



Mugo (Suing as Legal Representative of Donald Mbugua Mugo) v Omollo) & 2 others (Civil Appeal (Application) E988 of 2023) [2025] KECA 518 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KECA 518 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E988 OF 2023
W KARANJA, WK KORIR & GV ODUNGA, JJA
MARCH 21, 2025**

BETWEEN

LILLY ENID KAARI MUGO (SUING AS LEGAL REPRESENTATIVE OF DONALD MBUGUA MUGO) APPLICANT

AND

JOSEPH ISAAC OTIENO (SUING AS LEGAL REPRESENTATIVE OF MARY E. OMOLLO) 1ST RESPONDENT

THE CITY COUNCIL OF NAIROBI 2ND RESPONDENT

REGISTRAR OF TITLES 3RD RESPONDENT

(Being an application for injunction pending the hearing and determination of an appeal from the ruling and /or order of the Environment and Land Court at Milimani (J.A. Mogeni, J.) dated 21st November 2023 in E&LC Case No. 1082 of 2004)

RULING

1. Through the notice of motion dated 13th September 2024 supported by the affidavit of the applicant, Lilly Enid Kaari Mugo, the Court has been moved under sections 3, 3A and 3B of the *Appellate Jurisdiction Act* and rules 5 (2) (b) and 47 of the Court of Appeal Rules for an order of injunction restraining the respondents by themselves or their agents from dealing with land reference number Nairobi Block 63/522. The applicant also seeks an order of stay of execution of the ruling of the Environment and Land Court (ELC) delivered on 21st November 2023 in Milimani ELC Case No. 1082 of 2008 and prays that the costs abide the outcome of the appeal.
2. The background of the application is that the ELC delivered a judgment in Milimani ELC Case No. 1082 of 2008 on 17th May 2019. Subsequently, the applicant filed an application dated 11th July 2023 seeking to set aside the judgment. On 21st November 2023, Mogeni, J. dismissed the application



triggering the current application. The applicant contends that she has been in open occupation of the suit property, and her intended appeal raises substantial arguable points of law and fact as enumerated in the application. The applicant also avers that the appeal will be rendered nugatory if the orders sought are not granted. She deposes that she will be dispossessed of the suit property and evicted therefrom should her application be declined, thereby derogating her interest in the suit land. She is also apprehensive that the respondents might alienate the suit property, leading to an irreversible outcome rendering her appeal nugatory should her intended appeal eventually succeed.

3. The 1st respondent, Joseph Isaac Otieno, swore an affidavit on 20th September 2024 in opposition to the application. He avers that the intended appeal is not arguable as the learned Judge properly exercised her discretion. According to him, the appeal does not challenge the findings of fact by the learned Judge, and as a result, the applicant will not suffer irreparable loss because the suit property no longer belongs to her.
4. The 2nd respondent, the City Council of Nairobi, and the 3rd respondent, the Registrar of Titles, did not respond to the application.
5. The law firm of Muma & Kanjama Advocates filed submissions dated 27th September 2024 for the applicant and submitted that an application brought under rule 5 (2) (b) of this Court's Rules must demonstrate an arguable appeal which is likely to be rendered nugatory should stay be declined and the appeal eventually succeed. Relying on Stanley Kangethe Kinyanjui vs. Tony Ketter and 5 Others [2013] KECA 378 (KLR), counsel submitted that a single bona fide point which ought to be argued fully before the Court is sufficient to establish that there is an arguable appeal. Counsel urged that the memorandum of appeal raises substantial issues of law and fact warranting a complete determination by the Court. Additionally, counsel submitted that the intended appeal will be rendered nugatory since the applicant risks being dispossessed of the suit property. Counsel argued that the orders sought are meant to preserve the substratum of the intended appeal and without them, the suit property may be dealt with adversely, occasioning extra costs and difficulty in recovering it should the intended appeal eventually succeed. Reliance was placed on Meso Multipurpose Society Limited vs. Luore Nyoiro Company Limited & 2 Others [2020] eKLR for the proposition that an appeal will be rendered nugatory were an applicant to be evicted from a land that he or she has developed and occupied for long. Counsel's ultimate plea was for the application to be allowed as prayed.
6. The law firm of Otieno Okeyo & Co. Advocates filed submissions dated 3rd October 2024 urging the 1st respondent's opposition to the application. Counsel referred to Dickson Sinkeet Mapi & Others vs. Naisenyu Paragarna Mutunkei, Civil Appeal (Application) No. E041 of 2020 and Peter Anyang Nyongo & 2 Others vs. Minister of Finance & Another [2007] eKLR to urge that a negative order cannot be stayed, and as the ruling, which is the subject of the intended appeal, resulted in a negative order, the application should be declined. Turning to the substance of the application, counsel submitted that the applicant has not demonstrated the existence of an arguable appeal, and neither has she shown that the appeal is likely to be rendered nugatory should it eventually succeed. Reliance was placed on Nairobi Women Hospital vs. Purity Kemunto [2018] eKLR; Regoil Kenya Ltd vs Winfred Njeri [2019] eKLR; and Jennifer Akinyi Osodo vs Boniface Okumu Osodo & 3 Others [2021] eKLR in support of the submissions. Counsel subsequently urged for the dismissal of the application with costs.
7. The Court has pronounced in a plethora of decisions that an applicant desirous of enjoying the Court's discretionary power under rule 5 (2) (b) of the Rules of the Court must demonstrate that the appeal or intended appeal is arguable and not frivolous, and that were it to eventually succeed, it will be rendered nugatory if stay orders are not granted. For instance, it was held in Chris Munga N. Bichage vs. Richard



