



**Gwaro & another v Mangana & 2 others (Civil Application
E045 of 2024) [2025] KECA 464 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KECA 464 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E045 OF 2024
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
MARCH 7, 2025**

BETWEEN

GRACE NYANCHAMA GWARO 1ST APPLICANT

ANGELA NYANGANYI GWARO 2ND APPLICANT

AND

ELIAS MABEYA MANGANA 1ST RESPONDENT

EAST AFRICAN UNION LIMITED 2ND RESPONDENT

THE CHIEF REGISTRAR, KISII COUNTY 3RD RESPONDENT

(Being an application for stay of execution/enforcement of the ruling and order, pending the hearing and determination of the intended appeal against the ruling and order of the Environment and Land Court at Kisii (Munyao, J,) dated 13th March 2024 in ELC Case No. 69 of 2015)

RULING

1. Before us is a motion on notice dated 12th April 2024, in which Grace Nyanchama Gwaro and Angela Nyanganyi Gwaro (“the applicants”), seek stay of execution of the ruling and/or order of the trial court dated 13th March 2024, together with all consequential proceedings and/or orders and in particular, the limb directing the Kisii District Government Valuer to value LR No. Nyaribari Chache/B/B/Boburia/7754 (hereinafter the “suit property”), within 30 days and the Valuation Report be filed in the trial court so that it can determine specific amount of money payable to the 1st respondent as compensation.
2. The background to this application is that the 1st respondent filed a civil suit claiming that he had bought the suit property from the 1st applicant in 2006 for a consideration of Kshs. 850,000.00 that was fully paid. However, the 1st applicant failed and or neglected to transfer the suit property to the 1st



respondent. Instead, she did so to the 2nd respondent. This was for the reason that the 1st respondent had taken too long to complete payment of the full purchase price. As expected, the claims by the 1st respondent were denied by the applicants. Following a full merit hearing, the Environment and Land Court (“the ELC”) at Kisii ordered that the suit property be registered in the name of the 1st respondent. The suit property was a subdivision of LR No. Nyaribari Chache/B/B/Boburia 2904, (“the original property”). The original property was registered in the name of Joseph Lucas Gwaro, deceased, who was the husband and father to the 1st and 2nd applicants respectively.

3. Following the death of the deceased, the 1st applicant took out succession proceedings resulting in a grant of letters of administration. Pursuant to the grant, the 1st applicant subdivided the original property aforesaid which gave rise to the suit property. The other subdivisions were transferred to third parties. Subsequently, one, Rose Moraa Nyangau successfully applied for the revocation of the grant demanding a share of the original property. As a result of the foregoing, the applicants applied for review of the judgment and decree of the ELC, the argument being that the grant having been revoked and declared as null and void, all subsequent transactions involving the original property based on the grant, the judgment and decree of ELC could not be implemented. The application for review was allowed, however, on condition that the 1st respondent be compensated by the applicants with a sum of money equivalent to the current value of the suit property. Towards this end, the ELC directed the Kisii District Government Valuer to act as already stated.
4. The applicants being dissatisfied with this ruling and order lodged Notice of Appeal subsequent to which they filed the instant application.
5. The applicants are fearful that the 1st respondent is keen on implementing the ruling and order, which may involve valuing a non-existent suit property, as the title to it had already been revoked. This could result in the applicants paying for a transaction that is a nullity. On the basis of the foregoing, the applicants are persuaded that their intended appeal is arguable.
6. The applicants also argue that the execution of the ruling and order would sanction an illegality and cause irreparable harm to them should the intended appeal succeed, which would then render the intended appeal nugatory. Therefore, there was sufficient cause to preserve the original property pending the hearing and determination of the appeal.
7. Elias Mabeya Mangana, (“the 1st respondent”), opposed the application through a replying affidavit dated 23rd April 2024, deposing that the applicants had not demonstrated an arguable intended appeal or that their intended appeal would be rendered nugatory if the orders sought are not granted and the intended appeal succeeds. That the 1st applicant, received money from him under the false guise that she was in a position to sell the suit property to him. That the applicants had not disputed receipt of full purchase price for the suit property, and the ELC rightly ordered for a refund of the purchase price and therefore, the appeal does not raise any triable issues; was a waste of valuable judicial time and was a delaying tactic calculated to frustrate his quest for justice. He argues that the applicants will suffer no loss if the application is disallowed as the ELC merely ordered for a refund.
8. There was no response to the application by the 2nd and 3rd respondents though served with the application.
9. The application was heard by way of written submissions with limited oral highlights. When it came up for hearing on 14th October 2024, through our virtual platform, Ms. Ochwal, learned counsel for the applicant submitted that the application met the threshold required under rule 5 (2) (b) of this Court’s Rules. She submitted that the intended appeal is arguable and would be rendered nugatory if the stay orders are not granted and it is eventually successful. The applicant cited several authorities



