



REPUBLIC OF KENYA



**Njuguna v Kinyanjui & 2 others (Civil Application E271 of 2023)
[2024] KECA 98 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 98 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E271 OF 2023
HA OMONDI, A ALI-ARONI & GWN MACHARIA, JJA
FEBRUARY 9, 2024**

BETWEEN

TERESIA WANJIKU NJUGUNA APPLICANT

AND

MARY NYUMBURA KINYANJUI 1ST RESPONDENT

ANNA WANGARI 2ND RESPONDENT

THE NATIONAL LAND COMMISSION 3RD RESPONDENT

(An application for stay of execution of the Judgement of the Environment and Land Court at Thika (Kemei, J.) dated 31st March, 2023 in ELC Case No. 604 of 2017)

RULING

1. A judgment in favour of the Respondents that was delivered on the 31st of March, 2023 in the Environment and Land (ELC) at Thika, in Case No. 604 of 2017, triggered an appeal to this Court.
2. Pending hearing and determination of the appeal the applicant, who lost in the court below has moved the court by way of a Notice of Motion dated 19th April, 2023 under rule 5(2) (b) of this Court's Rules seeking: -
 - a. –(b) Spent
 - b. That the Honourable court be pleased to stay execution of the Judgement dated 31st March, 2023 and all consequential orders arising therefrom, pending hearing and determination of the appeal.
 - c. That costs of the application be provided for



3. The application is supported by the grounds on the face of it that; the instant appeal raises arguable grounds and has reasonable chances of success; that the applicant is apprehensive that the title in favour of one Patrick Ndungu Njuguna may be revoked, thus defeating the appeal; and that there is likelihood of the respondent disposing and/or transferring the property to a third party which will render the appeal nugatory.
4. In an undated affidavit of the applicant she disposes that she is the legal representative of the Estate of Patrick Ndungu Njuguna (deceased); who was prior to his death a shareholder of Juja Farmers Limited and had been allocated a parcel of land and issued with a title deed to the said piece of land known as Ruiru East/Juja East Block/1662 in 1993; that thereafter a dispute arose as to ownership of the said property with the Estate of Herman Kinyanjui Kimani (deceased), who moved the court in ELC Case No. 604 of 2017 and where the trial court found in favour of his estate; and in the judgement the trial court made the following orders:
 - (i) An inhibition or prohibitory order be and is hereby issued against the defendant by themselves and or those claiming under them or any other body or officer restricting them, interfering, entering alienating, selling transferring registering charging and/or dealing with the suit premises Ruiru East/Juja East Block 2/1667 (suit land) pending the hearing and determination of the suit. (sic)
 - ii. It is hereby declared that the suit premises rightly and lawfully belong to the plaintiffs.
 - ii. An order is hereby issued revoking and or annulling the title issued to Patrick Ndungu Njuguna for the suit land and rectification of the register accordingly.
 - ii. Costs in favour of the Plaintiffs.
5. In his submissions, learned counsel for the applicant stated that the respondent had no valid transfer documents and that no proof of payment for stamp duty was placed before the trial court; further that the trial court placed weight on the testimony and records of the Land Registrar, yet the documents did not form part of the record; and that the learned judge disregarded the official register of Juja farmers Limited as at 1976.
6. On the nugatory aspect counsel submitted that there is possibility of execution of the decree and the ramification of execution is averse to the issue of proprietorship of the suit property.
7. The application was opposed by way of a replying affidavit and submissions. In a replying affidavit sworn on 2nd May, 2023, the 1st respondent, Mary Nyambura Kinyanjui disposes that the title issued on 9th November, 1993 had been revoked and the register rectified pursuant to the High Court judgement; that she is in possession of the suit property; that the applicant does not have an arguable appeal; and that the appeal will not be rendered nugatory in the event the orders prayed for are not granted.
8. Learned counsel for the respondents in his submissions dated the 10th of May, 2023, rehashed the averments in the 1st respondent's affidavit and further stated that the applicant's claim arises from a title issued on 9th December, 1993 whereas the respondent's claim arises from a title issued on 3rd December, 1990. Further learned counsel contended that, at the trial no impropriety, fraud or misrepresentation was proved against the respondent, and he confirmed that pursuant to the orders of the High Court, the applicant's title was revoked on 15th of July, 2019 and thus there is nothing for this Court to stay; lastly, he asserted that the appeal has no chances of success.



9. 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.”
10. In order for an application under rule 5(2) (b) to succeed, an applicant must satisfy two principles. Firstly, that the appeal has arguable grounds, secondly, that if an order of stay is not granted, the appeal will be rendered nugatory.

In *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013]* eKLR this Court stated follows:

“That in dealing with Rule 5(2) (b), the court exercises 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.”

11. We shall not delve into the merit or otherwise of the grounds of appeal, as that will be the duty of the bench that will hear the appeal. In her memorandum of appeal, the applicant contends that there were no valid transfer documents; nor proof of payment of stamp duty; that the court made reference to documents that were not part of the court record; and disregarded crucial documents. A cursory look at the grounds gives the impression that these are arguable points.
12. On the aspect of nugatory, the applicant’s contention is that unless a stay is granted, the title to the suit property will be adversely affected. The 1st respondent’s averment that the title held by the applicant was cancelled, was not controverted, neither the 1st respondent’s claim that she is in possession of the suit land. Since execution of the judgment seems to have already taken place, we are of the considered view, that there is nothing for this Court to stay. In any event, any damage that may arise from the judgment is reversible and/or damages payable.
13. For an applicant to succeed in an application such as the one before us he must satisfy both limbs. The applicant has failed to do so; as a consequence, this application must fail. It is hereby dismissed. Costs to abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.



H. A. OMONDI

.....

JUDGE OF APPEAL ALI-ARONI

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

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

Signed

Deputy Registrar.

