



Cheptoo & 8 others v National Social Security Fund (NSSF) & 2 others (Civil Appeal (Application) E943 of 2023) [2025] KECA 799 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KECA 799 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E943 OF 2023
W KARANJA, WK KORIR & GV ODUNGA, JJA
MAY 9, 2025**

BETWEEN

- JOSEPH CHEPTOO 1ST APPLICANT**
- FAITH JEROTICH 2ND APPLICANT**
- ALICE CHEBET 3RD APPLICANT**
- VIVIAN JEPKEMBOI 4TH APPLICANT**
- LEROY KIMUTAI 5TH APPLICANT**
- BRENDA CHERONO 6TH APPLICANT**
- JOSEPH CHEPTOO 7TH APPLICANT**
- KEVIN KIPNGETICH 8TH APPLICANT**
- EVANS KIPROP 9TH APPLICANT**

AND

- NATIONAL SOCIAL SECURITY FUND (NSSF) 1ST RESPONDENT**
- DAVID GACHONDE 2ND RESPONDENT**
- REBECCA JEPCHUMBA BOIT 3RD RESPONDENT**

(An application for stay of execution of the judgment and decree of the Environment and Land Court of Kenya at Nairobi (Komingoi, J.) dated 26th July 2023 in ELC Case No. E223 of 2020)

RULING

1. At the trial court, the applicants sued the respondents for, inter alia, a permanent injunction restraining the respondents from processing or issuing title certificate/deed and or lease certificate to land parcel



- No. LR 97/0XX0/5X4 (the “suit property”) in favour of the 2nd respondent and or any other party and or creating any interest on the parcel to any other party; permanent injunction restraining the respondents by themselves, servants, employees, agents, representatives or any other person acting under their instructions or their interests from evicting, demolishing, entering, interfering, threatening the applicants with entry, peaceful occupation and possession, and from otherwise dealing, entering, remaining in, trespassing or in any other manner whatsoever interfering with the applicant’s peaceful occupation, possession and use of the suit property; an order restoring Joseph Cheptoo, the 1st applicant, as the registered owner in title certificate/deed and or lease certificate to suit property.
2. The respondents opposed the claim, the 1st respondent contending that it has never sold the suit property to the applicants thus they are illegally in possession.
 3. The 2nd respondent in his statement of defence and counterclaim contended that he owns the suit property by virtue of allocation and purchase from the 1st respondent. He prayed for orders, inter alia; a declaration that the 2nd respondent is a bona fide purchaser of the suit property; a permanent injunction restraining the applicants whether by themselves, their relatives, servants, agents, employees and/or anybody acting for them that is to say from entering, trespassing on, invading, offering for sale, selling, transferring, letting, alienating or in any manner interfering with the 2nd respondents’ ownership, use, peaceful and quiet enjoyment of the suit; mesne profits from 2.3.2016 until payment in full; an award for general damages for trespass; an order of eviction be issued against the applicants and any other person claiming proprietorship of the suit land.
 4. On 26th July 2023, L. Komingoi, J. dismissed the applicants’ case and entered judgment in favour of the 2nd respondent, by allowing his counterclaim as follows; by issuing a declaration that the 2nd respondent is the bona fide purchaser of the suit land.
 5. The learned Judge also issued a permanent injunction restraining the applicants whether by themselves, their relatives, servants, agents, employees and/or anybody acting for them from interfering or dealing with the suit property in any way and also awarded Kshs. 100,000 as general damages for trespass and gave the applicants one hundred and fifty (150) days to vacate the suit land, failure to which the 2nd respondent shall be at liberty to use lawful means to evict them.
 6. The applicants, being aggrieved by the decision of the trial court, filed the instant appeal and in the interim, the applicants are ,through the notice of motion dated 5th August 2024, seeking to stay the execution of the judgment, and the decree arising therefrom, pending hearing and determination of the appeal.
 7. David Gachonde, (the 2nd respondent), and Rebecca Jepchumba Boit (the 3rd respondent) swore replying affidavits dated 26th September 2024 and 25th September 2024, respectively in opposition to the application.
 8. When the application came up for hearing on 9th December 2024, there was no appearance for the applicants but the firm of Katwa Kigen had filed submissions in support of the application. Learned counsel, Mr. Peter Muwo appeared for the 1st respondent; Mr. Mwaniki Kariuki, appeared for the 2nd respondent and Ms. Winnie Ochieng appeared for the 3rd respondent. Counsel for the 1st respondent informed the Court that they were not participating in the application. The others adopted their written submissions and made no oral highlights.
 9. In support of the motion, the applicants aver that they have an arguable appeal and refer to their 5-point memorandum of appeal through which they fault the learned trial Judge for, inter alia, holding that the 2nd respondent rightfully owned the land parcel LR.No. 97/0XX0/5X4.



