



**Suri v Kaur alias Mandeep Kaur (Civil Appeal (Application)
E540 of 2023) [2024] KECA 17 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KECA 17 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E540 OF 2023
MSA MAKHANDIA, K M'NOTI & M NGUGI, JJA
JANUARY 25, 2024**

BETWEEN

AVTAR SINGH SURI APPLICANT

AND

PARAMJIT KAUR ALIAS MANDEEP KAUR RESPONDENT

(An application for stay of execution pending appeal from the Judgment of the Environment and Land Court (O. Mboya, J.) dated 7th June 2023 in Nairobi ELC Suit No. 738 of 2013)

RULING

1. Before us is a Notice of Motion dated 11th July, 2023 in which Avtar Singh Suri, (“the applicant”), seeks an order for stay of execution of the judgment and decree of the Environment and Land Court “ELC” (Oguttu Mboya, J) dated 7th June 2023. The application is brought pursuant to rule 5(2) (b) of this [Court’s Rules](#).
2. The application is premised on the grounds set out on its face and the annexed affidavit of the applicant dated 11th July 2023. It is the applicant’s case that by the said judgment and decree, the court directed him to pay Paramjit Kaur alias Mandeep Kaur, (“the respondent”), a sum of Kshs 22,078,207.00 together with interest at the rate of 14% per annum from 2015 to date for accumulated rent arrears plus interest; execute documents in connection with subdivision of LR No 427/44 (“the suit property”) into two; and transfer one portion thereof to the respondent within 60 days.
3. Being aggrieved by the said decision, the applicant has filed a notice of appeal dated 8th June, 2023 signalling his intention to appeal the entire judgment and decree. According to the applicant, the intended appeal is arguable on grounds whether the trial court: was entitled to pronounce itself and grant reliefs that had not been sought in the pleadings; was justified in predicating its judgment and decree primarily on documentary evidence that had not been formally produced and admitted in



evidence; and last but not least, whether the trial court was justified in granting the prayer for payment of Kshs 22,078,207.00 which the sum was in excess of what had been pleaded.

4. On the nugatory aspect, the applicant states that unless the orders sought are granted, the execution of the judgment to facilitate subdivision and the subsequent transfer of the suit property will be processed and concluded through the Deputy Registrar of the High Court, thereby putting the suit property beyond the reach of the applicant should he succeed in his intended appeal. Further, the appeal will be rendered nugatory as the applicant will be made to pay to the respondent a substantial sum of Kshs 22,078,207.00 together with interest, and there is no guarantee that if the appeal succeeds, the monies will be paid back to him given the fact that the respondent was a foreigner and not ordinarily resident in this country.
5. The application was opposed through the replying affidavit of the respondent. It is the respondent's case that for more than 10 years, the applicant has had unlawful possession of and unilaterally benefitted from the rent from the suit property. That she had a son who was studying in the United States and the respondent urgently needs to pay his University fees and upkeep expenses, if the Court would be inclined to allow the application, then the Court should order the applicant to pay Kshs 11,039,103.50 plus interest being half of the decretal sum. Further, the applicant should be ordered to deposit the other half plus the interest in Court or in a joint interest earning account in the names of the parties' advocates on record. That the applicant is her father-in-law's brother and the two owned the suit property as tenants in common, in equal shares. That upon the demise of her father-in-law in 2004, the interest in the suit property devolved to her late husband, Gurmeet Singh Suri, who passed on in 2008 leaving a will bequeathing his share in the suit property to her. However, when she tried to assert her rights to the same, the applicant became hostile and cut her off completely from the tenants and directed them not to pay rent to her. The respondent maintains that the applicant cannot suffer any loss as there can be no loss over what he does not own.
6. When the application came up for plenary hearing on 9th October 2023, Mr. Mutua alongside Mr. Muturi, learned counsel, represented the applicant whereas AB Shah and Allan Kamau, learned counsel, held brief for Mr. Goswani for the respondent. The parties relied on their written submissions. The applicant submitted that in an application of this nature, a party must satisfy both limbs of an arguable appeal and the nugatory aspect. To this end, he submitted that he had demonstrated from the memorandum of appeal annexed to the application that indeed the intended appeal was arguable. As to whether the appeal would be rendered nugatory, the applicant submitted that giving effect to the terms of the judgment and decree of the trial court while the appeal was pending would result in an irreversible loss of the suit property as it will be subdivided and transferred before this Court can hear and render its verdict on the appeal.
7. On her part, the respondent submitted, while relying on the case of *Bashir Haii Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR, that the memorandum of appeal raises wide grounds which makes it impossible to figure out what in the judgment and decree aggrieved the applicant, and the same should be treated as a violation of rule 88(1) of this *Court's Rules*. On that basis, she submitted that the intended appeal is not arguable. Further, that the appeal will not be rendered nugatory on the grounds and reasons already set out elsewhere in this ruling.
8. We have considered the application, the grounds in support thereof, the respective submissions, the authorities cited and the law. The jurisdiction of this Court under rule 5(2)(b) of this *Court's Rules* is discretionary. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will have been rendered nugatory.



9. These principles were reiterated in the case of *Trust Bank Limited & another v Investech Bank Limited & 3 others* [2000] eKLR, in which the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under rule 5 (2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

10. In considering the twin principles above, we are cognizant that the applicant must satisfy the Court on both limbs. On the first limb, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant in order to warrant its ventilation before this Court. See *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR where this Court described an arguable appeal in the following terms:

- “vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
- viii) In considering an application brought under rule 5 (2)
- (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

11. We have carefully considered the grounds set out in the motion. In our view, it is arguable inter alia, whether the judgment was premised on documents that had not been properly tendered in court, whether the trial court was right in granting reliefs that had not been prayed for and the quantum thereof.

12. On the nugatory aspect, in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others* (*supra*) this Court once again stated that:

- “ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- x) 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.”

It is clear to us that the applicant and the respondent are related, the applicant being the respondent’s uncle in marriage. Further, the suit revolved around the ownership of the suit property. Whether or not the respondent is entitled to a portion of the suit property is not seriously contested. It simply boils down to how much. The respondent has also pointed out in this regard and which has not been controverted by the applicant, that there have been several consents recorded in courts between the parties as to the ownership of the suit property and part payment of rent receivable from the tenants to the respondent, but which consents have at all times been neglected, frustrated and or breached by the applicant for reasons best known to himself.

13. Given the foregoing, we are not satisfied that there will be prejudice or that the appeal will be rendered nugatory should the stay order not be granted.



14. The fear that if the judgment and decree is executed will put the suit property beyond the reach of the applicant is unfounded as there is no evidence to that effect. In any event, the applicant will still retain half of the suit property. In the circumstances, we are persuaded that though the applicant has demonstrated an arguable appeal, he has failed on the nugatory aspect. As both limbs have to be satisfied before the order sought can be granted, the application fails and is dismissed. Costs shall abide the outcome of the appeal.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

