



**Birithia v Owino & another (Civil Appeal (Application)
E078 of 2023] [2024] KECA 159 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KECA 159 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E078 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
FEBRUARY 23, 2024**

BETWEEN

STANLEY THINE BIRITHIA APPLICANT

AND

MILLICENT ODERO OWINO 1ST RESPONDENT

JUMA OMAR MUSA ALIAS MUJUMA 2ND RESPONDENT

(Being an application for stay of execution pending appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (L. L. Naikuni, J.) delivered on 19th July 2023 in E.L.C. Case No. 225 of 2012)

RULING

1. The 1st respondent, Millicent Odero Owino (suing as legal representative of the estate of her deceased husband, John Owino Opiyo), instituted civil proceedings against the applicant, Stanley Thine Birithia, and the 2nd respondent, Juma Omar Musa AKA Mujuma (as legal representative of the estate of his deceased father, Omar Musa), in the Environment and Land Court at Mombasa in ELC case No. 225 of 2012 praying for: an order revoking the transfer of plot No. 1665/Sec. VI.M.N. (the suit property) to the applicant and directing its restoration to the estate of her deceased husband; a mandatory injunction requiring the applicant to vacate the premises; an order requiring the applicant to deposit all income derived from the suit property in court pending determination of her suit; general damages for interfering with the 1st respondent's use and peaceful occupation of the suit property; and for costs of the suit.
2. Gathering from the incomplete record as put to us, and from the impugned judgment without the benefit of pleadings in the trial court, the 1st respondent's case was that, in 1985, the deceased purchased from one James Otieno with the consent of the landowner, Omar Musa (deceased), a building erected on the suit property; that her deceased husband demolished the building and erected his own premises



- on the suit property; that, thereafter, he continued paying ground rent to Omar Musa and the 2nd respondent; that, upon the demise of her deceased husband, the suit property comprised part of his estate, and the 1st respondent continued paying ground rent thereon to the 2nd respondent, and also continued in occupation as tenant; that, in May 2012, the applicant claimed to have purchased the suit property from the 2nd respondent, obtained eviction orders against the tenants, and proceeded to take possession thereof; that she had no outstanding ground rent; and that she was neither sued by the applicant nor served with any notice to pay ground rent. She alleged fraud on the part of the applicant and the 2nd respondent.
3. In his defence and counterclaim, the applicant averred that the 2nd respondent and two other persons sold the suit property to him in their capacity as personal representatives of the estate of Omar Musa; that the same was registered in his name; and that he followed all the due process of the law. The applicant admitted that there stood an earthen structure on the property, and that some tenants were in occupation thereof, but contended that neither the structure nor the land belonged to the 1st respondent. According to the applicant, he intended to remove the tenants, who had been given by the deceased landlord the option of purchasing their dwellings under a local cultural practice known as “Nyumba Bila Shamba” (house without land), but failed to exercise the option. Consequently, he bought the land and took possession thereof. He prayed that the 1st respondent’s suit be dismissed with costs, and also sought an order for demolition of the earth structure erected on the suit property.
 4. On his part, the 2nd respondent contended that the suit property was theirs; that they intended to sell the property due to financial constraints; that they were approached by the tenants, but were unable to carry out the sale; that the applicant showed interest, and the 2nd respondent cautioned him that there stood on the suit property a house owned by the 1st respondent’s deceased husband; and that the applicant purchased the property and paid all the dues for transfer of the land.
 5. In its judgment dated 19th July 2023, the ELC (L. L. Naikuni, J.) dismissed the applicant’s counterclaim with costs to the 1st respondent. He entered judgment for the 1st respondent as prayed and awarded her general damages in the sum of KShs.1,000,000. The learned Judge found that, when the applicant bought the suit property, it was not free from encumbrances; that the encumbrance was the existence of an overriding interest in the form of an earth structure belonging to the 1st respondent; and that the 1st and 2nd respondents had a tenancy agreement arising from the concept of “house without the land” (Nyumba Bila Shamba), which was unique to the coastal region of Kenya, where a person is given permission to build a house on land, whose ownership by the landlord was distinct from ownership of the house. The learned Judge also held that such a period tenancy could only be terminated by a notice not shorter than the period in relation to which rent became due and payable. In this case, the applicant had failed to serve notice of termination of the lease to the 1st respondent, to involve the estate of the deceased husband, and to declare the existence of the building in CMCC No. 2250 of 2010 in which he obtained the eviction orders; and that the applicant and the 2nd respondent had conspired to falsely and unlawfully deprive the 1st respondent or the estate of her deceased husband of the suit property.
 6. Dissatisfied with the impugned judgment, the applicant moved to this Court on appeal on 4 grounds contained in his draft memorandum of appeal faulting the learned Judge for: failing to appreciate the definition of land in Article 260 of the Constitution, and for defining land to exclude the surface of the earth from the subsurface rock (structure); curtailing the rights and privileges of a registered proprietor of land over use and occupation of his property in the absence of fraud or misrepresentation in obtaining registration of title to the land; holding that the remedy available to an owner of “house without land” against the registered proprietor of the land is to defeat the registered proprietor’s right to use/occupation and possession of the suit property in a claim where consent/permission to own



the “house without land” was withdrawn without notice; and for ascribing and granting the owner of “house without land” the remedies available to a tenant in a landlord/tenant relationship against the registered proprietor of the suit property despite unexpressed relief in the plaint by the owner of “house without land” (tenant) challenging the registered proprietor’s (landlord’s) title to the suit property by seeking its nullification.

