



**Kingoina (Suing as the legal representative of Jeremiah Kingoina Obego - Deceased) v Kingoina & 3 others (Civil Application E0131 of 2023) [2024] KECA 129 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 129 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E0131 OF 2023  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
FEBRUARY 9, 2024**

**BETWEEN**

**ARUSHA KINGOINA (SUING AS THE LEGAL REPRESENTATIVE OF  
JEREMIAH KINGOINA OBEGO - DECEASED) ..... APPLICANT**

**AND**

**PETER OKARI KINGOINA ..... 1<sup>ST</sup> RESPONDENT  
HARUN ONYIMBO KINGOINA ..... 2<sup>ND</sup> RESPONDENT  
GLADYS NYANSARORA ONUKOH ..... 3<sup>RD</sup> RESPONDENT  
KENNEDY ZACHARIA MAKORI ..... 4<sup>TH</sup> RESPONDENT**

*(Application for stay of Execution of the Judgement and Decree of the Environment and Land Court of Kenya at Kisii (Munyao, J) Dated 29th June, 2023 in Kisii ELC Case No. 457 of 2023)*

**RULING**

1. By a Notice of motion dated 23<sup>rd</sup> October, 2023 brought under Rule 5 (2) (b), 43,44,45,47 & 49 of the [Court of Appeal Rules, 2022](#), the applicant seeks an order of stay of execution of the judgement and decree of the Environment and Land Court (ELC) (Munyao, J) delivered on 29<sup>th</sup> June, 2023.
2. In the judgement, the learned Judge had dismissed a suit that had been filed by the applicant as the administrator of the estate of his late father Jeremiah Kingoina Obego against the 4 respondents herein. In the suit the applicant claimed that the respondents were holding in trust for and on behalf of the applicant, half of properties registered in their names as the properties originally belonged to the late Jeremiah Kingoina Obegi (Deceased) who was the father to the applicant and the respondents, whose mothers were co-wives.



3. The properties were Nyaribare Chache B/B/Boburai/2901, now registered in the name of 1<sup>st</sup> respondent), and Nyaribare Chache B/B/Boburai/5787 which was registered in the name of 2<sup>nd</sup> respondent and then subdivided into 4 parcels Nyaribare Chache B/B/Boburai/5069, 5070, 5578, and 10186. The applicant contends that he has been residing on the parcels of land and that the respondents procured their registration through fraud
4. The respondents filed statement of defence and counterclaim in which they contended that the suit properties were transferred to them by their father willingly and voluntarily.
5. In his judgement, the learned Judge dismissed the applicant's claim and allowed the respondents' counterclaim. Consequently, the learned judge issued orders for the applicant to give vacant possession of the disputed properties to the respondents within 30 days from the date of the judgement, and in default, to be forcefully evicted. The learned judge also decreed that the applicant be permanently restrained from entering into the suit properties or in any way interfering with the respondents' quiet possession.
6. That judgement is what gave rise to the applicant's appeal and the notice of motion now before us. The motion is supported by grounds stated on its face, an affidavit sworn by the applicant and written submissions filed in support of the motion.
7. The applicant contends that his appeal raises pertinent and plausible issues of law which are arguable. He has availed a draft memorandum of appeal in which he faults the judgement of the ELC on 10 grounds. He maintains that the suit properties were ancestral land which were originally registered in the name of their deceased father whose estate he is the administrator, and that the deceased clearly demarcated the suit properties between his two households before his demise. He contends that unless the orders sought are granted the intended appeal shall be rendered nugatory as he may be evicted from the suit properties which are his only home. In addition, the demolition of developments that he has made on the suit properties cannot be compensated by way of damages nor have the respondents demonstrated that they are capable of compensating the applicant, in the event that the decree is executed and the appeal succeeds.
8. The applicant has relied on *Kenya Shell Limited v Benjamin Karuga Kibiru & another* Nairobi Civil Appeal No. 97 of 1986 for the proposition that:

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting of a stay. That is what has to be prevented.”
9. The applicant submits that he has discharged the onus of proving the nugatory aspect in his application, as he has shown that he has been in the suit properties for over 70 years; and that the respondents have never been in occupation of the suit properties. He also relied on *Jenipher Akinyi Osodo v Boniface Okumu Osodo & 3 others* [2021] eKLR, wherein this Court stated as follows:

“On the nugatory aspects it was contended by the applicant that the subject property was matrimonial and ancestral home of the applicant and the 1<sup>st</sup> respondent. And that if the orders of injunction were not issued, the subject property may be dealt with in a manner that could not be compensated by money.

