



**Mparo & 5 others v Kanji (Being sued as administrator of the Estate of Kanji Naran Patel)
(Civil Appeal (Application) E279 of 2023) [2024] KECA 12 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KECA 12 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E279 OF 2023
HA OMONDI, A ALI-ARONI & GWN MACHARIA, JJA
JANUARY 25, 2024**

BETWEEN

**SAMUEL KIMINTAE MPARO 1ST APPLICANT
WANGUI KIMINDAI JOSEPH 2ND APPLICANT
ANNA MBENEK 3RD APPLICANT
ALBERT LEMPARO 4TH APPLICANT
RICHARD TURERE 5TH APPLICANT
ANDREW SAIBULU KIMINTAE 6TH APPLICANT**

AND

**ARVIND KANJI (BEING SUED AS ADMINISTRATOR OF THE ESTATE OF
KANJI NARAN PATEL) RESPONDENT**

*(Being an application for stay of execution of the Judgment and Decree of the ELC
Court at Kajiado (C. Ochieng' J) delivered on 30th April 2020 and the Ruling of
(M.N Gicheru, J.) delivered on 8th February 2023 in ELC Suit No. 662 of 2017)*



RULING

1. What is before us for determination is the applicants' Notice of Motion dated April 27, 2023, brought pursuant to rule 5(2)(b) of the *Court of Appeal Rules*, seeking two orders:

the first being that a temporary injunction be issued against the respondent, his agents, assigns or any other persons from trespassing, evicting or interfering with the applicants' quiet possession over L.R. No. Kajiado/Kaputiei South/44;

and the second being that there be a stay of execution of any further execution proceedings emanating from the judgment of Kajiado Environment and Land Court (ELC) Case No. 662 of 2017 dated and delivered on April 30, 2020.
2. The application is supported by the grounds on its face and an affidavit sworn by Brian Okoko Njeka, the advocate on record for the applicants. It is his contention that there is imminent risk of the applicants' eviction from the suit property, as the applicants had been ordered to vacate the suit property within 90 days from February 8, 2023; that the applicants have been living on the suit property, which is their ancestral home since 1970; and that the substantial loss to be suffered cannot be compensated by way of damages. It is also contended that the intended appeal raises serious arguable grounds; and that it will be rendered nugatory if the applicants are evicted from the suit land as they will be rendered homeless, hence the need for the status quo to be maintained. Finally, the applicants contend that the delay in filing the appeal was due to an inadvertent mistake on the part of their previous advocates on record, which mistake is excusable in equity; and that the interest of justice tilts towards granting the orders sought.
3. The application is opposed vide a replying affidavit sworn on May 25, 2023 by the respondent, who avers that the applicants have not demonstrated what substantial loss may result from execution of the decree, nor have they demonstrated that they have an arguable appeal. Furthermore, the only proceedings that are pending from the impugned judgment is the execution of the decree, and, as such, the appeal is not arguable.
4. On whether the appeal will be rendered nugatory if the orders sought are not granted, the respondent contends that he is a person of means, and would therefore be able to compensate the applicants should the appeal succeed. Finally, it is the respondent's contention that the application was filed as an afterthought, and the Court should not belabor in dismissing it.
5. We heard the application on a virtual platform on July 26, 2023. Learned counsel Mr. Mururu holding brief for Mrs. Musinga appeared for the applicants while Ms. Mageto holding brief for Mr. Itaya appeared for the respondent. All counsel relied on their written submissions. The applicants' submissions are dated May 26, 2023 while those of the respondent are dated May 25, 2023.
6. Mr. Mururu submitted that the applicants have been ordered to vacate the suit premises within 3 months effective of April 8, 2023; that the suit land is an expansive land which is home to the six applicants and a home to the larger pastoral community that has carried out developments on it.
7. On arguability of the appeal, it was submitted that this Court will require to determine whether the learned judge properly applied the doctrine of adverse possession. On whether the appeal will be rendered nugatory if the orders sought are not granted, the applicants are apprehensive that once evicted, the respondent is likely to sell the land to third parties or charge it to a financial institution, thus



defeating their interest in it. Furthermore, apart from them being in possession, the eviction notice has since lapsed, and as such, the status quo should be maintained.

8. In opposing the application, Ms. Mageto submitted that the applicants have not satisfied the twin principles for granting of the orders sought. She hinged her submission on the fact that the learned trial Judge held that the respondent was the legal proprietor of the suit land; that the orders sought by the applicants are not specifically staying the judgment of the trial court; that the applicants have blatantly refused to vacate the suit land three years after judgment; that the application is tantamount to resuscitating an appeal that is way out of time; that the respondent is entitled to enjoy the fruits of his judgment; and that the applicants having disobeyed previous orders of a court are not entitled to the exercise of the discretion before this Court, as they have approached the Court with unclean hands.
9. On query from the Court, Ms. Mageto confirmed that the applicants are the ones in occupation of the land.
10. We have considered the Motion, the affidavits both in support of, and in opposition to, the application and the submissions made both in writing and orally before us. The principles that guide a consideration of an application of this nature have been restated by this Court in many decisions including *Stanley Kangethe Kinyanjui vs. Tony Keter & 5 others* [2013] eKLR. The principles are: first, that the applicant must demonstrate that they have an arguable appeal that is not frivolous, and second, that the intended appeal will be rendered nugatory if the orders sought are not issued.
11. The applicants have filed a memorandum of appeal dated March 16, 2023 in which they have raised several issues that they contend are arguable. These grounds have been reiterated in their supporting affidavit, and were highlighted by their counsel during the hearing. The main one is that the learned judge misapprehended, misinterpreted and misapplied the principles of the doctrine of adverse possession. At this stage, it is not for us to gauge the merits of the issues to be considered and determined by this Court. For purposes of this ruling, we have isolated that one arguable ground, as we bear in mind that even one single bona fide ground is sufficient to satisfy the first limb of the twin principle that an applicant must satisfy in an application of this nature.
12. As regards the second limb, we are guided by the decision in *Stanley Kangethe Kinyanjui vs Tonny Keter & others* (*supra*) where the Court summarized what should guide the court as follows:
 - xii. The term ‘nugatory’ has to be given its full meaning. It does only mean worthless, futile or invalid. It also means trifling.
 - xiii. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.
 - ix. Where it is alleged by the applicant that the appeal will be rendered nugatory on account of the respondent’s impecuniosity, the onus shifts to the latter to rebut by evidence the claim.”
13. The applicants allege that should the orders sought not be granted, the respondent is likely to sell off the suit property to third parties, thus rendering the appeal nugatory. The respondent on the other hand avers that he is a man of means capable of compensating the applicants should the appeal succeed.
14. We do note that judgment herein was rendered on April 30, 2020, and the orders for eviction were issued almost three years later, on February 8, 2023. All the while, the applicants never sought refuge by seeking a stay of the judgment. Their inaction reeks of indolence. Further, we do hold that the respondent has a certificate of ownership which ought to be protected. In the event that the appeal



succeeds, it is our view that the applicants are at liberty to apply for the cancellation of the certificate of title. The dispute between the parties revolves around the ownership of the suit land whose value can be assessed and damages awarded, which the respondent has averred he is capable of paying.

15. The upshot of the foregoing is that the applicants have failed to satisfy the twin principles for grant of orders of stay of execution pending appeal. We therefore dismiss the application with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

H. A. OMONDI

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

