



Muchene v Kinuthia & 2 others (Civil Application E603 of 2024) [2025] KECA 813 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KECA 813 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E603 OF 2024
LA ACHODE, WK KORIR & JM NGUGI, JJA
MAY 9, 2025**

BETWEEN

PATRICK KABUE MUCHENE APPLICANT

AND

HANNAH WANGARI KINUTHIA 1ST RESPONDENT

SAMUEL MWAURA FELIX KARIUKI 2ND RESPONDENT

MICHAEL MUHIA NGAE 3RD RESPONDENT

((An application for stay of execution pending the hearing of an appeal from the judgment of the Environment and Land Court at Nairobi (M. D. Mwangi, J.) dated 11th April 2024 in E&LC Case No. E788 of 2015))

RULING

1. The notice of motion dated 12th November 2024 is brought under rule 5 (2) (b) of the Court of Appeal Rules. In the application, the applicant seeks an order of injunction restraining the respondents from evicting him or his family from the suit parcel, being 0.180 Ha of L.R. 1X4/X2 and 0.2238 Ha. of L.R. 1X4/X3, situated in Kabuku, Limuru Sub-County of Kiambu County, pending the determination of his intended appeal against the 2nd and 3rd respondents. The application is premised on the grounds contained in the application and the depositions made by the applicant in his affidavit sworn in support of the application.
2. From the deposition by the applicant, the application is in respect of a judgment delivered by M. D. Mwangi J. of the Environment and Land Court on 11th April 2024, subsequent to a suit he filed seeking to acquire ownership of the suit property by adverse possession. Through the judgment, the applicant’s claim was dismissed, and eviction was ordered against him, which was to take place upon the expiry of 30 days from the date of the judgment. The applicant’s case is that his intended appeal is arguable



on account of the learned Judge's erroneous interpretation of the doctrine of adverse possession and misapprehension of the evidence on record. He further avers that without injunctive orders, the 2nd and 3rd respondents will proceed to evict him from the suit property, rendering his family homeless and leaving him in distress. According to him, the distress to be caused by eviction cannot be compensated by an award of damages.

3. The 1st, 2nd and 3rd respondents swore independent affidavits all dated 20th November 2024 opposing the application. According to them, the orders sought cannot be issued since there is no proper appeal before the Court because the applicant's Civil Application No. E600 of 2024 - Patrick Kabue Muchene vs. Hannah Wangari Kinuthia & 2 Others seeking an extension of time to file an appeal is yet to be determined. They additionally aver that the 2nd and 3rd respondents were innocent purchasers for value. Further, that the intended appeal is not arguable, and the applicant has not established that it will be rendered nugatory should the application be declined.
4. Both counsel for the applicant and respondents filed their respective written submissions, which they relied on with brief oral highlights at the hearing.
5. Learned counsel, Mr. Sikuku for the applicant, relied on the submissions dated 27th November 2024 filed by the law firm of J.K. Kibicho & Co. Advocates. Counsel referred to Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR to identify the genome of an arguable appeal and submitted that a single bona fide point meets the threshold for declaring an appeal arguable. Counsel submitted that the intended appeal concerns the application of the doctrine of recent possession and the validity of a contract relied upon by the Court and is therefore arguable. Addressing the nugatory aspect of the application, counsel submitted that if the orders sought are not granted, the applicant and his family will be rendered homeless, yet they have known the suit property as their home for 24 years. Counsel referred to Waweru Mwaura vs. Mary Wanjiru Njenga [2016] KECA 574 (KLR) to buttress the argument that eviction would render the appeal nugatory. Counsel further submitted that a monetary award would not be sufficient to compensate the applicant for the distress and suffering that he would endure with his family if the eviction were to take place. In support of this point, counsel relied on Films Rover International vs. Canon Film Sales Ltd [1986] 3 All ER 772, as cited in George Gitau Wainaina vs. Kenya Commercial Bank Ltd & 2 Others [2015] KECA 226 (KLR). In the end, counsel urged us to allow the application.
6. In opposition to the application, learned counsel, Mr. Oguye who held brief for learned counsel Mr. Kimani relied on the submissions filed on 2nd December 2024 by the law firm of Mwamuye, Kimathi & Kimani to submit that the orders sought cannot issue because the applicant has a pending application for the extension of time for filing the appeal. Counsel also faulted the applicant on account of the delay in lodging the instant application. Reliance was placed on John Mathenge Gaita vs Beth Wahito Wambugu [2021] eKLR and Kuko & Another vs. Ali & Another; Robinson (Interested Party) [2024] KECA 305 (KLR) in support of the arguments.
7. Next, learned counsel took issue with the applicant's supplementary affidavit sworn on 26th November 2024, asserting that it should be expunged from the record as it was filed without the leave of the Court. In support of the argument, learned counsel cited the Supreme Court decision in Barclays Bank of Kenya Limited (Now Absa Kenya PLC) vs. Commissioner of Domestic Taxes (Large Taxpayer's Office); Kenya Bankers Association & Another (Interested Parties) [2023] KESC 44 (KLR) and submitted that the affidavit and the annexes are inadmissible for the reason that a party seeking to adduce additional evidence should make a formal application to the court.
8. Turning to the substance of the application, counsel for the respondents argued that the applicant had failed to establish the twin principles for granting the injunctive orders sought. Counsel submitted



