



REPUBLIC OF KENYA



**Kibos v Kirui (Civil Application E002 of 2023)
[2024] KECA 56 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KECA 56 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E002 OF 2023
F SICHALE, LA ACHODE & WK KORIR, JJA
FEBRUARY 2, 2024**

BETWEEN

WILSON KIPROP KIBOS APPLICANT

AND

FRANCIS KIGEN KIRUI RESPONDENT

(An application for stay of execution of the Ruling of the Environment and Land Court of Kenya at Eldoret (S.M. Kibunja, J.) delivered and dated 23rd September 2022 in E&LC Appeal No. E051 of 2021)

RULING

1. Through a notice of motion dated 19th January 2023 the applicant, Wilson Kiprop Kibos, moved this Court for orders of stay of execution of the judgment and decree in Eldoret Chief Magistrate’s Court Case No. 169 of 2018. He also prayed for the costs of the application. The application is based on the grounds contained on its face as well as an affidavit sworn by the applicant on the date of the application.
2. In support of the application, the applicant avers that he has an arguable appeal against the ruling delivered on 23rd September 2022 by S.M. Kibunja, J. of the Environment and Land Court (E&LC) who dismissed his application for stay of execution of the judgment in Eldoret Chief Magistrate’s Court Case No. 169 of 2018. He additionally deposes that he has developed the suit property and it is yet to be transferred to the respondent in compliance with the judgment of the trial court; that there is need to preserve the suit property because if the orders of the trial court are executed he will suffer loss as he will be evicted and his residence demolished; and, that, if stay is not granted, the title to the suit property will be transferred to the respondent hence rendering the intended appeal nugatory.
3. The application is opposed through a replying affidavit sworn on 28th March 2023 by Francis Kigen Kirui, the respondent. It is the respondent’s case that the application is frivolous and lacks merit, and



- ought to be dismissed with costs. The respondent deposes that since filing the appeal two years have lapsed and the applicant has not taken any action which demonstrates that he is not vigilant but only keen on crowding the judicial system with frivolous applications. He also avers that the ruling which is the subject of the intended appeal was made in exercise of discretion and the applicant has not demonstrated that the learned Judge erred in the exercise of discretion. Further, that the orders made by the learned Judge are negative orders not capable of being stayed. The respondent finally deposes that he has since taken possession of the suit property hence issuance of stay orders will be in vain.
4. At the hearing of this application on 23rd October 2023, Mr. Momanyi who appeared for the applicant had filed submissions dated 14th February 2023 whereas Mr. Tororei represented the respondent and had filed submissions dated 28th March 2023. The advocates for the parties sought to rely on the filed submissions.
 5. On whether the intended appeal is arguable, Mr. Momanyi submitted that the application is arguable as the applicant has attached photographs demonstrating his possession of the suit parcel and there is no evidence to support the respondent's averment that the eviction had taken place. Counsel submitted that intended appeal is also arguable because the applicant has shown the loss he will suffer should an order of stay be declined.
 6. With regard to the question as to whether the intended appeal will be rendered nugatory if the application is not allowed, counsel submitted that the possible eviction and demolition of the applicant's structures on the suit land are irreversible actions that will render the intended appeal nugatory. Further, that the applicant will be deprived of his title to the suit property thereby exposing the property to the dangers of being adversely utilized by the respondent. Counsel additionally submitted that if the orders sought are not granted, the applicant will be highly prejudiced as his house will be demolished during his eviction. Counsel consequently asked us to allow the application so as to preserve the suit property.
 7. On the respondent's part, Mr. Tororei submitted that the fact as to whether the intended appeal is arguable or not cannot be gauged from the pleadings as the applicant has not filed his record of appeal. Counsel asserted that the applicant failed to prove his alleged ownership of the suit property during the trial.
 8. Regarding the issue whether the intended appeal will be rendered nugatory if the orders sought are not granted, Mr. Tororei relied on the case of *Kenya Commercial Bank Ltd v. Benjob Amalgamated Ltd & Another*, Civil Application No Nai 50 of 2001 and argued that the applicant had failed to demonstrate that his intended appeal will be rendered nugatory. Counsel cited the case of *Kakuta Maimai Hamisi v. Peris Tobiko & 2 others*, Civil Appeal No. 154 of 2013 in support of the proposition that appeals against interlocutory rulings ought to be deferred to await the determination of the main case. Mr. Tororei closed his submissions by urging us to dismiss the application asserting that it lacks merit.
 9. We have considered the motion, the supporting affidavit, the replying affidavit and the submissions made by counsel for the parties. This is an application under rule 5(2)(b) of the rules of this Court and the applicable principles in applications of this nature are well settled. For an applicant to succeed he must, first, demonstrate that the appeal, or intended appeal, is arguable and not frivolous, and second, that the appeal would be rendered nugatory absent stay-see *Stanley Kangethe Kinyanjui v. Tony Ketter & others* [2013] eKLR. Unfortunately, the consideration of this application will take a different trajectory for the reasons to be stated hereunder.
 10. The brief background to this application is that the respondent obtained judgment in Eldoret Chief Magistrate's Court Civil Suit No. 169 of 2018. The applicant was aggrieved by the said judgment and preferred an appeal to the E&LC at Eldoret. Prior to the hearing of the appeal, the applicant applied



