



REPUBLIC OF KENYA



**Njoroge v Kandiri & 2 others (Civil Application E058 of 2023)
[2024] KECA 199 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KECA 199 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E058 OF 2023
FA OCHIENG, PM GACHOKA & WK KORIR, JJA
FEBRUARY 23, 2024**

BETWEEN

SAMUEL NDIRANGU NJOROGE APPLICANT

AND

JOHN MUGO KANDIRI 1ST RESPONDENT

MOHAMMED KARANJA NJOROGE 2ND RESPONDENT

JOYCE MUTHONI NJOROGE 3RD RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an intended appeal from the Judgment of the Environment and Land Court at Nyabururu (Y.M. Angima, J.) dated 23rd February 2023 in ELC Appeal No. 14 of 2021)

RULING

1. Before us is an application dated 18th July 2023, in which the applicant prays for orders pending the hearing and determination of this application and the intended appeal:
 - “a) There be a stay of execution of the judgment dated 18th August 2021 in Nyahururu CM ELC No. 163 of 2018.
 - b. A temporary injunction be issued restraining the respondents and their servants from entering, remaining, demolishing structures, cutting trees, cultivating, occupying, transferring, or charging the 5 acres of land parcel LR No. 9195 Sabugo Settlement Scheme, hereinafter, “the suit land”.”



2. The application is brought under Rule 5(2)(b) of the *Court of Appeal Rules*, and Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*. The application is based on the following grounds:

- a) The 1st respondent in a plaint dated 28th June 2011 sought a permanent injunction against the appellant and the 3rd respondent, to restrain them from interfering with the suit land; the appellant and the 3rd respondent be evicted from the suit land on which the 2nd respondent's house was built.
- b. On 18th August 2021 the court issued a permanent injunction in favour of the 1st respondent with costs as prayed.
- c. Aggrieved by the judgment, the appellant appealed to the ELC. The appeal was dismissed.
- d. The appellant filed a notice of appeal dated 8th March 2023 and applied for certified copies of the proceedings.
- e. On 8th July 2023 the 2nd respondent entered the suit land and started the demarcation process with the intention of permanently occupying the suit land.
- f. The appellant has a nursery school and mature trees on the suit land.
- g. The appellant was in occupation of the suit land prior to the agreement between the 1st and 2nd respondents on 28th May 2008.
- h. The appellant was in occupation of the suit land when the 2nd respondent purportedly bought it from the 1st respondent on 5th August 2008.
- i. It is in the interest of justice that the orders sought be granted to preserve the substratum of the intended appeal.
- j. The intended appeal has high chances of success.”
1. The application was further supported by the applicant's affidavit sworn on 18th July, 2023 in which he reiterated the grounds on the face of the application.

4. The 1st respondent in his replying affidavit sworn on 22nd August 2023 and also on behalf of the 2nd respondent stated that:

- a) The application is misconceived, incompetent, without merit, and an abuse of the court process and the same should be dismissed.
- b. L.R. No. 9195 from which the suit land arose belonged to their deceased father, Peter Njoroge Karanja. The estate of the deceased was distributed vide Nakuru Succession Cause No. 296 of 1989 in which the 1st respondent was appointed the administrator.
- c. A confirmation of grant was issued on 4th March 2005, in which the 1st respondent was given 115 acres, his brother received 95 acres, while the 3rd respondent holds 190 acres in trust for herself and her 14 children.
- d. The applicant is the 3rd respondent's son hence he did not directly receive land as his share is within the 190 acres held in trust by the 3rd respondent.