that deal with the above guiding principles, and whether the outcome of the appeal would be reversible or if damages would reasonably compensate the applicants. The authorities adverted to were: *Re Estate of Isaac Kaburu Marete (Deceased)* [2017] eKLR; *Macfoy vs. United Africa Co. Ltd* [1961] 3 All ER 1169; *Martevé Guest House Limited vs. Njenga & 3 Others (Civil Appeal No. 400 of 2018)* [2022] KECA 539 (KLR); *Governors Balloon Safaris Ltd vs. Skyhip Company Ltd & Another Nairobi CACA No. 32 of 2015*; and *Kenya Medical Lab Technicians & Technologists Boards vs. Prime Communications Limited* [2014] eKLR.

10. Counsel argued that the trial court should not have ordered valuation for a non-existent parcel of land and give effect to a nullified transaction. It was submitted that the 1st respondent had not sought a refund in his pleadings but rather specific performance and damages for breach of contract, which was later declared a nullity. The applicants were ordered to pay for the valuation exercise while the suit property to be valued is non-existent. This ground alone make the intended appeal arguable. The applicants argued that the implementation of the ruling and order before the hearing and determination of the intended appeal would defeat their rights and interests thus rendering the intended appeal nugatory.
11. The 1st respondents, through learned counsel Mr. Kipkemboi, opposed the application and submitted that the application did not meet the threshold for the grant of a stay of execution. He relied on the cases of *ABN Amro Bank N. V. vs. Kenya Pipeline Company Limited* [2015] eKLR; *Patrick Mweu Musimba vs. Richard N. Kalemhe Ntile & 3 Others* [2013] eKLR; *Rupa Saving & Credit Cooperative Society vs. Violet Shidogo* [2022] eKLR; and *Combi (Singapore) Pte Limited vs. Ramnath Sriram & Another* [1997] EWCA 2164, to demonstrate that the appeal was neither arguable nor that it would be rendered nugatory if the application is denied. He contended that the conditional review order was warranted. He argued that the intended appeal raised no triable issues as the applicants had not denied receiving the full purchase price for the suit property. That the ruling and order merely sought to restore the 1st respondent to his original position before the deception by the 1st applicant. That the intended appeal was therefore not arguable, as the ruling and order being appealed only addresses the sum of money received by the 1st applicant not the suit property. The respondent asserted that no substantial loss would be caused to the applicant, therefore, if the ruling and order is implemented. Accordingly, the intended appeal if successful will not be rendered nugatory.
12. We have considered the application, the grounds, the rival affidavits, the submissions, the authorities cited and the law. The jurisdiction of this Court on applications brought pursuant to rule 5(2) (b) of this Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will have been rendered nugatory.
13. This Court in the case of *Trust Bank Limited & Another vs. Investech Bank Limited and 3 Others* [2000] eKLR, delineated the jurisdiction of this Court 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...”



14. In considering the twin principles set out above, we are cognizant that both limbs must be demonstrated to the Court's satisfaction.
15. On the first limb, we have to be persuaded that there is at least a single bona fide arguable ground that has been raised by the applicant to warrant ventilation before this Court. See Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR 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.
16. We have considered the grounds set out in the motion and the draft memorandum of appeal. In our view, the applicants were only ordered to facilitate the valuation of the suit property for purposes of ensuring that the 1st respondent is refunded the purchase price paid to them by the 1st respondent, and which they have not denied. The issue of the suit property not existing or facilitating and or sanitizing what court has declared a nullity does not therefore arise. The trial court was very categorical that the 1st respondent will not be able to have the suit property as at the time of sale, the applicants did not have capacity to sell it and thus, a refund was the only available remedy. We do not think there is anything that the applicants will suffer if valuation is undertaken. Yes, the transaction was nullified, however, the suit property is still identifiable on the ground. Thus, it will not be impossible for the valuer to undertake the exercise as directed by the court. It is not lost on us that the applicants have the purchase price, and equally, wants to retain the suit property which is unconscionable. They want to benefit from their own mischief. We do not think therefore that the applicants have made a case that the intended appeal will be arguable and or be rendered nugatory if the stay of execution is not granted and it is successful. It pricks the conscience of a court of equity for the applicants to retain the purchase price as well the suit property and that the 1st respondent therefore walks away with nothing.
17. As the applicants are required to establish both limbs, the applicants having failed to satisfy both limbs, the application fails and is accordingly dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF MARCH 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

Deputy Registrar