for stay of execution of the judgment of the trial court. The application was dismissed by the E&LC in a ruling delivered on 23rd September 2022. It is this ruling that should be the subject of this application.

11. Having established that background, we wish to point out that in the notice of motion, the applicant is seeking stay of execution of the judgment and decree of the trial court. This Court's jurisdiction is invoked by filing a notice of appeal and in this instance, the notice of appeal was filed against the ruling of the E&LC whereas the stay sought is against the judgment of the Magistrate's Court. This Court is bereft of jurisdiction to issue the order of stay sought by the applicant as the Court is only moved upon filing a notice of appeal which must be with respect to the decision appealed against. In this case, there is no notice with regard to the decision of the Chief Magistrate's Court. In any event, this Court has no jurisdiction to directly entertain appeals arising from the decisions of the magistrates' courts. Impugned decisions from the magistrates' courts are first appealed to the High Court or any of the courts of equal status before any aggrieved party can, where allowed, approach this Court on second appeal. Our decision aligns with the holding in *Gitundu v. Wathuku* [2022] KECA 959 (KLR), where in addressing a similar occurrence, this Court stated that:

“That said, we come to the merits of the application as filed before us. We start with the important issue of the jurisdiction of this Court to stay the orders and decree of the Chief Magistrate as invited to do by learned counsel, Mr. Amuga. This Court draws its jurisdiction to entertain an application under Rule 5

- (2) (b) from a Notice of Appeal duly filed pursuant to Rule 75 of the Rules of this Court. (See *Safaricom Ltd vs Ocean View Beach Hotel Ltd & 2 Others* [2010] eKLR). Such Notice must be in respect to the impugned decision appealed from. In this case the Notice of appeal is against the learned Judge's decision striking out the applicant's application on grounds that it was res judicata. There is no Notice of Appeal before us with regard to the Chief magistrate's decree. We do not, therefore have jurisdiction to grant the orders sought in the application.”

12. Nevertheless, even if the application was for stay orders against the decision of the E&LC, what would there be to stay? The learned Judge dismissed the application for stay. The Judge did not order any party to do anything capable of being stayed. He simply dismissed the application. In this regard, it is appropriate to refer to the holding in *Western College of Arts and Applied Sciences v. EP Oranga & 3 others* [1976] eKLR that:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”

13. From the foregoing discussion, the ultimate fate of this application is inevitable. It is without merit and is hereby dismissed.
14. The final issue is with regard to the costs of the application.

Considering the history of the litigation in this matter, the conduct of parties, and the principle that costs should ordinarily follow the event, we find no reason not to award the



costs of this application to the respondent. The applicant shall therefore bear the costs of this application.

15. For avoidance of doubt, the application dated 19th January 2023 is hereby dismissed with costs to the respondent.

16. It is so ordered.

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

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