- e. During subdivision, it was realized that the 3rd respondent had constructed her home on 5 acres which formed part of the 1st respondent's share.
- f. On 29th May 2008 while before the Ol Kalou Land Control Board, the 3rd respondent agreed to compensate the 1st respondent 5 acres of land forming the suit land on which the 3rd respondent had built her home so that her home would not be demolished.
- g. Following the agreement, 5 acres, the subject of litigation, were excised from the 3rd respondent's share and a sketch drawn to that effect.
- h. The 1st respondent sold the suit land to the 2nd respondent.
- i. The applicant's application for revocation of grant was dismissed on 9th April 2020.
- j. The applicant holds no proprietary rights over the suit land as his share in the estate of the deceased is held in trust by the 3rd respondent.
- k. The trial court held that the suit land was legally and procedurally exchanged between the 1st respondent and the 3rd respondent, and if the applicant was aggrieved, he ought to have sued the 3rd respondent for breach of trust.
- l. The applicant's appeal was dismissed on the grounds that there was no outright sale of land but a mere exchange and the 190 acres she held in trust remained intact.
- m. There was no evidence before the trial court to demonstrate that the applicant had extensively developed the suit land, and the learned Judge held that there was no nursery school on the suit land save for a small timber structure measuring 10 by 10 feet.
- n. The applicant also filed an application for revocation of grant which was dismissed on 27th July 2023 for being res judicata.
- o. The 1st respondent has not been served with a notice of appeal within the timelines set by the court.
- p. Rule 77(1) of the *Court of Appeal Rules* has not been complied with, and no reason has been given for the failure to do so."

1. The 2nd respondent in his replying affidavit sworn on 24th August 2023 stated that:

- "a) He is the beneficial owner of the suit land which he purchased from the 1st respondent vide the sale agreement dated 5th August 2008.
- b. He could not take possession of the suit land immediately due to the issues which arose leading to the present application.
- c. When the suit before the trial court was determined in favour of the 1st respondent, he took possession of the suit land.
- d. After the appeal was dismissed, the applicant confirmed in the presence of the area chief that he would not interfere with his occupation of the suit land.



- e. He is currently in possession of the suit land, and if the application is allowed, he will be evicted therefrom.”
6. The 3rd respondent in her replying affidavit sworn on 12th September 2023 stated that:
 - “a) The application does not meet the requirements of Rule 5(2)(b) of this Court’s rules, and it ought to be dismissed.
 - b. The applicant has no title to the suit land, and has not extensively developed it as alleged.
 - c. The applicant has not demonstrated that he will suffer any substantial loss or damage which cannot be compensated in damages if the orders sought are not granted.
 - d. The suit land as claimed by the 1st respondent is part of his 115 acres and the same has already been registered with the directorate of survey.
 - e. There is no evidence of breach of trust, and the applicant’s continued interference with the suit land means she will be evicted from her homestead.”
7. When the application came up for hearing on 21st November 2023, Mr. Gicheru, learned counsel appeared for the applicant; whereas Mr. Karanja, learned counsel appeared for the 1st and 2nd respondents and Mr. Chege, learned counsel appeared for the 3rd respondent. Counsel relied on their respective written submissions which they opted to briefly highlight.
8. Mr. Gicheru submitted that the suit land has been demarcated.

Counsel reiterated that the applicant has built a school on the suit land and also planted trees which are now mature.
9. The applicant relied on the case of *Giella v Cassman Brown Ltd* [1973] EA 358 in submitting that his application meets the threshold for grant of a temporary injunction.
10. Citing the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR, the applicant pointed out that the notice of appeal dated 8th March 2023 indicated the applicant’s intention to appeal to this Court. The applicant submitted that the 2nd respondent has demarcated the suit land and if he is allowed to continue doing so, the appeal will be rendered nugatory.
11. The applicant is apprehensive that all his developments on the suit land will be demolished and he will be rendered destitute with no source of livelihood, and the children who go to the nursery school will have no place to study.
12. The applicant concluded by stating that the appeal has high chances of success as the 3rd respondent is in breach of trust for exchanging the suit land.
13. Mr. Karanja pointed out the applicant had not filed a draft memorandum of appeal hence there was nothing to show that there is an arguable appeal. Counsel submitted that the 1st respondent had already taken possession of the suit land. He informed us that the 3rd respondent is the applicant’s mother. She gave the suit land to the 1st respondent in exchange for her home not to be demolished.
14. The 1st and 2nd respondents submitted that service of a notice of appeal is a vital process in the institution of an appeal, and the applicant is in breach of Rule 77(1) for failing to serve the notice of appeal on the respondents 5 months after judgment was delivered. They pointed out that no record



of appeal had been filed and served as provided for under Rule 82, and no explanation had been given to that effect.