that the intended appeal is not arguable and will not be rendered nugatory should the orders sought be declined. Counsel referred to *David Morton Silverstein vs. Atsango Chesoni* [2002] eKLR and urged that the applicant had not discharged the onus of demonstrating that his intended appeal would be rendered nugatory should the orders not be granted. Adverting to *Katangi Developers Ltd vs. Prafula Enterprises Ltd & Another* [2018] eKLR, learned counsel submitted that an order of stay should not be issued where costs would be sufficient compensation. Counsel ultimately urged us to dismiss the application with costs.

9. We have considered the notice of motion, the supporting affidavit, the replying affidavits, and the submissions of both sides. Before we delve into the application on merit, we must address the respondents' contention that the application is not properly before this Court. Pursuant to rule 5 (2) (b) as read with rule 75 of the Court of Appeal Rules, 2022, the jurisdiction of this Court to stay execution, stay proceedings, and issue injunctive orders can only be invoked once a notice of appeal has been lodged. The necessity of complying with this requirement was expressed by the Court in *Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR, thus:

“At the stage of determining an application under Rule 5

- (2) (b) there may or there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5 (2) (b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the decision of the High Court.”

10. Therefore, an applicant can only reap from the discretionary jurisdiction of the Court under rule 5 (2) (b) of the Court of Appeal Rules once a notice of appeal is lodged. In this application, the respondents have averred that the applicant has a pending application, being Civil Application No. E600 of 2024 - *Patrick Kabue Muchene vs. Hannah Wangari Kinuthia & 2 Others* for extension of time to file an appeal. During the hearing of this application, learned counsel for the applicant acknowledged the existence of the application and confirmed that they were yet to be granted leave to file the memorandum of appeal and the record out of time. In *Mae Properties Limited vs. Joseph Kibe & Another* [2017] eKLR, the Court held that:

“It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgment of the appeal within 60 literal days, or such longer time as may still amount to 60 days by operation of the proviso to Rule 82
....on exclusion. ...”

11. It is, therefore, a fact that there is no appeal on record, and going by the holding in *Mae Properties Limited vs. Joseph Kibe & Another* (supra), the notice of appeal suffered a natural death due to failure to file the appeal within the requisite time. In the circumstances, there is no valid appeal before this Court upon which the applicant can anchor his application under rule 5(2)(b). Without a valid appeal, there is no arguable appeal that can be rendered nugatory. In the circumstances, there is no reason to interfere with the respondents' right to enjoy the fruits of a valid judgment entered in their favour. On that basis alone, this application must therefore fail.
12. We have no choice but to strike out the application. Consequently, the notice of motion dated 12th November 2024 is hereby struck out with costs to the respondents.



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

L. ACHODE

JUDGE OF APPEAL

W. KORIR

JUDGE OF APPEAL

JOEL NGUGI

JUDGE OF APPEAL

