



**Chege v Ndirangu & another (Civil Appeal (Application)  
E428 of 2024) [2025] KECA 210 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KECA 210 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E428 OF 2024  
K M'INOTI, PO KIAGE & WK KORIR, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**PETER NGA'NG'A CHEGE ..... APPLICANT**

**AND**

**ESTHER WANGARI NDIRANGU ..... 1<sup>ST</sup> RESPONDENT**

**GERALD NDIRANGU KARIUKI ..... 2<sup>ND</sup> RESPONDENT**

*(Application for stay of execution pending the hearing and determination  
of an appeal from the judgment and decree of the High Court of Kenya  
at Nairobi (Ongeri, J.) dated 24th May 2024 in HCCA No. E226 of 2023)*

**RULING**

1. By a motion on notice dated 13<sup>th</sup> June 2023, the applicant, Peter Ng'ang'a Chege prays for an order of stay of execution pending appeal from the judgment of the High Court of Kenya at Nairobi (Ongeri, J.) dated 24<sup>th</sup> May 2004. The judgment of the High Court, the execution of which the applicant seeks to stay, was rendered in favour of the respondents, Gerald Ndirangu Kariuki and Esther Wangari Ndirangu in an appeal they had preferred from the judgment of the Chief Magistrates Court at Nairobi dated 31<sup>st</sup> May 2022. The dispute was over determination of the boundary between the applicant's and the respondents' plots of lands.
2. The respondents own Plots No. 1/244 and 1/245 while the applicant owns Plot No. 1/243 all situate at Kariobangi Light Industries, Nairobi. We shall refer to the plots as "the suit properties".
3. The respondents filed a suit in the Chief Magistrates Court at Nairobi against the applicant and prayed for a declaration that the common boundary between the suit properties was as set and determined by the defunct Nairobi City Council's surveyors and confirmed by private surveyors and, an order of



injunction to restrain the applicant from trespassing or interfering with their plots. They also prayed for damages, costs and interest. The applicant filed a defence and denied the respondents' averments.

4. After hearing the dispute, by a judgment dated 31<sup>st</sup> May 202, the Chief Magistrates' Court dismissed the respondents' suit but made no order on costs. The respondents were aggrieved and filed an appeal in the High Court. That appeal was heard by Onger, J., who, by a judgment dated 24<sup>th</sup> May 2024, allowed the same with costs and set aside the judgment of the subordinate court. The learned judge further issued a declaration that the boundary between the suit properties was as set out and beaconed by the defunct Nairobi City Council. She also issued an injunction restraining the applicant from interfering with the respondents' plots and awarded the respondents KShs. 259,840.00 for their construction materials damaged by the applicant.
5. In support of the application for stay of execution, the applicant relied on written submission dated 1<sup>st</sup> July 2024 and submitted that the intended appeal is arguable. He relied on his memorandum of appeal in which he has set out some 15 grounds of appeal, 11 of which contend that the learned judge erred in fact. Being a second appeal, the applicant is precluded from raising in this Court issues of fact. (See Charles Kipkoech Leting v. Express (K) Ltd & Another [2018] eKLR).  
What that means is that the rather impressively long list of grounds of appeal is built on what may ultimately prove to be juridical quicksand.
6. Be that as it may, the applicant submitted that the High Court erred in holding that he had trespassed on the respondents' plot contrary to the evidence and in awarding the respondents KShs 259,840.00. He also contended that there was real risk that the respondents would move post-haste and enforce the judgment, which would expose him to irreparable loss and damage. He added that it was in the interest of justice to grant the orders sought and that the respondents would suffer no prejudice.
7. The respondents opposed the application vide a replying affidavit sworn on 3<sup>rd</sup> July 2024 by Esther Wangari Ndirangu and written submissions dated 9<sup>th</sup> July 2024. They contended that the applicant's appeal was not arguable because it is founded on issues of fact rather than of law and that in any case, the surveyor from Nairobi City County, S. G. Mwangi, who testified before the subordinate court, confirmed the boundary between the suit properties and the co-ordinates thereof. Further, that the High Court merely held that the boundary should remain as determined by the Nairobi City County.
8. The respondents also submitted that the appeal will not be rendered nugatory because if it succeeds, the boundary will be set as shall be determined by this Court. Further, that the 2nd respondent is a practising advocate of the High Court of Kenya who will have no problem in refunding the KShs. 259,840.00 should the appeal succeed.
9. We have considered the application. To entitle the applicant to the reliefs sought, he must demonstrate that his appeal is arguable, or that it is not frivolous and that unless stay of execution is granted, the appeal will be rendered nugatory if it succeeds. The applicant is obliged to satisfy both those considerations (See Stephen Wanyee Roki v. K-Rep Bank & 2 Others [2015] eKLR). Satisfying only one will not suffice.
10. At this stage the Court is not required determine the issues to be canvassed on the appeal definitively. The Court is supposed to determine on the basis of the material before it whether there is even a single bona fide issue raised in the appeal that requires consideration by the Court. That issue need not succeed when the appeal is ultimately heard.
11. As we have indicated, the majority of the issues raised in the memorandum of appeal relate to matters of fact, which ought not to be raised in a second appeal in this Court. There are a few issues of law raised, which we cannot say are entirely frivolous. We shall grant that the intended appeal is arguable.



12. However, we are far from satisfied that if it succeeds, the appeal will be rendered nugatory. The concern of the Court in considering whether the appeal will be rendered nugatory is to avoid any judgment in favour of an appellant being reduced to mere paper judgment. In *Ahmed Musa Ismael v. Kumba ole Ntamorua & 4 Others* [2014] eKLR the Court explained the rationale behind this consideration to be:

“to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succour by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual.”

13. We agree with the respondents that should the appeal succeed, the boundary between the suit properties will be set as shall be determined by this Court, if any different from what the High Court found. As regards the award of Kshs 259, 840.00, the applicant has not even remotely suggested that the respondents cannot refund the same. Indeed, the 2nd respondent has put that issue to rest by deposing that she is an advocate of the High Court of Kenya in private practice, who is able to repay the amount, a fact that the applicant has not disputed or controverted.

14. In these circumstances, the applicant has not satisfied us that his appeal will be rendered nugatory, and having failed to satisfy both considerations under rule 5(2)(b) of the Court of Appeal Rules, we find that the motion dated 13<sup>th</sup> June 2024 is not deserved. The same is hereby dismissed with costs to the respondents. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF FEBRUARY 2025.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