15. They submitted that the applicant has not demonstrated that the appeal is arguable, and the orders sought do not serve any purpose as the applicant is not in possession of the suit land. The 2nd respondent has already taken possession of the suit land and he is in the process of demarcation. They stated that the applicant had failed to demonstrate that he will suffer any substantial loss should the application be disallowed.
16. Relying on the case of *Judicial Service Commission v Newton Muriu Muriuki* [2017] eKLR, they submitted that the applicant has not demonstrated that he has an arguable appeal which will be rendered nugatory unless stay is granted. They urged that the application be dismissed with costs.
17. Mr. Chege relied on the 3rd respondent's replying affidavit and the submissions by the 1st and 2nd respondents. Counsel pointed out that the failure by the applicant to annex a draft memorandum of appeal meant that the court had no way of determining whether or not the intended appeal was arguable.
18. We have thoroughly reviewed the application, along with the supporting documents, affidavits, counsels' submissions, relevant case law, and legal provisions. We recognize that our jurisdiction under Rule 5(2)(b) is original, independent, and discretionary. However, we must exercise this discretion judiciously and rationally, and not out of impulsiveness or sympathy.
19. Rule 5(2)(b) is a procedural provision that allows the court to protect the subject matter of an appeal when it has already been filed. In the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others*, (supra), the court held that:
 - "i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
 - ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
 - iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
 - iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
 - v. An applicant must satisfy the court on both of the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
 - 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. *Joseph Gitabi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.



- 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. *Damji Pragji (supra)*.
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
 - 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.
 - xi. Where it is alleged by the applicant that an
20. It follows therefore that, to succeed in an application for a stay of execution and order for a temporary injunction, the applicant must show that his intended appeal is arguable. Once this has been established, the applicant must also demonstrate that if his appeal were to be successful, it would be rendered nugatory. This principle was demonstrated in the case of *Trust Bank Limited & Another v Investech Bank Limited & 3 Others* [2000] eKLR.
21. In the case of *Dennis Mogambi Mang'are v Attorney General & 3 Others* [2012] eKLR, this Court held that:
- “An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”
22. On whether or not the applicant has established a valid basis for an arguable appeal, the applicant did not annex a draft memorandum of appeal setting out the grounds of appeal he intends to rely on. In the absence of the same, we do not know what he intends to appeal against. We cannot tell whether the grounds intended to be raised in the appeal are arguable or not.
23. It is trite that the law aides the vigilant and not the indolent. The judgment appealed against was delivered on 23rd February, 2023 and a notice of appeal lodged on 8th March 2023. At the time of filing this application, it had been about 5 months and yet no record of appeal or a draft memorandum of appeal had been filed. The applicant has also not complied with the provisions of Rules 77, 79 and 82 of this Court’s Rules.
24. It is common ground that the 2nd respondent has taken possession of the suit land and commenced the demarcation process. The learned Judge held that there was no extensive development on the suit land and the nursery school alleged by the applicant was not on the suit land. The mere fact of stating that there is a school on the suit land was not sufficient evidence, the applicant was required to go the extra mile and produce documents concerning the school or show the permanent structures housing the school.
25. It follows therefore, that the applicant is not in possession of the suit land and he has not demonstrated that he will suffer any substantial loss should the orders sought not be granted.
26. From the foregoing, we find that the applicant has not demonstrated to us to the required standard that there is any arguable point in the appeal or that if the orders sought are not granted the appeal would be rendered nugatory. He has not disputed the fact that the 2nd respondent is in possession of the suit land or demonstrated that there is threat of the applicant being evicted from where he is staying should the orders sought not be granted.



27. Therefore, as this Court held in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] I EA 227, the factors which can render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the Court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the Court stated *inter alia*:

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”

28. However, in the circumstances of the present case, the applicant has not demonstrated the hardship he is likely to suffer should stay of execution or temporary injunction not be granted, and it is safe to say no prejudice will be occasioned to the applicant.

29. In the result, we are not inclined to exercise the Court's discretion in favour of the applicant. Consequently, the application dated 18th July 2023 lacks merit and is accordingly dismissed with costs to the respondents.

Orders accordingly.

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

F. OCHIENG

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

