



**Nduati & 2 others v Malenya & another (Civil Appeal (Application)
761 of 2022) [2024] KECA 182 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KECA 182 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 761 OF 2022
HA OMONDI, KI LAIBUTA & A ALI-ARONI, JJA
FEBRUARY 23, 2024**

BETWEEN

**JOSEPH NGUGI NDUATI 1ST APPLICANT
NANCY GATHONI 2ND APPLICANT
STEPHEN G. KIARIE 3RD APPLICANT**

AND

**CHARLES ADAVACHI MALENYA 1ST RESPONDENT
NAIROBI CITY COUNCIL 2ND RESPONDENT**

*(An application for stay of execution of the Judgment and Decree
of the Environment and Land Court at Nairobi (S. Okong’o, J.)
delivered on 10th November, 2021 in ELC Case No. 1453 of 2002)*

RULING

1. Before this Court is a notice of motion dated 4th November 2022, brought under rule 5(2) (b) of the [*Court of Appeal Rules*](#), seeking the following prayers:
 - a. That pending the lodging, hearing and determination of the Applicant’s appeal, there be stay of execution of the decree dated 6th June, 2022 and any other further proceedings in Milimani ELC Suit No. 1453 of 2002; and
 - b. That the costs of this application be provided for.
2. In order to contextualize the application, it is necessary to give a background in summary. The 1st respondent, who was the plaintiff in the trial court, filed a plaint dated 5th September 2002, seeking a declaration that the purported registration of L.R No. Nairobi/Block 63/316 to the 1st applicant, the 1st defendant therein, was unlawful; an order directing that the said registration be cancelled by the



- Registrar of Lands; and an injunction restraining the applicants herein from transferring, constructing or in any manner dealing with the suit property until final determination of the suit. Alternatively, he sought compensation for the full market value of the suit property and costs.
3. The suit was opposed. The 1st applicant averred that he was the lawful owner of the suit property, having been allocated by the 2nd respondent and, thereafter, sold the property to the 2nd and 3rd applicants. He denied all allegations of fraud.
 4. In its judgement, the trial court found that the purported allotment of the suit property by the 2nd respondent to the 1st applicant was irregular and unlawful. The court further found that, in the absence of evidence that the 1st applicant accepted the allotment, paid the requisite charges and issued with a lease by the 2nd respondent, then the certificate of lease held by the applicant could only be fraudulent, the same having been issued without due process. The court found the 1st respondent to be the lawful beneficial owner of the suit property and ordered the Chief Land Registrar to rectify the register by cancelling the registration of the 1st applicant. Further, the court granted a stay for 90 days within which the 2nd and 3rd applicants were to pay the 1st respondent the market value of the suit property, failing which the stay orders would automatically lapse.
 5. The application before us is supported by the grounds set out on the face of it, namely that the judgement by the trial court was rendered on 10th November 2012, a notice of appeal lodged on 26th November 2021 and the letter bespeaking the proceedings filed on 29th of November, 2021; that typed proceedings delayed and a certificate of delay issued on 14th June, 2022; that this court extended time within which the appeal was to be filed on 21st October 2022; that the respondent has applied to quash the said ruling with an aim of executing the trial court's judgement; and that the appeal has arguable issues.
 6. In an undated affidavit sworn by the 1st applicant, he rehashes the grounds in support of the application, in addition, he states that the appeal is arguable and has high chances of success and, unless the 1st respondent is restrained, the whole substratum of the appeal will be destroyed, thereby rendering the intended appeal nugatory.
 7. The applicant's learned counsel filed written submissions dated 8th December 2022. However, it is evident that learned counsel does not appreciate the principles required to be satisfied to merit orders of stay of execution or injunctive relief pursuant to rule 5(2) (b) of this *Court's Rules*. Instead, counsel dwells on the threshold for stay or injunctive relief applicable in the High Court under Order 42 rule 6(3) of the *Civil Procedure Rules*, which are not applicable in this instance, we shall therefore not belabour them.
 8. In opposition, the 1st respondent filed a replying affidavit through its appointed Attorney, Emmanuel Malenya, who deposed that prayer for stay of further proceedings is misplaced as the matter was determined and concluded to its finality; that the memorandum of appeal does not raise any triable issue and only consists of blanket assertions that the learned Judge failed to consider their pleadings; that the 1st respondent's counsel had at some point written to the applicant's lawyers in pursuit of the payment option and even proposed Tyson valuers; and that the orders directed to the Chief Lands Registrar to rectify the register are not reversible and, even if the register were to be rectified, that would not render the appeal nugatory.
 9. Learned counsel for the 1st respondent filed written submissions dated 13th March 2023 wherein he reiterated the facts deposed to in the replying affidavit. Further, he made reference to the case of *Kenlink Global Limited & 2 Others vs. Paramount Universal Bank Limited* (2021) eKLR.



10. The principles that apply in applications under rule 5(2) (b) of this [Court's Rules](#) for stay of execution pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the appeal (or intended appeal) is arguable and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if stay orders are not granted. These principles have been enunciated in various judicial pronouncements of this court, including those cited by the parties.
11. We note that the applicants sought stay of execution of the decree and stay of further proceedings, but did not state the basis for seeking stay of proceedings in the suit, bearing in mind that the suit was heard and judgment delivered, we need shall therefore not delve into that prayer.
12. The application is brought under rule 5(2) (b) of this court's

Rules which provide that:

- “(2) 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:
 - a.
 - 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 a stay of any further proceedings on such terms as the court may think just.”

13. In [Stanley Kangethe Kinyanjui vs. Tony Ketter & Others](#) [2013] eKLR this Court stated follows:

“That in dealing with Rule 5(2) (b), the court exercise original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this court.

The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

In [Attorney General vs. Okiya Omitata Okoiti & Another](#) [2019] eKLR the Court stated:

“The principle for our consideration in the exercise of an unfettered discretion under Rule 5(2) (b) to grant an order for stay are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal should be rendered nugatory.”

14. On the first limb of the twin principles, in [Anne Wanjiku Kibe vs. Clement Kungu Waibara & IEBC](#) [2020] eKLR this Court held that for stay orders to issue, the applicant must demonstrate that the appeal or intended appeal would, in the absence of stay be rendered nugatory. This brings us to the question whether the intended appeal arguable.
15. We have carefully considered the arguments of the applicants on the question whether the appeal raises arguable grounds. To answer that question, it is important to note that most of the grounds in the memorandum of appeal all point towards the learned Judge's failure to consider either their joint statement of defence, their submissions or their evidence. Additionally, the grounds simply rehash the



orders issued by the trial court, and state that the learned Judge erred by granting them. From a cursory reading of the memorandum of appeal, there is no single ground that would, in our view, be arguable.

16. In view of the foregoing, we are not persuaded that the applicant has raised any arguable grounds in this application. We say no more lest we embarrass the bench that will ultimately pronounce itself on the merits of the appeal. The applicant having failed to satisfy the first limb of the twin principle for grant of orders under rule 5(2) (b), we consider it unnecessary to pronounce ourselves on the 2nd limb.
17. Consequently, the applicants' notice of motion dated 4th November, 2022 fails and is hereby dismissed with costs to the respondents.

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

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