7. By a Notice of Motion dated 5th September 2023 and supported by the applicant’s affidavit sworn on 5th September 2023, the applicant seeks: stay of execution of the judgment and decree of the ELC (L. L. Naikuni, J.) dated 19th July 2023 pending hearing and determination of his appeal; directions that the National Land Commission do hold in abeyance any planned acquisition and award with respect to the suit property as it forms the substratum of the appeal; and that the costs of the Motion do abide the outcome of the appeal.
8. The applicant’s Motion is anchored on 8 grounds set out on its face, but which we need not replicate here, save to observe that, according to the applicant, there is an impending compulsory acquisition in respect of which an award is likely to be made to the owner of a “house without land” in whose favour the impugned judgment was rendered; that execution of the judgment, if not restrained, has the potential of depleting the suit property, which is the substratum of the intended appeal, thus rendering it nugatory; that, even before the expiry of the 90 days window granted in the impugned judgment, the 1st respondent has begun to take possession of the suit property by evicting existing tenants and demolishing part of the structure on the pretext that they wish to undertake renovation thereof; that execution of the decree in respect of the sum of KShs. 1,000,000 awarded to the 1st respondent would occasion substantial loss that “... no amount of damages would compensate the applicant;” and that the chances of recovery of the amount aforesaid against the 1st respondent would be almost impossible as she is on record having admitted that she was a person of low income. He urged us to allow the Motion as prayed.
9. Learned counsel for the applicant filed written submissions and list of authorities dated 14th September 2023 citing the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR, highlighting the twin principles for grant of orders under rule 5(2) (b) of the *Court of Appeal Rules*.
10. On their part, the 1st and 2nd respondents did not file any replying affidavit or written submissions in response to the applicant’s Motion.
11. As this Court has often pronounced itself, for an applicant to merit orders of stay of execution pursuant to rule 5(2) (b) of the *Court of Appeal Rules* pending appeal, he or she must demonstrate to the satisfaction of the Court that he or she has an arguable appeal; and that the appeal (or intended appeal as the case may be), if successful, would be rendered nugatory absent stay. The two requirements constitute what is commonly referred to as the twin principles required to be satisfied before such orders can avail (see *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR; and *Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 Others* [2014] eKLR).
12. A cursory look at the grounds of appeal advanced in the applicant’s draft memorandum of appeal viewed in the backdrop of the record as put to us reveals a number of substantive issues of law and fact deserving of the Court’s inquiry on appeal. Moreover, and as this Court has often stated, even one ground of appeal is adequate to satisfy the first limb of the twin principles. *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR is a case in point. We need not say more with regard to those grounds lest we embarrass the bench that will ultimately pronounce itself on the merits or otherwise of the intended appeal. Suffice it to observe that, as this Court held in the case of *Wasike v Swala* [1984] KLR 591, an arguable appeal is not one that would necessarily succeed, but one that



merits consideration by the court. Indeed, an arguable appeal is one that is not idle and/or frivolous (see *Stanley Kangethe Kinyanjui v Tony Ketter & Others* (*supra*)).

13. Regarding the second limb of the twin principle, the term “nugatory” was defined in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA p.227 at p.232 as “worthless, futile or invalid”. It also means “trifling”. Having concluded that the applicants’ intended appeal is arguable, the decisive question is whether the intended appeal, if successful, would be rendered nugatory if the stay orders sought were not granted.
14. In the case of *African Safari Club Limited v Safe Rentals Limited* [2010] eKLR, this Court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the Court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”
15. On the authority of *African Safari Club Limited* (*ibid*), the Court is invited to determine which party’s hardship is greater. Put differently, would it serve the course of justice to decline the orders sought with the effect of giving way to an impending compulsory acquisition in respect of which an award is likely to be made to the 2nd respondent as the owner of the land subject of “house without land,” and in whose favour the impugned judgment was rendered? To our mind, that would invariably erode the substratum of the intended appeal and render it nugatory. Secondly, declining the orders sought would allow the 1st respondent to take possession of the suit property by evicting existing tenants and demolishing part of the structure erected thereon on the pretext of renovation thereof. Finally, execution of the decree in respect of the sum of KShs. 1,000,000 awarded to the 1st respondent would render the intended appeal nugatory as she is admittedly a person of low income, and incapable of repaying the money in the event that the intended appeal succeeds.
16. Having carefully examined the impugned ruling, the applicant’s Motion, the grounds on which it is anchored, the affidavits in support and in reply thereto, the written and oral submissions of learned counsel for the applicant, and the cited authorities, we form the view that either way, the intended appeal, if successful, would be rendered worthless or futile if stay of the stay orders thereby sought are not granted. In effect, the applicant has satisfied the conjunctive limbs of the twin principles for grant of stay orders under rule 5(2) (b) of the *Rules of this Court*. Accordingly, his Motion dated 5th September 2023 succeeds and is hereby granted with orders that:
 - a. Execution of the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (L.L. Naikuni,J.) delivered on 19th July 2023 in ELC Case No. 225 of 2012 be and are hereby stayed pending hearing and determination of the intended appeal;
 - b. In the meantime, the status quo be maintained to the effect that the parties shall not do anything in relation to the suit property to either one or the others’ prejudice; and
 - c. The costs of the applicant’s Motion shall abide the outcome of the intended appeal.Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF FEBRUARY 2024.

A. K. MURGOR

JUDGE OF APPEAL



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DR. K. I. LAIBUTA

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JUDGE OF APPEAL
G.V. ODUNGA

.....
JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

