



Chumba & 8 others v Misoi (Suing as the Legal Representative of the Estate of the Late Chepyego Kipkorkor Sigor) & another (Civil Application E029 of 2023) [2024] KECA 55 (KLR) (2 February 2024) (Ruling)

Neutral citation: [2024] KECA 55 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E029 OF 2023
F SICHALE, P NYAMWEYA & WK KORIR, JJA
FEBRUARY 2, 2024**

BETWEEN

**ROBERT KIPLIMO CHUMBA 1ST APPLICANT
STEPHEN KANDIE KIPCHUMBA 2ND APPLICANT
JONATHAN KIPRONO KIPCHUMBA 3RD APPLICANT
PETER KIPKOECH KIPCHUMBA 4TH APPLICANT
WILSON KIMELI KIPCHUMBA 5TH APPLICANT
ELIZABETH SOTE KICHUMBA 6TH APPLICANT
TIMOTHY KIPCHUMBA KOSGEI 7TH APPLICANT
ELGEYO MARAKWET COUNTY 8TH APPLICANT
ATTORNEY GENERAL 9TH APPLICANT**

AND

**MAGARINA SANIAKO MISOI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE CHEPYEGO KIPKORKOR SIGOR) 1ST RESPONDENT
ROSEMARY JEPKOSKEI CHEPYEGO KIPKORKOR SIGOR (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE CHEPYEGO KIPKORKOR SIGOR) 2ND RESPONDENT**

(Being an application for stay of execution to the decision of Environment and Land Court of Kenya at Eldoret (S. Kibunja, J.) dated 22nd March 2023 in ELC Case No. 445 of 2015)



RULING

1. The 1st to 7th applicants are before us with a notice of motion application dated 19th June 2023 brought under Rules 5(2)(b) of the *Court of Appeal Rules*. Through the application, the applicants seek orders of stay of execution of the judgment delivered on 22nd March 2023 by S. Kibunja J. of the Environment and Land Court (E&LC) at Eldoret in Case No. 445 of 2015 pending the hearing and determination of the intended appeal. The applicants also pray for the costs of the application. The application is supported by an affidavit sworn on 19th June 2023 by the 1st applicant, Robert Kiplimo Chumba, as well as the grounds on the face of the application.
2. The applicants aver that they are dissatisfied with the judgment of the E&LC which if implemented will render their intended appeal nugatory since it ordered cancellation and revocation of their titles and ordered that the same be reverted to the estate of the deceased Chepyego Kipkorkor Sigor. It is their case that they have an arguable appeal as they had tendered evidence at the trial showing that the deceased had, prior to his demise, transferred the parcel of land in question to the 1st applicant. They further depose that the decree arising from the said judgment exposes them to loss of their properties of which they are the legal owners hence rendering them at the brink of being evicted upon the lapse of 90 days from the date of the delivery of the impugned judgment. They also aver that the process of cancellation, revocation and transfer of a title is expensive and if the appeal succeeds, the applicants will be forced to undergo the expensive process of retransferring the parcels of land to themselves. Finally, they assert that the status quo is in their favour as they are not only the registered owners of the said properties, but also the current occupants of the same.
3. The application was opposed by an affidavit sworn on 13th July 2023 by Rosemary Jepkosgei Cheron, the 2nd respondent. She avers that the deceased was her father and the grandfather to the 1st, 2nd, 3rd, 4th and 5th applicants, as well as the father-in-law of the 6th applicant. Her case is that upon the demise of the deceased, the 1st applicant fraudulently registered the suit land in his name and thereafter subdivided it amongst the applicants including the 7th applicant who was not a beneficiary of the deceased's estate. She deposes that the applicants do not deserve the audience of this Court and that the judgment of the E&LC is sound in law. Further, that the applicants have no arguable appeal and have not shown that the intended appeal will be rendered nugatory.
4. In support of the application the law firm of Manani, Lilan, Mwetich and Company advocates filed submissions dated 27th July 2023. While addressing the question as to whether the appeal was arguable, the said applicants' counsel restated the evidence tendered at the trial, and submitted that the intended appeal raises the pertinent question as to whether the deceased prior to his death transferred the suit land as a gift to the 1st applicant. Asserting that the appeal will be rendered nugatory if stay is not granted, counsel relied on the case of *Muthithi Investment Co. Ltd. vs. Commissioner of Prisons & 2 others* [2020] eKLR to urge that the intended appeal will be rendered nugatory as there is a likelihood that the respondents will execute the decree, cancel the titles and evict the applicants.

