



**Kamau v Agricultural Finance Corporation & 3 others (Civil Application
E067 of 2022) [2025] KECA 574 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KECA 574 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E067 OF 2022
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
MARCH 14, 2025**

BETWEEN

ANN WANGECHI KAMAU APPLICANT

AND

AGRICULTURAL FINANCE CORPORATION 1ST RESPONDENT

KEYSIAN AUCTIONEERS 2ND RESPONDENT

**ELIAS MWANGI & SAMSON KIARIE (OFFICIALS OF WAMUMU SELF-HELP
GROUP) 3RD RESPONDENT**

WATSON MUTHIGA 4TH RESPONDENT

*(An application for stay of execution pending appeal against the
judgment of the Environment and Land Court at Kerugoya (E.C.
Cherono J.) dated 18th February 2022 in ELC Cause No. 706 of 2013)*

RULING

1. Ann Wangechi Kamau (the applicant) has vide a notice of motion dated 25th July, 2022 expressed to be brought pursuant to the provisions of Rules 1, 4 and 5(2)(b) of the Court of Appeal Rules (this Court's Rules), sought the following orders:
 - i. Spent
 - ii. Spent
 - iii. That this Court be pleased to stay execution of the judgment and orders of justice E.C. Cherono J. made on 18th February 2022 in Kerugoya Environment and Land Court Case Number 706 of 2013 pending the hearing and determination of the appeal;



- iv. That this Court be pleased to grant any further relief for the ends of justice to be met; and
- v. That costs of the application be provided for.

Agricultural Finance Corporation, Keysian Auctioneers, Elias Mwangi & Samson Kiarie (officials of Wamumu self-help Group) and Watson Muthiga are the respondents herein.

2. The motion is premised on the grounds that the appeal relates to Land Reference No. Kiine/Rukanga/602 (the suit land) where the applicant averred to have stayed thereon for over 40 years with her family; that the 2nd respondent raided the suit land to evict the applicant for an outstanding loan of Kshs.3,000,000 allegedly guaranteed by the applicant's husband, Kibinga Gitau (the Deceased); that the documents in support of the loan (certificate of acceptance dated 4th July 2007 and letter of guarantee and indemnity dated 3rd July, 2007) were allegedly executed by the deceased yet on the said dates the deceased was already deceased having died on 2nd June, 2007. The applicant moved the Environment and Land Court (ELC) seeking for inter alia injunction. However, judgment was delivered against her allowing the respondents to evict her. The applicant maintains that she has an arguable appeal, which will be rendered nugatory unless the orders sought are granted.
3. The background of the applicant's claim was that her deceased husband did not sign the documents guaranteeing the subject loan giving the suit land as security. The ELC dismissed the applicant's suit for reasons that the applicant had not proved forgery of her deceased husband's signature as alleged. Further, that the 4th respondent was an innocent purchaser having bought the suit land during a public auction. The ELC found in favour of the 4th respondent's counterclaim and issued an order of mandatory injunction to evict the applicant and removal of any structures at the applicant's cost. The ELC further ordered the applicant to pay the 4th respondent Kshs.100,000 per year from August 2012 until she vacates the suit land or eviction is effected.
4. The motion is supported by an affidavit sworn by the applicant rehashing the grounds on the face of the application and stating further that she and her family risk being evicted from the suit land. Further, that the appeal is arguable as per the attached draft memorandum of appeal.
5. From the record, the respondents did not file any replying affidavit. Counsel for the 4th respondent submitted that a replying affidavit dated 27th September 2022 in opposition of the application was filed. The same was however not availed to us

Submissions by Counsel.

6. The application was heard by way of written submissions with oral highlighting. Learned counsel Ms. Ndung'u was present holding brief for Mrs. Makwaro, learned counsel for the applicant. Learned counsel, Mr. Nderitu was present for the 4th respondent. There was no appearance for the 1st, 2nd and 3rd respondents despite service. Ms. Ndung'u submitted that the intended appeal is arguable for reason that the alleged loan agreement dated 27th June 2007 and the letter of guarantee and indemnity of the Deceased dated 3rd July 2007 were created after the deceased had died in 2nd June 2007.
7. Counsel further submitted that the notification of sale in respect of the suit land was served upon the son of the Deceased who was not the legal administrator of the estate of the Deceased. Counsel asserted that unless stay is granted, the intended appeal will be rendered nugatory, as applicant and her family will be evicted from the suit land, which has been their home for many years. Counsel urged that there is need for preservation of the status quo pending appeal.



8. Mr. Nderitu submitted in reliance with section 99 (4) of the *Land Act*, 2012 that:

“a person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”
9. Counsel asserted that there is no arguable appeal. That the 4th respondent is the registered proprietor of the suit land. Further, that the applicant charged the suit land to the 1st respondent and defaulted repaying the loan resulting to the sale of the suit land through public auction. Counsel submitted that no material has been produced to show impropriety of the charge. Counsel submitted that the 4th respondent bought the suit land through public auction and is an innocent purchaser for value without notice.
10. Counsel further submitted that the 4th respondent is greatly prejudiced, as he has been kept out of the suit land for over eleven years despite having paid the full purchase price. Further, that in the event that the applicant’s appeal is successful, her remedy lies in damages and the appeal will therefore not be rendered nugatory as alleged. Counsel submitted that the 1st respondent is a party with means, which can compensate the applicant for any loss that she may suffer. Counsel refuted the applicant’s claim that she has been in occupation of the suit land for 40 years as she lives in a different parcel of land. Counsel urged that the application be dismissed.

Determination

11. We have considered the application; the grounds in support thereof, the authorities cited and the law. The jurisdiction under Rule 5(2)(b) of this Court’s Rules is discretionary and guided by the interests of justice.
12. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court’s Rules are well settled. This Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited & 3 Others* [2000] eKLR delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
13. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court. See: *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* (supra) where 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.
 - viii) In considering an application brought under Rule 5 (2)
 - (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”



14. On the nugatory aspect, the position in law is that this depends on whether or not what is sought to be stayed if allowed to happen is irreversible; or if it is not reversible, whether damages will reasonably compensate the aggrieved party. See: Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others (supra).
15. It is well settled that for an application under Rule 5(2)(b) of this Court's Rules to succeed, the applicant must satisfy both limbs of the twin principles. (See: Republic v Kenya Anti-Corruption Commission & 2 others (2009) KLR 31, and Reliance Bank Ltd v Norlake Investments Limited (2012) 1 EA 227).
16. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, whether the learned Judge erred in law and in fact in holding that the charge documents were validly signed yet they were allegedly signed after the demise of the signatory. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
17. 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, execution is imminent and if it proceeds, it will render the intended appeal nugatory as the applicant and her family who have lived in the suit land for many years will be evicted. We therefore find that in the circumstances of this application, the intended appeal will be rendered nugatory if the orders sought are not granted and the intended appeal succeeds.
18. In the circumstances, we find that the applicant has satisfied both limbs of the requirements under Rule 5(2)(b) of this Court's Rules. The upshot is that the notice of motion dated 25th July 2022 is merited and is allowed.

Costs to abide the outcome of the intended appeal. It is so ordered.

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

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

