



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Kamau v Gatonye & another (Civil Application E520 of 2024)  
[2025] KECA 789 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 789 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E520 OF 2024  
W KARANJA, SG KAIRU & WK KORIR, JJA  
MAY 9, 2025**

**BETWEEN**

**JENNIFER WANGARI KAMAU ..... APPLICANT**

**AND**

**JOSEPH GATONYE ..... 1<sup>ST</sup> RESPONDENT**

**DAVID MUCHIRI GIKONYO ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of execution pending the hearing of an appeal from the ruling of the Environment and Land Court at Nairobi (Oguttu-Mboya, J.) delivered on 3rd October 2024 in ELC Case No. 578 of 2009 as consolidated with ELC Case No. 498 of 2009)*

**RULING**

1. The applicant, Jennifer Wangari Kamau, in her notice of motion dated 11<sup>th</sup> October 2024 brought pursuant to rule 5 (2) (b) of the Court of Appeal Rules seeks an order staying the execution of the ruling delivered on 3<sup>rd</sup> October 2024 by Mboya, J. of the Environment and Land Court (ELC) in Nairobi Civil Suit No. 498 of 2009. The application is based on the grounds on its face and the applicant's affidavit sworn in support of the application.
2. The impugned ruling was in respect to two applications and a preliminary objection. The applicant had filed an application dated 19<sup>th</sup> July 2024 and a preliminary objection dated 16<sup>th</sup> September 2024. The preliminary objection was in response to the respondents' application dated 9<sup>th</sup> August 2024. The applications and preliminary objection were filed post the delivery of the judgment dated 1<sup>st</sup> October 2019 by Bor, J. In his ruling, Mboya J. dismissed the applicant's application and preliminary objection. Through the same ruling, he allowed the respondents' application and consequently found the applicant and others to be in contempt of the judgment of the trial court. The applicant has filed an appeal against the ruling and contends that the appeal is arguable, and unless an order of stay is granted, the appeal will be rendered nugatory.



3. The applicant avers that failure to secure an order staying execution will lead to an infringement of her rights under Articles 40, 43, 57, and 159 of *the Constitution*. She also avers that unless the impugned ruling is stayed, third parties who have rented the structures erected on the disputed property will be affected and she will lose her retirement investment, rendering the appeal nugatory. According to her, the respondents would not suffer any prejudice and it is in the interest of justice that the application be allowed.
4. The application is opposed by the affidavit sworn by Sarah Namanyanja Gatonye on 13<sup>th</sup> December 2024 in her capacity as the administrator of the estate of the 1<sup>st</sup> respondent, Joseph Gatonye and on behalf of the 2<sup>nd</sup> respondent, David Muchiri Gikonyo. Through the replying affidavit, she deposed that the application is res judicata, vexatious, and an abuse of the Court process. She avers that the respondents' ownership of the suit property has been affirmed by a valid judgment and that an application for stay against the said judgment was dismissed vide Civil Application 236 of 2020. She also avers that the appeal against the judgment of the E&LC has also since been dismissed by this Court. She deposes that the applicant has continued to occupy the suit property in disobedience of the judgment dated 1<sup>st</sup> October 2019 and the decree dated 1<sup>st</sup> May 2023.
5. Additionally, it was Sarah's averment that the interested parties referred to by the applicant were cited and punished for contempt and have since purged the contempt and filed a notice of motion dated 9<sup>th</sup> August 2024 seeking to be released from civil jail. She urges that the application be dismissed with costs, asserting that it has been overtaken by events, is not premised on an arguable appeal, and there is therefore no appeal to be rendered nugatory.
6. In submissions dated 6<sup>th</sup> December 2024, the firm of Mugo & Associates urged that the applicant would suffer substantial loss and prejudice as she was likely to be convicted and committed to jail, which action is not reversible and will render the appeal a mere academic exercise. Counsel maintained that it is in the interest of justice that the execution of the ruling is stayed. Counsel referred to Carter & Sons Ltd vs. Deposit Protection Fund Board & 2 Others - Civil Appeal No. 291 of 1997; Michael Kareko Gatere vs. Cooperative Merchant Bank Ltd & 3 Others [2017] eKLR; and Order 42 rule 6(2) of the Civil Procedure Rules, 2010 to buttress these submissions and to urge that the application has satisfied the threshold for grant of the orders sought.
7. At the time this application was heard on 16<sup>th</sup> December 2024, the respondents had not filed any submissions.
8. Under rule 5 (2) (b) of this Court's Rules, an applicant seeking an order of stay of execution or proceedings, or an injunction must first demonstrate that the intended appeal or appeal is arguable and not frivolous and that were the intended appeal or appeal to eventually succeed, it would be rendered nugatory absent stay orders. In that regard, it was held in Chris Munga N. Bichage vs. Richard Nyagaka Tongi & 2 others [2013] KECA 141 (KLR) that:

