



**Kinyua v Kamurwa (Civil Application E051 of 2023)
[2025] KECA 1001 (KLR) (4 April 2025) (Ruling)**

Neutral citation: [2025] KECA 1001 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E051 OF 2023
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
APRIL 4, 2025**

BETWEEN

JOHNSON MURIITHI KINYUA APPLICANT

AND

JOSEPH MWAI KAMURWA RESPONDENT

(Being an appeal from the Judgment and Orders of the Environment and Land Court of Kenya at Nyeri (J. O. Olola, J.) delivered on 27th April, 2023 in E.L.C. No. 508 of 2014)

RULING

1. The applicant Johnson Muriithi Kinyua by Motion said to be brought under sections 3 and 3A of the *Appellate Jurisdiction Act* and Rule 5(2) of the Court of Appeal Rules prays that we be pleased to stay execution of the judgment of Olola J. in Nyeri ELC Case No. 508 of 2014 delivered on 27th April, 2023 and further proceedings in that court pending the hearing and determination of this application and of the intended appeal. In grounds in support of the Motion and in a supporting affidavit of the applicant Johnson Muriithi Kinyua, it is said, *inter alia*, that the respondent Joseph Mwai Kamurwa had filed the said case on 14th November, 2011 seeking for a declaratory order to cancel the applicant's title and the same be registered in his name; that the applicant is dissatisfied with the said judgment and filed a notice of appeal; that he intends to file a memorandum of appeal that will raise several arguable issues and that the respondent has taken steps to execute the judgment. He has attached to the Motion the judgment of the ELC and says that he has made several attempts to procure copies of proceedings to enable him appeal and that the intended appeal will be rendered nugatory if execution takes place.
2. In a replying affidavit the respondent says that there were three other parties at the case at ELC where he was the plaintiff. It is deponed that the suit land Parcel No. Iriaini/Chehe/371 was originally registered on 5th February, 1959 on a first registration in favour of one Gachiri s/o Njege (deceased); that on 19th November, 1988 one Joseph Gachiri Njege a grandson of the original proprietor of the land applied



to the Registrar for a correction of names which application was approved where the applicant who applied for change of names became the registered proprietor of the land; that the applicant became registered as proprietor on 27th June, 2006 upon sale of the land by the said Joseph Gachiri Njege. It is deponed that Gachiri son of Njege and Joseph Gachiri Njege were not one and the same person and that the change of names was done through fraud which could not pass an interest in land; that Joseph Gachiri Njege had not preferred an appeal against the finding of ELC; that it is unlikely that he/applicant who derives title from the fraudulent act of a person who was a defendant in the case has any basis for the intended appeal. He says at paragraphs 8 and 9 of the affidavit:

8. That the trial court has made its remarks in the attached judgment regarding the applicants bona fides which I identify with as he knew that the purported vendor had never been in possession of the suit land even as he attempted to carry out eviction.
 9. That the applicant has never been in possession of the suit land.”
3. He further depones that there is no likelihood of any appeal being rendered nugatory as there is no loss that is likely to result to the applicant. Further that the only issue pending for execution is the payment of taxed costs.
 4. When the Motion came up for hearing before us on 4th November, 2024 the applicant was represented by learned counsel Mr. Ndana while the respondent was represented by learned counsel Mr. Nderi. Both sides had filed written submissions which they fully relied on without finding it necessary to highlight the same.
 5. It is stated in written submissions by the applicant that the intended appeal is arguable; that the trial Judge erred by holding that title to the parcel of land No. Iriaini/Chehe/371 be cancelled and reverted back to the estate of the deceased Gachiri Njege and at the same time ordered the same land to be registered in the names of the respondent Joseph Mwai Kamurwa; it is submitted that the Judge should have allowed the land to first revert to the deceased so that the family could file succession proceedings to determine the beneficiaries; it is also said that the Judge erred in failing to find that the applicant was an innocent purchaser for value without notice.
 6. It is submitted on the nugatory aspect that the applicant is the registered owner of the land whose title the Judge has ordered to be cancelled.
 7. In written submissions by the respondent it is stated that the Judge was right to find that the registration of the suit land in favour of the 1st defendant in the suit was fraudulent. It is submitted on the issue of the applicant being an innocent purchaser for value that without valid root of title none would have been transferred. It is finally submitted by the respondent that the applicant has not been in possession and cannot suffer any loss.
 8. The principles that govern an application for stay of execution pending appeal are well settled and were well summarized in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR. For an applicant to succeed he must firstly demonstrate that for the appeal or intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. Such an applicant must in addition demonstrate that the appeal would be rendered nugatory absent stay.
 9. It is submitted by the applicant that it was wrong for the Judge to order cancellation of title. This we find to be an arguable point on whether there was sufficient evidence to support that conclusion. An arguable point is not one that must succeed but is one that deserves a full consideration and determination by the court. A single arguable point will suffice as an applicant is not required to



demonstrate a multiplicity of arguable grounds - Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd Civil Application No. Nai 345 of 2004.

10. What about the nugatory aspect which an applicant must also demonstrate to succeed?
11. It appears common ground that the applicant is not and has not been in possession of the land. We find that the intended appeal will not be rendered nugatory where the applicant has never possessed the land. The applicant can be compensated in damages if his appeal succeeds. The applicant has therefore failed to demonstrate the second limb which he must also satisfy to succeed in an application of this nature. The motion fails and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 4TH DAY OF APRIL, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL ALI - ARONI

..... **JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

