



**Mwangi v Karocha (Civil Application E123 of 2022)  
[2024] KECA 1044 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KECA 1044 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E123 OF 2022  
W KARANJA, LK KIMARU & AO MUCHELULE, JJA  
FEBRUARY 2, 2024**

**BETWEEN**

**PAUL WAIGANJO MWANGI ..... APPLICANT**

**AND**

**MAINA KAROCHA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Environment and Land Court of Kenya at Nyeri (Olola, J.) delivered on 27th January, 2022 in E. L. C. Case No. E004 of 2022)*

**RULING**

1. By a notice dated 24<sup>th</sup> January, 2023, the applicant, who is acting in person, sought orders from this Court to stay the execution of the decree pursuant to the judgment delivered on January 27, 2022 by the Nyeri Environment and Land Court (ELC) in ELC Appeal No. E004 of 2022 pending the hearing and determination of the intended appeal. In the alternative, the applicant asked the Court to grant an order of injunction to restrain the respondent from interfering with his ownership and occupation of L.R. No. Mahiga/Kamoko/1409 (the suit parcel of land) pending the hearing and determination of the intended appeal. The application is supported by the annexed affidavit of the applicant and the grounds in support thereof on the face of the application.
2. The applicant pleads that if the respondent is allowed to execute the decree and judgment of the ELC, the intended appeal would be rendered nugatory. He further argued that he would suffer irreparable damage if stay is not granted as his assets would be sold. He would unlikely get justice if, upon the appeal being successful, the court orders that he be compensated by an award of liquidated damages. He urged the Court to take into consideration the broader interest of justice and grant the orders sought in the application. He was ready to abide by any reasonable conditions that this Court will impose if it grants the orders craved for in the application.



3. The application is opposed. The respondent told the Court that he had already executed the judgment and decree of the ELC by sub-dividing the suit land in accordance with the determination of the said court. In the circumstances therefore, if this Court were to grant the orders craved for by the applicant, it would be doing so in vain.
4. This Court has carefully considered the rival submission made by the parties to this application. Although the applicant did not cite rule 5 (2) (b) of this *Court's Rules*, it was clear to the Court that his application is predicated on that Rule. The principles upon which this Court is called upon to consider such an application are well settled. In *NIC Bank Ltd & 2 others v Mombasa Water Products Ltd* [2021] eKLR, this Court held thus:
  - “10. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court...
  12. On the nugatory aspect, which is whether the appeal, should it succeed would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (*supra*) this Court stated that:
    - ‘ix) .....
    - (x) 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...”
5. In the present application, the applicant has pleaded with the Court to stay execution of the judgment and the decree of the ELC pending the hearing and determination of his intended appeal, which will be a second appeal to this Court. The applicant was aggrieved by the judgment of the ELC which agreed with the decision of the Magistrate's court that the suit land belonged jointly to the applicant and his brother being the children of Gladys Wamucii Mwangi (deceased), (the respondent's sister) who had inherited the same. In the suit, the applicant had sought a declaration that he was the sole owner of the suit land because his brother had relocated to Laikipia County during the lifetime of their mother.
6. We have perused the draft memorandum of appeal annexed to the affidavit in support of the application. We are not prepared, at least at this stage of the proceedings, to make a finding that the said draft memorandum of appeal does not raise arguable grounds of appeal. We are satisfied that the applicant has raised at least one substantial question of law, particularly whether he had been given the entire parcel of land as a gift prior to their mother's death. As this Court has said time and time again, an arguable appeal is not one which must necessarily succeed but one which is not frivolous. In the premises therefore, we hold that the applicant has established the first aspect of his application, that he has an arguable appeal
7. On the second aspect, we are not satisfied that the appellant demonstrated that the intended appeal would be rendered nugatory if the application for stay of execution or injunction is not granted. The judgment has already been executed and the suit land is now registered in the joint names of the applicant and his brother. The applicant did not say that he feared that his brother would sell his portion of the suit land. If the applicant succeeds in his intended appeal, the transfer that has already been made in the joint names of his brother and himself will be reversed. In any event, as joint proprietor, neither of them can dispose of the suit land without the consent of the other. There is no



danger that the suit land would be disposed of or wasted during the pendency of the hearing of the appeal.

8. In the premises therefore, we hold that the applicant failed to establish that his intended appeal would be rendered nugatory if the application is not allowed. The application lacks merit and is hereby dismissed but with no orders as to costs since the parties are relatives.

It is so ordered.

**DATED AND DELIVERED AT NYERI THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2024.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