“The law as regards applications for stay of execution, stay of proceedings, or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”
9. In assessing whether the intended appeal is arguable, we appreciate that as was held in Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] KECA 378 (KLR), a single bona fide issue satisfies the



threshold for finding an appeal arguable. It must also be recalled that, as was held in *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike; Lantech Ltd* [2006] KECA 333 (KLR), the Court is, at this stage, not required or expected to pronounce itself conclusively on the arguability of the appeal. We have looked at the grounds of appeal as expressed in the supporting affidavit and in the annexed memorandum of appeal, and note that among the issues raised are whether there was compliance with Order 1 Rule 12 (2) of the Civil Procedure Rules and whether the elements of contempt were established. In light of the already stated principles, we find that these are arguable points warranting full consideration by the Court. As such, we find that the applicant has an arguable appeal.

10. Will the intended appeal be rendered nugatory? In *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* (supra), the meaning of an appeal being rendered nugatory was explained as follows:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

11. The respondents have a judgment dated 1<sup>st</sup> October 2019 issued in their favour in respect to the ownership of the suit property. The origin of the contempt proceedings was the applicant’s failure to comply with the terms of that judgment and the decree arising therefrom. Although the respondents averred that the applicant’s appeal against the judgment of Bor J. has since been dismissed by this Court, and the applicant did not rebut the averment, we note that the respondents have not exhibited a judgment from this Court dismissing the applicant’s appeal. What the respondents exhibited is the ruling of this Court (*M’Inoti, Laibuta & Ngenye-Macharia JJ.A.*) dismissing the applicant’s attempt to stay execution of the judgment of Bor, J. Be that as it may, the applicant’s plea is that she is apprehensive of being sentenced and committed to civil jail for contempt. If one were to wonder why the applicant sounds sure of her fate, the straight answer would be that she has been found to have disobeyed a valid judgment. As already stated, this Court has since declined to stay the execution of that judgment. In the circumstances, the applicant’s apprehension does not warrant our intervention.
12. Additionally, the applicant alleges that interested parties will be affected by the execution of the ruling. The applicant has, however, failed to challenge the respondents’ averment that those Interested Parties have already been sentenced and even sought to purge the contempt. Therefore, the outcome of this application will not affect them in any way. Furthermore, we must point out that this is not an application for stay of the judgment dated 1<sup>st</sup> October 2019, but one against the ruling of 3<sup>rd</sup> October 2024. We must add that the applicant has the option of purging the contempt and later seeking damages should her intended appeal against the impugned ruling succeed. In the circumstances of this matter, we come to the inevitable conclusion that the applicant has not established how the intended appeal will be rendered nugatory.
13. The upshot of the foregoing is that the applicant has failed to meet the established threshold for the grant of an order of stay of execution of judgment. Consequently, the notice of motion dated 11<sup>th</sup> October 2024 is found to be without merit and is dismissed with costs to the respondents.
14. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY 2025**

**W. KARANJA**

.....

**JUDGE OF APPEAL**



**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**W. KORIR**

.....

**JUDGE OF APPEAL**

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

Signed

Deputy Registrar .