Nyagaka Tongi, Independent Electoral & Boundaries Commission & Robert K. Ngeny [2013] KECA 141 (KLR) that:

“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”

8. Before we delve into the merits of the application, it is important to point out that whereas the respondent has argued that the ruling which is the subject of the pending appeal resulted in a negative order, the drafting of the application shows that the applicant seeks an order of injunction. Even though the application for setting aside the ex-parte judgment was dismissed, the applicant seeks to stop a positive action that may be taken by the respondent concerning the suit property. We are therefore of the considered view that the application cannot be dispensed with on this preliminary argument.

9. Having dispensed with the 1st respondent’s preliminary opposition to the application, we now turn to the merits of the motion. The first issue is whether the intended appeal raises arguable issues. It is trite that a single bona fide issue is sufficient for determining that an appeal or intended appeal is arguable. It must also be recalled that at this stage, the Court should not definitively pronounce itself on the merits of the appeal or intended appeal. Thus, in *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike; Lantech Ltd* [2006] KECA 333 (KLR), it was held that:

“It is to be remembered that in an application such as this the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide on the issue of whether or not the matters raised are arguable.”

10. We have reviewed the impugned ruling vis-à-vis the memorandum of appeal. In the circumstances of this application, we agree that the pending appeal is arguable as it challenges the learned Judge’s exercise of discretion and appreciation of the evidence before the trial court. We further note that the appeal has been filed. We, without saying more, lest we prejudice the bench that will hear the appeal, find the applicant’s appeal to be arguable.

11. The next question is whether the applicant has established that the appeal will be rendered nugatory. In *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others* [2013] KECA 378 (KLR), the Court addressed what it means for an appeal to be rendered as follows:

“ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd vs. Norlake Investments Ltd* [2002] 1 EA 227 at page 232.

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.”

12. In addressing this issue, we must first appreciate that the pending appeal is against the ruling of 21st November 2023 and not the ex- parte judgment delivered on 17th May 2019. The appeal filed before the Court is seeking to upset the decision declining to set aside the ex-parte judgment. In those circumstances, can it be said that the appeal will be rendered nugatory? We do not think so. The



substratum of the present appeal does not touch on the ownership of the suit property, which we are called upon to injunct from further dealings. Conversely, the 1st respondent has a valid judgment affirming his right to the suit property. In determining the question as to whether an appeal or intended appeal is likely to be rendered nugatory, the Court must always strike a balance between the right of the applicant to appeal and the right of the respondent to enjoy the fruits of judgment. In this case, noting that the pending appeal is intended to reverse the ruling declining to set aside the ex parte judgment, there is no reasonable ground for denying the 1st respondent the fruits of a valid judgment.

13. Additionally, the applicant has not specifically pleaded any tangible loss that she is likely to incur if stay is not granted, save for being apprehensive that she will be dispossessed of the suit property. This argument cannot hold against the backdrop of the 1st respondent being the legal proprietor of the suit property and having a valid judgment to that effect. We further note that although land ownership is at the core of the dispute between the parties, and should the appeal succeed, undoing whatever may have been done in pursuit of the judgment may be cumbersome and expensive, such actions are still reversible. For the foregoing reasons, we do not think the appeal, were it to succeed, will be rendered futile or worthless if an order of injunction is not granted. Consequently, we find that in the circumstances of this case, the applicant has not established the nugatory aspect of the application.
14. The upshot of the foregoing is that the notice of motion dated 13th September 2024 lacks merit and is hereby dismissed. There being a pending appeal, the costs of this application shall abide the outcome of the appeal.
15. It is so ordered.

Dated and delivered at Nairobi this 21st day of March 2025.

W. KARANJA

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