From the circumstances of this case, we are satisfied that if an order of injunction is not granted to preserve the suit property, and the property is dealt with in an adverse manner, the substratum of the appeal will have been lost and the intended appeal shall have been rendered nugatory”



10. The applicant urged that the respondents being the registered owners of the suit properties, it is necessary that the suit properties be preserved from wastage and or alienation to third parties.
11. The 4 respondents were all duly served with the motion but only the 3<sup>rd</sup> respondent filed a replying affidavit which was sworn by Daniel Ogwoka Gichana who is her legal representative through a power of Attorney donated to him. In the affidavit, it is deposed that the 3<sup>rd</sup> respondent's land does not form part and parcel of the land that is claimed by the applicant as the 1<sup>st</sup> and 2<sup>nd</sup> respondents' parcel are Nyaribare Chache B/B/Boburai/2901 and 5787 while the 3<sup>rd</sup> respondent's parcel is Nyaribare Chache B/B/ Boburai 5070 which has nothing to do with the applicant. The 3<sup>rd</sup> respondent claims that he has been wrongly sued and has suffered a lot of unnecessary damages as there is no case against him. He urged the Court to guard against stopping the 3<sup>rd</sup> respondent from enjoying the fruits of his judgement.
12. During the hearing of the application, only Ms. Ochwal counsel for the applicant was present in court.
13. We have considered the applicant's motion, the contending affidavit and the submissions filed by the applicant's counsel under Rule 5(2) (b) of the *Court of Appeal Rules*. In *Charterhouse Bank Limited v Central Bank of Kenya & 2 others* [2007] eKLR, this Court stated:

The principles upon which this Court

exercises its unfettered discretion to grant a stay of execution, stay of proceedings or an order of injunction are settled. The applicant should satisfy the court that the appeal or the intended appeal is not frivolous, that is to say, that, the appeal or intended appeal is arguable and, secondly, that unless the application is granted the results of the appeal, if successful would be rendered nugatory. The purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory. (See *Madhupaper International Limited v Kerr* [1985] KLR 840; *JK Industries v Kenya Commercial Bank Ltd & Another* [1987] KLR 506; *Githunguri v Jimba Credit Corporation Ltd (No. 2)* 1988 KLR 838"

14. Thus, this Court has unfettered discretion to issue an order of stay of execution or temporary injunction pending the hearing of an appeal against the judgment of a superior court, provided the applicant has filed an appeal and has satisfied the Court that he has an arguable appeal and that the appeal may be rendered nugatory if the orders of stay of execution is not granted, and such power is exercised to prevent the appeal if successful from being rendered nugatory.
15. In this case the applicant has satisfied the court that he has an arguable appeal as there is a dispute over the ownership of the suit properties and the findings made by the learned judge are contested. It is sufficient that the appeal is one capable of ventilation.
16. As regards the nugatory aspects, the applicant has demonstrated that the decree issued by the learned Judge of the ELC includes an order for the applicant to give vacant possession of the suit property within 30 days or else be forcibly evicted. It is obvious that if the decree is executed, the applicant will lose possession of the suit property and this will not only prejudice him but can also lead to the suit properties being alienated and falling into the hands of third parties. This was the position in *Yellow Horse Inns Limited & another v A.A. Kawir Transporters Ltd & 4 others* [2014] eKLR where this Court allowed an application for stay stated:

“Turning to the issue of the intended appeal being rendered nugatory should the applicants succeed on their appeal, it has been argued by the 1<sup>st</sup> respondent that the subject suit properties can be valued and compensated for in terms of money. We have no quarrel with



that considering that the subject suit properties are land, and are capable of being valued and compensated for in monetary terms. However, the circumstances displayed herein call for a restraint in making a move in that direction. The reason being that in a situation where ownership and possession is being hotly contested by several claimants, the possibility of ownership falling prematurely into the hands of a party who may ultimately not be adjudged the rightful owner at the conclusion of the litigation cannot be ruled out. The net result of such a situation arising is that the applicants if ultimately adjudged the lawful and rightful owners may very well have to undergo great expense if not inconvenience to pursue other persons for the recovery of ownership or monetary value.”

17. On our part, we are satisfied, given the circumstances herein, this is an appropriate case in which stay should issue. Accordingly, we issue an order of stay of execution pending appeal as sought in the applicant’s motion. In addition, we issue an order of injunction restraining the respondents from parting with possession of the suit property or in any way interfering with title to the disputed properties. We direct that the costs of the application shall be in the appeal.

It is so ordered.

**DATED AND DELIVERED AT KISII THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL JOEL NGUGI**

.....

**JUDGE OF APPEAL**

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

*SIGNED*

**DEPUTY REGISTRAR.**