10. On its part, the 2nd respondent averred that his ownership and claim as espoused in the counterclaim is that the 1st respondent was at all material times the registered proprietor of the suit property and offered the same for sale among other portions to any other interested members of the public; that the 3rd respondent offered to purchase and the 1st respondent agreed to sell the suit property to her but she did not fully pay for the same and the 1st respondent repossessed it and offered it to him as shown by the letter dated 31st March 2016 by the 1st respondent addressed to the 1st applicant. He purchased the said property and was a bona fide purchaser. He deposed that if the application is allowed, he will suffer prejudice as he will not be able to enjoy the fruits of his judgement and that the applicants have not offered security as a sign of good faith.
11. On her part the 3rd respondent averred that the application does not satisfy the requirements for the prayers sought because the applicants have not disclosed any sufficient reasons to warrant granting stay of execution; that the appeal is not arguable on the grounds that she is a stranger to the allegations made as she has established that she has no interest in the suit land; that she was clear throughout the trial that she initially intended to purchase the suit property but lost interest upon her separation with the 1st applicant and she ended up not paying the full purchase price; and that she at no point in time held the suit property in trust for the applicants and, therefore, has no interest in the said property.
12. We have considered the application along with the rival affidavits and submissions by the parties. In order to persuade the Court to stay execution, issue injunction or stay any further proceedings pursuant to the discretionary power granted under rule 5(2 (b) of this [Court's Rules, 2022](#), an applicant must establish that there is an arguable appeal which, were it to eventually succeed, would be rendered nugatory owing to the failure to issue any of the stated orders. The aforesaid principles were succinctly expressed by the Supreme Court in [Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others](#) [2014] eKLR thus:

“... The principles to be considered before a Court may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that: i.the appeal or intended appeal is arguable and not frivolous; and that ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory. These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of [the Constitution](#) of Kenya, 2010, a third condition may be added, namely: iii. that it is in the public interest that the order of stay be granted.”
13. We shall constrain ourselves to the above parameters and eschew making any definitive findings at this stage, lest we embarrass the bench that will be seized of the task to hear and determine the substantive appeal.
14. On the limb on arguability of the appeal, a perusal of the motion and the supporting affidavit of Joseph Cheptoo shows that the applicants do not have any documents on which they can peg their claim for ownership of the suit property. Their occupation of the suit property was pegged on the sale agreement between the 1st respondent and the 3rd respondent. Unfortunately for the applicants, the 3rd respondent has conceded that she has no interest in the suit property as she was unable to complete the sale and the suit property was lawfully sold to the second respondent. She has deposed that she has no claim over the suit property. In these circumstances, it is evident that the applicants have no arguable appeal.
15. On the limb of nugatory aspect, the law is clear that for an application of this nature to succeed, an applicant needs to prove both arguability and the nugatory aspect. The two limbs are conjunctive and



satisfying only one of them does not aid the applicant at all. See *Stanley Kang'ethe Kinyanjui -vs- Tony Ketter & 5 Others* [2013] eKLR. Having failed to demonstrate arguability of the appeal, the nugatory aspect becomes moot and it will not be necessary for us to consider the same.

16. In conclusion, our finding is that the notice of motion dated 5th August 2024 fails to meet the threshold set for such applications to succeed. We dismiss it with costs to the 2nd and 3rd respondents.

DELIVERED AND DATED AT NAIROBI THIS 9TH DAY OF MAY, 2025.

W. KARANJA

JUDGE OF APPEAL

W. KORIR

JUDGE OF APPEAL

G. V. ODUNGA

