



**Kato v Keesi & 2 others (Civil Application E186 of 2024)
[2025] KECA 973 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 973 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E186 OF 2024
SG KAIRU, FA OCHIENG & AO MUCHELULE, JJA
MAY 23, 2025**

BETWEEN

JOHN KATO APPLICANT

AND

ALICE MBESA KEESI 1ST RESPONDENT

JUSTUS KYALO KEESI 2ND RESPONDENT

LILIAN NTHAMBI KEESI 3RD RESPONDENT

*(Being an application for stay of execution of the Ruling and
Order of the Environment and Land Court of Kenya at Nairobi
(Murigi, J.) dated 6th March 2024 in ELC Cause No. 337 of 2017)*

RULING

1. The applicant, John Kato, has moved the Court by Notice of Motion dated 4th April 2024 seeking an order under Rule 5(2)(b) of the Court of Appeal Rules to stay execution of the ruling/order made on 6th March 2024 by Environment and Land Court at Makueni (ELC) (Murigi, J.) in Makueni ELC Case No. 337 of 2017. In that ruling, the ELC found the applicant guilty of contempt of an order dated 20th November 2018 (should be 20th December 2018) and directed the applicant to appear before that court on 7th May 2024.
2. The background in brief is that in 2013 the respondents as administrators of the estate of Jonathan Keesi Nguzi, deceased, instituted suit against the applicant, among other persons who were named as defendants. As against the applicant, the respondents sought judgment for a permanent injunction to restrain him from trespassing, cultivating, or in any way dealing with the property known as Kilala/Kaumoni/323 as well as an order compelling him to vacate and give vacant possession of the same to



the respondents. The applicant on the other hand asserted that he purchased the property from the beneficiaries of the deceased.

3. The suit has a long procedural history having originally been filed before the ELC in Nairobi before being transferred to ELC Makueni. Of relevance to the present application is an order that was issued by the ELC at Makueni in a ruling delivered on 20th December 2018 by which that court (Mbogo, J.) allowed the respondents application dated 26th February 2014. In that Order, the ELC restrained the applicant by an order of injunction from:

“...continuing to trespass onto, constructing, cultivating, selling, invading, wasting or in any way dealing or any way interfering with the suit property known as ...Kilala/Kaumaoni/323...pending the hearing and determination of [the] suit.”

4. According to the respondents, despite having been served with that order, and during its subsistence, the applicant in blatant breach of the same continued to construct a residential house on the property, completed the same, and eventually moved into the house with his family. Consequently, the respondents moved the ELC with an application dated 18th November 2020 seeking orders of committal of the applicant to civil jail for wilful disobedience and contempt of the court order; and an order compelling the applicant to demolish the house.
5. In opposition to that application, the applicant asserted that he started construction of the house long before he was notified of the existence of the order; that when COVID 19 pandemic struck he moved his family into the house as he was unable to pay rent; that in any event when he resumed construction of the house on the property, there was no valid order in force.
6. Having considered the application, the learned Judge of the ELC in the ruling of 6th March 2024 that is sought to be stayed found that the respondents had clearly demonstrated that the applicant constructed a permanent house on the property in blatant breach of the court order and found him guilty of contempt of the order. The applicant was then ordered to appear before the ELC on 7th May 2024 for sentencing. Aggrieved by that ruling the applicant filed a Notice of Appeal dated 18th March 2024 on which the present application is hinged.
7. The application was canvassed before us on 17th February 2025. Learned counsel Mr. Michael Nzuli held brief for Mr. Muinde for the applicant while Mrs. Ahomo held brief for Mr. Issa Mansur for the respondent. We have considered the application, the affidavits in support sworn by the applicant and by Dominic Muinde; the replying affidavit sworn by Justus Kyalo Keesi; and the rival written and oral submissions against the principles applicable. (See Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others [2013] KECA 378 (KLR)).
8. It was urged for the applicant that the intended appeal is arguable. For instance, it was submitted, there is the question whether there was a valid order capable of being disobeyed considering the provisions of Order 40 Rule 6 of the Civil Procedure Rules which provides for the lapse of interlocutory orders of injunctions if the suit is not determined within 12 months. Moreover, it was urged the suit, including the order of 20th December 2018, had in any event been stayed. Other grounds of appeal include the complaint that the effect of the impugned orders is to determine the suit before it is heard.
9. On the nugatory aspect, it was urged that the applicant was due to be sentenced on 7th May 2024, and although that date is past, the applicant was on that occasion ordered to purge the contempt by moving out of the property within 14 days, and although he has since complied, he is being “denied the consortium and company of his wife and the love and affection of his children.”



10. The respondents on the other hand submitted that the Court has no jurisdiction to entertain this application as the notice of appeal was filed and served out of time; that the appeal is not arguable as the order made on 20th December 2018 was to stay in force “pending hearing and determination of the suit” and did not therefore lapse and neither did an order of stay of proceedings pending substitution of a deceased party have the effect of staying that order.
11. On the nugatory aspect, it was submitted for the respondents that despite the applicant having been directed on 7th May 2024 to purge his contempt by vacating the property, he remains in occupation and continues in his contempt; that furthermore, the applicant has a pending application before the ELC dated 3rd May 2024 seeking to set aside or vacate his conviction; and the present application is devoid of merit.
12. As regards the contention by the respondents that the Court has no jurisdiction to entertain the application because the notice of appeal was filed out of time and never served in accordance with the rules, we note that there is an application pending before the Court, being Civil Application No. E251 of 2024, in which the respondents seek to have the notice of appeal struck out on those grounds. We will therefore refrain from dealing with the question of the competence or otherwise of the notice of appeal so as not to prejudge the pending application.
13. As to whether the intended appeal is arguable, we are prepared to give the applicant the benefit of doubt that the intended appeal is not frivolous bearing in mind that an arguable appeal is not one that must necessarily succeed. See Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Limited & 2 Others [2009] eKLR. There is for instance the argument that the order made on 20th December 2018 had lapsed by dint of Order 40 Rule 6 of the Civil Procedure Rules. What is arguably frivolous is the complaint regarding the reference in the last paragraph of impugned ruling to “the order dated 20/11/2018” (as opposed to 20/12/2018) which is patently an error as it is otherwise clear from the body of the ruling that the order in question was dated 20th December 2018.
14. Regarding the nugatory aspect, the position as correctly urged by counsel for the applicant is that this depends on whether what is sought to be stayed if allowed to happen is irreversible. Dominic Muinde, the advocate for the applicant has deponed in his affidavit (wrongly indicated as having been sworn on 13th April 2024, which must be an error as he deposes to later events) that on 7th May 2024 when the matter was due for sentencing, the applicant, who had filed an application to set aside the impugned ruling, was ordered to purge the contempt by moving out of the property within 14 days and that the applicant “must secure alternative homes (sic) for his family”.
15. In the subsequent submissions it is contended for the applicant that he moved out of the property (though this is contested by the respondents) and what he now complains of is loss of consortium. If, as the applicant says, he has already moved out of the property in compliance with the order of 7th May 2024, we see no difficulty, should the appeal succeed, in the applicant returning to the property. We are therefore not persuaded that the intended appeal will be rendered nugatory.
16. Consequently, the application fails. It is accordingly dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY, 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. OCHIENG



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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar.

