



**Osir v Mburu & 3 others (Civil Appeal (Application)
E110 of 2023) [2024] KECA 44 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KECA 44 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E110 OF 2023
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
JANUARY 25, 2024**

BETWEEN

SIMON LUO OSIR APPELLANT

AND

JOHN GORDHARD MBURU 1ST RESPONDENT

HELLEN NAUTUTU 2ND RESPONDENT

OWUOR ALICE 3RD RESPONDENT

LAND REGISTRAR KISUMU 4TH RESPONDENT

(Being an application under the Court of Appeal Vacation Rules for leave to hear an application for stay of execution pending the hearing and determination of the appeal from the Judgment of the Environment & Land Court at Kisumu, (Asati, J.) dated 27th July, 2023 in ELC Case No. E031 of 2021)

RULING

1. The applicant herein (and his now deceased wife) lodged a plaint in the Environment and Land Court at Kisumu seeking, in the main, for orders that the register with respect to the parcel of land known as Kisumu/Dago/492 (“Suit Property”) be nullified and cancelled; and that the same be registered in the name of the applicant. The applicant’s case was simple: that the Suit Property was ancestral land which belonged to his father and was later registered in his name but that somehow the respondents had colluded to transfer it to the name of the 3rd respondent. The appellant and his wife had, as a way to secure their interests in the Suit Property, also registered a caution over the Suit Property.
2. The respondents filed a defence to the suit and the case proceeded for full trial. The 3rd respondent also filed a counter-claim seeking orders that the caution placed by the applicant be removed; that an order



- of permanent injunction restraining the applicant and his wife from interfering with the Suit Property be issued; and that an order for eviction against the applicant be issued.
3. At the conclusion of the trial, the applicant's case failed in its entirety while that of the 3rd respondent succeeded in entirety. Consequently, the learned Judge made the following orders in her judgment dated 27th July, 2023:
 - i. An order that the caution lodged against land title number Kisumu/Dago/492 be removed by the Registrar.
 - ii. An order of permanent injunction restraining the Plaintiffs (in the suit) and their servants, by themselves or others from interfering with the 3rd Defendant's parcel of land parcel No. Kisumu/Dago/492.
 - iii. An order of eviction for the eviction (sic) of the Plaintiffs from any portion of the suit land that they have encroached onto.
 - iv. Costs of the counter-claim are awarded to the 3rd Defendant (in the suit).
 4. The applicant was aggrieved by the judgment and he timeously lodged a Notice of Appeal. In addition, he has filed the present application dated 20th August, 2023 which seeks, in the main, prayers for stay of execution of the judgment of the ELC.
 5. The application is predicated on Rule 5(2)(b) of the [Rules of this Court](#). That Rule provides as follows:

Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may -

 - (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or stay of any further proceedings on such terms as the Court may think just.
 6. This rule clothes this Court with original jurisdiction to preserve the substratum of the appeal pending before it. The Court has fashioned twin principles which a party hoping to successfully invoke Rule 5(2)(b) must satisfy. First, they must demonstrate that the appeal is arguable. Second, they must demonstrate that the appeal would be rendered nugatory but for the prayed-for relief of stay of execution or injunction.
 7. The applicant argues that he has an arguable appeal and has annexed his Memorandum of appeal which lists nine grounds of appeal against the ELC judgment. Chiefly, the applicant is aggrieved that the learned Judge erred in finding that the applicant's suit was time-barred in light of this Court's jurisprudence on section 7, 12 and 26(a) of the [Limitations of Actions Act](#) that time is only computed to run only from when fraud is first discovered.. He also faults the finding by the learned Judge that the 3rd respondent had succeeded in proving fraud despite not producing the alleged Sale Agreement through which the 3rd respondent claimed the applicant sold the Suit Property to the 3rd respondent's predecessors in title. The applicant is also aggrieved by what he terms as un-procedural reception of additional evidence from the 4th respondent long after the applicant had closed his case; and when he did not have an opportunity to rebut the newly admitted evidence.
 8. On the question whether the appeal would be rendered nugatory if orders for stay are not granted, the applicant points out that the suit is about land – one which he has been in occupation of for more than sixty years. He is also apprehensive that, with the lifting of the caution, the 3rd respondent will dispose of the land.



9. On his part, the 3rd respondent filed a Notice of Preliminary Objection and a Replying affidavit in opposition to the application. However, during the plenary hearing of the application, Ms. Katasi, learned counsel for the 3rd respondent informed the Court that she was withdrawing the Preliminary Objection hence paving way for determination of the application on its merits.
10. Both the Replying Affidavit and Ms. Katasi's oral submissions focused on the evidence adduced in the ELC. The aim, we assume, was to show that there was overwhelming evidence in favour of the respondents in the trial court; and that, therefore, the applicant does not have any arguable appeal before this Court. On the second element – whether the appeal would be rendered nugatory – the 3rd respondent seemed to suggest that the applicant is not in possession of the Suit Property – and that, therefore, the orders sought are superfluous.
11. We have considered the application, the supporting affidavit, the replying affidavit and the written and oral submissions by the applicant and the 3rd respondent.
12. On the first principle, whether the appeal is arguable, we have to consider whether the appeal, as filed, raises at least a single bona fide arguable point noting, as the Court defined it in *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others* [2013] eKLR, that an arguable appeal is not one with a high probability of succeeding; it is, instead, one which ought to be argued fully before the Court. Differently put, an arguable appeal is one which is not frivolous.
13. In the present case, while the respondent insists that the appeal is not plausibly arguable, we find that to be an untenable position to take given the grounds of appeal listed by the applicant, and, especially, considering that this is a first appeal and the applicant is entitled to a re-evaluation of the entire body of evidence as presented to the trial court.

The applicant, for example, takes up the arguable position that the learned Judge was wrong as a matter of law and fact, in drawing the starting point for the computation of time for purposes of the statute of limitations. That is not an idle ground of appeal. Similarly, the question whether the 3rd respondent satisfied the very high threshold for proof of fraud which he had alleged in his counterclaim is an arguable ground of appeal. Simply put, both the factual contestations and legal points taken on appeal are eminently arguable and we so find.
14. Would the appeal be rendered nugatory if orders for stay are not granted? We think it most obviously would be. First, we note that the third order given by the trial court is one for eviction of the applicant. This order would be unnecessary if the applicant was not, in fact, in possession of the Suit Property as the 3rd respondent claims. An eviction would, most assuredly, render the appeal nugatory. Second, the court lifted the caution placed on the land by the applicant. The effect of this would be that the 3rd respondent would be at liberty to transfer the Suit Property to third parties hence putting it out of the reach of the applicant. Indeed, in the replying affidavit, the 3rd respondent is candid that he has plans to sell the property.
15. The upshot is that the applicant has satisfied the twin requirements in order to be entitled to orders of stay. Consequently, we hereby allow the application dated 20th August, 2023. The order we make is that pending the hearing and determination of Kisumu Civil Appeal No. E194 of 2023, this Court hereby issues an order staying the judgment and consequential decree issued on 31st of July, 2023 arising out of the judgment delivered on 27th July, 2023 by the Environment and Land Court in Kisumu in Land Suit No. E031 of 2021.
16. Orders accordingly.

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



HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