Counsel contended that such a move will reverse the expensive venture that the applicants had undertaken in registering the titles in their names and that they would be subjected to another expensive process to reverse the execution of the judgment, were their appeal to succeed. According to counsel, the status quo was also in favour of the applicants. He therefore urged us to allow the application.



5. In opposing the application, the law firm of R. M. Wafula & Co. Advocates through submissions dated 6th October 2023 contended that the intended appeal is not arguable. In so asserting, counsel relied on the evidence on record and submitted that the findings of the trial court are sound and backed by both the law and the evidence. As to whether the intended appeal, if successful, will be rendered nugatory if stay is not granted, counsel relied on the case of *University of Nairobi vs. Ricatti Business of East Africa* [2020] eKLR to urge that the intended appeal would not be rendered nugatory. According to counsel, the interests of the rightful beneficiaries would be protected if the disputed parcel of land is reverted to the estate of the deceased. Counsel further submitted that the process of reverting the suit land to the deceased's estate had long been initiated and may have been concluded. In the end, counsel urged us to dismiss the application with costs.
6. We have considered the application and the submissions by the parties. This being an application under Rule 5(2)(b) of the *Court of Appeal Rules*, the applicant is under obligation to establish two limbs, namely, that the intended appeal is arguable and that there is likelihood that the intended appeal, if successful, will be rendered nugatory if the orders sought are not granted. These principles were restated in *Attorney General & Another vs. Eunice Makori & Another* [2021] eKLR thus:

“Undoubtedly, this Court has unfettered discretion under Rule 5(2) (b) to grant an order of stay. The principles guiding the exercise of such discretion are well settled. Firstly, an applicant has to demonstrate 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 would be rendered nugatory.”
7. With regard to whether the intended appeal is arguable, the applicant submitted that the intended appeal revolves around whether the deceased, prior to his death, transferred the suit land as a gift to the 1st applicant. In *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR, it was held that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court.
8. Although the applicants did not attach a draft memorandum of appeal, we can glean from the pleadings and submissions what the intended appeal is all about. The intended appeal is a first appeal and the question as to whether the deceased, prior to his demise, had gifted the 1st applicant the land in question is a valid issue which deserves to be heard by this Court. It therefore follows that the intended appeal is arguable. Having found so, we only wish to point out that good practice would demand that an applicant clearly and with precision points out to the Court their intended grounds of appeal.
9. Will the intended appeal be rendered nugatory if the orders sought herein are not granted? To answer this question, we refer to the words of this Court in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR that:

“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.”
10. On this limb, the applicants contended that there is a likelihood that the respondents will execute the decree, cancel their titles and evict them. Counsel argued that such a move will reverse the expensive venture that the applicants had undertaken in registering the titles in their names and will subject them to another expensive process of reregistering the parcels of land in their names should their appeal be successful. From the record, it is discernable that the suit property is disputed between the



deceased's estate and the applicants. Apart from the 7th applicant, all the other applicants are likely to be beneficiaries of the estate of the deceased. The respondents also submitted that the process of reversing the transfer had been initiated. Having the title of the disputed parcel of land revert to the estate of the deceased is good for all the parties as no action can be taken by any party over the land without involving the courts. If the appeal eventually succeeds the land can always be re-transferred to the applicants and any expenses involved in the process can always be calculated and the respondents asked to bear the expenses. In other words, the execution of the judgement is reversible and any loss suffered can be compensated by way of damages. We therefore find that there is no harm in having the suit property rest where it originally belonged, with the deceased. Once the issue of ownership is finally and conclusively determined, the rightful owners will have the property formally and legally transferred to them.

11. In conclusion, we find that the applicants have not made out a case to warrant the grant of stay orders as prayed. Consequently, this application lacks merit and is dismissed.

With regard to the issue of costs, there being a pending appeal, the costs of the application shall abide the outcome of that appeal.

12. Consequently, the orders we make are as follows:

- i. The notice of motion dated 19th June 2023 is without merit and is hereby dismissed;
- ii. The costs of the application to abide the outcome of the main appeal.

DATED AND DELIVERED AT NAKURU THIS 2ND DAY OF FEBRUARY, 2024

F. SICHALE

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

