



FWK v JGK (Civil Application E042 of 2024) [2025] KECA 592 (KLR) (14 March 2025) (Ruling)

Neutral citation: [2025] KECA 592 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E042 OF 2024
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
MARCH 14, 2025**

BETWEEN

FWK APPLICANT

AND

JGK RESPONDENT

(An application for stay of execution from the Judgment and Decree of the High Court at Meru (Cherere, J.) delivered on 13th July 2023 in HCCC No. 19 OF 2017 (O.S.))

RULING

1. Before this Court is a Notice of Motion dated 26th April 2024 brought by Fredrick W. Kiruja, the applicant under rule 5(2) of the Court of Appeal Rules seeking orders of stay of execution of the judgment and decree delivered by Cherere, J. on 13th July 2023 in Meru HCCC No. 19 of 2017 (O.S.) pending the hearing and determination of the appeal.
2. The impugned judgment declared L.R. Kianjai/Mituntu/257 a matrimonial property and went further to distribute the property in equal shares between the applicant and the respondent, with the respondent’s portion being excised from the part where the permanent house is situated.
3. Aggrieved, the applicant filed an appeal to this Court to wit, Civil Appeal No. E168 of 2023 and subsequently filed the instant application.
4. The application is premised on the grounds on the face of the application and expounded in his supporting affidavit sworn on even date. The applicant averred that he has an arguable appeal with reasonable chances of success. His main complaint in the appeal, among others, is that the learned Judge misdirected herself by relying on evidence obtained way after the divorce of the parties in 2003. The respondent adduced evidence to prove contribution by the purchase of the matrimonial property.
5. The applicant averred that the respondent has extracted the decree and commenced execution proceedings. Therefore, he is apprehensive that the said act would result in him being evicted from his



permanent house and the house demolished, the only place he knew as his retirement home. Therefore, there was real danger that the subject matter of the appeal will dissipate rendering his appeal nugatory. In addition, the respondent averred that the respondent intends to dispose of her share of the property to third parties. Lastly, the applicant averred that he is a sickly old man suffering from complications of high blood pressure and the delay in filing the instant application was inadvertent.

6. In response to the application, the respondent filed her replying affidavit sworn on 4th July 2024. She averred that there has been inordinate delay of over 9 months by the applicant to bring the instant application and the delay has not been sufficiently explained. She further averred that the applicant has no arguable appeal as he failed to substantiate his pleadings during the trial leaving the evidence that she adduced uncontroverted and therefore unchallenged. The respondent further averred that the applicant has approached the Court with unclean hands and his application is merely meant to preserve the status quo so that he could continue to occupy the house, cultivate and lease the suit land at whim to her detriment. The respondent averred that the applicant has since sold his portion of the suit land to one Joseph Muthomi who has constructed some structure thereon. It has dawned on him that he would be left with a small share of the matrimonial property upon execution of the decree. Lastly, the respondent averred that she is a lady of advanced age of 70 years, a retired teacher and relying on pension for up keep and medical expenses and urged the Court to balance the interests of the applicant who is in exclusive position and utilization of the matrimonial property and her interest as a successful litigant and order that the decree be implemented on condition that no party would dispose of his/her share until the applicant's appeal is heard and determined.
7. At the virtual hearing, learned counsel Mr. Mwirigi was present for the applicant. The court noted that although the name of Mr. Muthomi learned counsel for the respondent, appeared on the platform, he, however, could not be seen and he never spoke forcing the court to record his non-appearance. Mr. Mwirigi for the respondent relied on his written submissions. Mr. Mwirigi confirmed to the court that the applicant did not defend the suit, nor did he apply to be allowed to defend the suit after the impugned judgment was delivered.
8. In his written submissions dated 8th October 2024, counsel, for the applicant's written submissions dated 8th October 2024, reiterated what was stated in the supporting affidavit. We need not rehash the same. The applicant maintained that he has an arguable appeal. On nugatory aspect, he also maintained that the respondent has commenced execution proceedings and their daughters have been summoned by the trial court to show cause why the caution registered on the suit land should not be removed. He further submitted that the respondent is already scouting for buyers and upon sub-division being undertaken, the applicant will be evicted from his permanent house, which action is irreversible and further, the suit land will be sold to third parties defeating the substratum of the appeal. The applicant relied on the case of *Peter Masula Killingo vs. Grace Nabiki Masula (Civil Application No. 37 of 2020)* 2021 KECA 909 (KLR) and argued that the court faced with similar application held that faulting the sharing of matrimonial property at 50% was an arguable point and an appeal would be rendered nugatory if the properties are sold.
9. Lastly, the applicant urged this Court to take into consideration his age and that he is currently in possession of the suit land, a fact which is not disputed, and that the respondent is remarried and resides elsewhere hence she would suffer no harm if the appeal is to be heard on merit.
10. On her part, the respondent filed her written submissions dated 14th October 2024 which is a reiteration of her replying affidavit which we need not rehash. She urged that the applicant has no arguable appeal. On nugatory aspect the respondent submitted that the applicant's averment that status quo should be maintained to ensure that he is not evicted from the suit property is a red herring as she is only entitled to an equal share of the same and not the entire property. Lastly, she emphasized



