



**PNN v EJM & another (Civil Application E059 of 2022)
[2024] KECA 142 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KECA 142 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E059 OF 2022
DK MUSINGA, W KARANJA & MSA MAKHANDIA, JJA
FEBRUARY 16, 2024**

BETWEEN

PNN APPLICANT

AND

EJM 1ST RESPONDENT

KMN 2ND RESPONDENT

(An application for stay of execution pending the hearing and determination of an appeal from the Judgment of the High Court of Kenya at Nairobi (A. O. Muchelule, J.) delivered on 11th November, 2021 in HCCC No. 18 of 2015 (OS))

RULING

1. By an application dated 3rd March 2022, the applicant sought, pending hearing and determination of Civil Appeal No. E774 of 2021, stay of execution of the judgment in HCCC No. 18 of 2015 (OS) that was delivered on 11th November 2021.
2. In his affidavit in support of the application, the applicant stated, inter alia, that he got married to the 1st respondent on 28th November 1998 and they were blessed with three children, who are all adults; that the marriage was dissolved on 30th May 2014; that on 5th September 2019, the 1st respondent filed a suit against the applicant, and one of their sons (the 2nd respondent) was subsequently joined as a third party. In the suit, the 1st respondent was claiming a share of what she termed as matrimonial property, which the applicant disputed, saying that the claimed property belonged to their children and some third parties.
3. The applicant further stated that the 1st respondent deserted their home and re-married in the United States of America, and never contributed towards acquisition and development of the matrimonial home, which he acquired after the separation.



4. However, the trial court valued all the properties that had been listed by the 1st respondent in her originating summons at Kshs.50,000,000 and awarded her Kshs.25,000,000, payable within 6 months from the date of the judgment.
5. Being aggrieved by the said judgment, the applicant preferred an appeal to this Court. Among the grounds of appeal he has raised are that the learned Judge erred in law and fact in holding that the suit properties were matrimonial properties when there was sufficient evidence that some of the properties were owned and registered in the names of their children; and by usurping the jurisdiction of the Environment and Land Court by determining questions of acquisition and ownership of land.
6. The applicant contended that the appeal is arguable, and that unless the orders sought are granted, the appeal shall be rendered nugatory because the amount awarded to the 1st respondent is colossal and he may not be able to raise it during the pendency of the appeal and he might be committed to civil jail. He further stated that even if he were to raise and pay the Kshs.25,000,000, the 1st respondent would not be able to refund it if the appeal is successful.
7. For those reasons, we were urged to grant the orders sought.
8. The 1st respondent did not file any replying affidavit. Her advocate, Beatrice Jepkoech Sawe, however, filed a replying affidavit that raises purely legal and procedural issues. The 1st respondent's advocate stated, inter alia, that Civil Appeal No. E774 of 2021 was not duly filed because the applicant had not complied with rule 81 of the Court of Appeal Rules; and that the notice of appeal, though dated 17th November 2021, was lodged on 8th December 2021, 28 days after delivery of the impugned judgment.
9. For those reasons, the 1st respondent's advocate urged the Court to find that the application before us is incompetent and dismiss it with costs.
10. In response to the replying affidavit by the 1st respondent's advocate, Mr. James Odhiambo, the applicant's advocate, stated that the notice of appeal was filed on time, since it was uploaded on the Judiciary e-filing portal on 17th November 2021 but the Deputy Registrar signed it on 8th December 2021. He asserted that the appeal was duly filed and security of costs and service fees paid.
11. We have considered the application, the affidavits on record as well as the submissions on record. The principles that guide this Court in an application of this nature are well settled. An applicant has to demonstrate that the appeal or intended appeal is arguable; and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See *Stanley Kangethe Kinyanjui vs Tony Keter & 5 Others*, [2013] eKLR.
12. An arguable appeal is not one that must succeed, it is one that ought to be argued fully before the Court. An applicant need not demonstrate a multiple number of arguable grounds, even one suffices.
13. We shall first dispose of the technical objections raised by the 1st respondent's advocate. We are satisfied with the explanation given by the applicant's advocate regarding propriety of the appeal. The notice of appeal was filed in time, six (6) days after delivery of the impugned judgment. The applicant's advocate had no control over the time the Deputy Registrar took to endorse the notice of appeal.
14. Turning to the merits of the application, whether the suit properties that were listed by the 1st respondent in her suit are matrimonial properties or not is clearly an arguable ground. It is also arguable whether some of the properties had lawfully been given to, or acquired by the adult children of the applicant and the 1st respondent. We need not say more, lest we embarrass the bench that shall hear the appeal.



15. On the nugatory aspect, unless the orders sought are granted, the 1st respondent shall proceed to execute the decree, and the applicant fears that he might be committed to civil jail if he does not pay the Kshs.25,000,000 which is a substantial amount of money. And even if she were to be paid that sum or cause some of the suit properties to be sold in execution of the decree, the 1st respondent did not say anything about her ability to repay the Kshs.25,000,000 if the appeal is successful.
16. For those reasons, we are satisfied that the applicant has satisfied the two limbs for consideration under rule 5(2)(b) of this *Court's Rules*. Consequently, we hereby grant orders as sought by the applicant. Costs shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

