excluding Mr. James Ochola Omoro as a beneficiary of the Estate of the deceased.
 8. On the nugatory aspect, it is submitted that unless the orders sought are granted, the respondent will use the impugned orders to institute another criminal complaint against the applicant, and she will end up being charged with forcible detainer contrary to Section 91 of the Penal Code, which would deny her the right to lodge the intended appeal and/or the right to a fair hearing.
 9. In reply, the respondents through Ms. Otieno, learned counsel contended that the order issued by the trial court is negative as the court only dismissed the suit with costs and did not order the parties to do or refrain from doing anything. Relying on the case of Kaushik Panchatia & 3 Others v. Prime Bank Limited and Another [2020] eKLR, the respondent submitted that when a court has granted a negative order, there is nothing that can be stayed.



10. Having carefully considered the motion, the grounds thereof, the supporting affidavit, the respondent's replying affidavit, the rival submissions by the parties, the cited authorities, and the law, the main issue for determination is whether the applicant has satisfied the laid down principles for the grant of stay of execution and or injunction pending appeal.
11. The applicable principles in the exercise of the Court's unfettered discretion under rule 5(2) (b) of the *Court of Appeal Rules*, 2022, to grant an order of stay of execution, stay of proceedings and or injunction are well settled. Firstly, an applicant has to satisfy the Court that he or she has an arguable appeal. Secondly, an applicant has to demonstrate that, unless an order of stay or interim injunctive relief is granted, the appeal or intended appeal (if successful) would be rendered nugatory. These principles have been restated and enunciated by this Court in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.
12. On arguability of the intended appeal, it is imperative to point out that an arguable appeal is not one that must necessarily succeed but one that is not frivolous and merits to be argued fully. Further, it is sufficient even if the appeal raises only one triable issue.
13. On the nugatory aspect, it was held in *Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 others* (*supra*) that whether or not an appeal will be rendered nugatory depends on whether or not what is or ought to be stayed or restrained by way of injunctive relief, if allowed to happen, is reversible; or, if not reversible, whether damages would reasonably compensate the aggrieved party. Similarly, in *Reliance Bank Limited v. Norlake Investment Limited* (2002), 1 EA 227 the court stated that factors which render an appeal nugatory are to be considered within the circumstances of each case and, in so doing, the Court is bound to consider the conflicting claims of both sides.
14. Submitting on the first limb of the twin principle with regard to the issue as to whether the applicant's intended appeal is arguable, counsel Mr. Ngoge drew the Court's attention to the grounds of appeal which, according to counsel, are arguable and deserving of the Court's scrutiny. The applicant contends that since the applicant's originating summons was unopposed therefore the learned judge ought to have granted the orders as sought therein. Further, the learned judge failed to note that by the time the disputed parcel was sold to the 3rd respondent, the power of attorney in favour of the 1st and 2nd respondents was yet to be registered and issued. 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 v. 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.
15. Is the appeal likely to be rendered nugatory should the execution not be stayed? In resolving the issue as to whether the appeal is likely to be rendered nugatory should the application be declined, the court in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (*supra*) stated that in determining if an appeal is likely to be rendered nugatory, the Court is called upon to determine

“ 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.”
16. On this issue, the applicant avers, and its counsel submits, that unless the orders sought are granted, the respondent shall use the impugned orders to institute criminal proceedings against the applicant subjecting her to criminal proceedings under Section 91 of the *Criminal Procedure Code*. That said criminal proceedings shall hinder the applicant from lodging and prosecuting the intended appeal. Further, that she will be denied a right to a fair hearing compared to the respondent and will be denied



the legal right to effectively access judicial remedies as provided under Articles 10, 25, 27, 48 and 50 of the *Constitution*.

17. Our considered view is that these averments are purely speculative, and unworthy of consideration. Though in the instant application, the applicant has demonstrated that there exists an arguable appeal, she has nonetheless failed to demonstrate that her arguable appeal will very likely be rendered nugatory should the execution of the judgment of the trial court be allowed to proceed. We also hasten to add that the Judge at the ELC dismissed the applicant's suit, that is a negative order that is not capable of execution. There is therefore nothing to stay or injunct. Further to grant the orders sought will unnecessarily tie the hands of the investigative authorities from investigating complaints lodged by the respondents on account of the applicant's own mischief and yet the said authorities are not parties to this application.
18. Consequently, the notice of motion dated 24th April, 2023 fails and is dismissed with costs to the respondents.

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