that the applicant would not suffer any prejudice if the decree is implemented as he has a place to reside, namely the semi-permanent house where he had been residing from mid December 2016 until he constructively evicted her on 2nd June 2019 and which semi- permanent house the applicant has alluded was allocated to him. The respondent thus prayed that the application be dismissed with costs.

11. We have carefully considered the application, the supporting affidavit, the respondent’s replying affidavit, the rival submissions, authorities cited and the law. The principles that guide the exercise of jurisdiction under rule 5 (2)(b) of the Court of Appeal Rules are well settled. To succeed, an applicant must demonstrate that his intended appeal or appeal, as the case may be, is arguable, in addition, he must demonstrate that the appeal would be rendered nugatory if stay is not granted and the appeal eventually succeeds. See. Stanley Kang’ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR.
12. On the first limb the applicant has since filed an appeal to this Court to wit Civil Appeal No. E168 of 2023. We note that the applicant has filed the memorandum of appeal dated 11th September 2023, which he annexed to his supporting affidavit to this application. He has raised issues concerning the basis of sharing matrimonial property equally between him and the respondent; and challenges reliance on receipts obtained after dissolution of marriage among others. It is our view that the issues raised thereon are arguable, they are neither frivolous nor idle. We are aware that 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. See Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008.
13. On the nugatory aspect, the applicant urges that the respondent intends to dispose of her share of the matrimonial property. He states that sale of the respondent’s portion will destroy the substratum of the appeal and will render the same nugatory.
14. The respondent argues that there was inordinate delay of over 9 months by the applicant in bringing this application. We agree that the applicant might have taken too long to file his application, however, he attributed the delay in filing to his ill health. We, however, note that delay in filing an application under rule 5 (2)(b) is not a pre-requisite condition for the court to consider in granting orders for stay. The respondent has, in her replying affidavit urged that the High Court determined that she was entitled to half share of the matrimonial property, and directed that she should get the side of the property that she developed and where she was living since 2003. She has urged us to remember that the applicant did not defend the suit and therefore her evidence was not controverted. The respondent urges that she is also elderly and of ill health.
15. We have considered what has been urged in support of the nugatory principle. As to whether the appeal will be rendered nugatory if the orders sought are not granted and the appeal ultimately succeeds, we bear in mind the pronouncement by this Court in Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR that “in considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.” In the same judgment the court defined nugatory as follows:
 - xii. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - xiii. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.



ix. Where it is alleged by the applicant that the appeal will be rendered nugatory on account of the respondent's impecuniosity, the onus shifts to the latter to rebut by evidence the claim."

16. We find that what the applicant seeks to stay, according to him is the sale of the respondent's share of the matrimonial property. The respondent has stated that she intends to live on the property which she developed. We are not convinced that the respondent is likely to sell her portion. Further, we have taken into account that even if the appeal may succeed, the respondent will be found deserving of a portion of the property. Even if the respondent is found to deserve less than she was awarded by the High Court, we are satisfied that the applicant can reasonably be compensated by an award of damages. Even if the property is sold, which we are not convinced it will, the applicant will not be left without a remedy. The applicant did not claim that the respondent cannot be able to compensate him in case the stay is not granted and the appeal succeeds after the property is sold.

17. We have come to the conclusion that the applicant has not satisfied the second principle that the appeal will be rendered nugatory if the order sought is not granted, should his appeal succeeds. We find no merit in this application and dismiss it with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 14TH DAY OF MARCH, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL ALI – ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

