



**Waleiaora v Njoroge (Civil Application E170 of 2021)
[2024] KECA 57 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KECA 57 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E170 OF 2021
F SICHALE, P NYAMWEYA & WK KORIR, JJA
FEBRUARY 2, 2024**

BETWEEN

EMILY WALEIAORA APPLICANT

AND

DAVID KURIA NJOROGE RESPONDENT

(Being an application for an injunction and/or stay of execution of the orders of Environment and Land Court of Kenya at Kitale (M. Njoroge, J.) dated 9th October 2019 in ELC Case No. 83 of 2017)

RULING

1. Before us is a notice of motion application dated 2nd June 2023 lodged by the applicant, Emily Waleiaora, seeking an order staying execution of the decree and orders arising from the judgment issued on 9th October 2019 in Kitale Environment and Land Court (E&LC) Case No. 83 of 2017 pending the hearing and determination of her intended appeal. She also prays for the costs of the application. The application is premised on the grounds contained on its face as well as the applicant's affidavit sworn on the date of the application.
2. The applicant avers that she is dissatisfied by the judgment of M. Njoroge J. in Kitale E&LC Case No. 83 of 2017 and has lodged an appeal before this Court. It is her deposition that her appeal raises substantial issues of both law and fact with the likelihood of success as demonstrated in the annexed memorandum of appeal. She further avers that the respondent has extracted the decree and an order dated 6th September 2022 directing the Officer in Charge of Kwanza Police Station to evict her from the suit land. She deposes that if the orders sought are not granted, she will be evicted from the suit property which is the only place she has always known as home.
3. The application is opposed by the respondent, David Kuria Njoroge, through a replying affidavit sworn on 9th October 2023. It is the respondent's averment that he had sought eviction orders against



- the applicant after a long and protracted legal battle over the ownership of the suit property. He asserts that he is entitled to enjoy the fruits of his judgment by taking the possession of the suit property considering that the applicant has utilized the property since 2009. According to the respondent, the intended appeal is not arguable since the question of ownership of the said parcel of land had been determined in earlier proceedings. He also avers that the intended appeal will not be rendered nugatory. The respondent confirmed the existence of an eviction order but averred that it was yet to be enforced by the OCS Kwanza Police Station due to lack of approval from the Inspector General of Police. The respondent therefore prays for the dismissal of the application.
4. This application was heard on 17th October 2023 when learned counsel Mr. Nakitare appeared for the applicant and learned counsel Mr. Kiarie represented the respondent. Counsel for the parties had filed submissions all dated 9th October 2023 which they sought to rely upon with brief oral highlights at the hearing.
 5. In support of the application, Mr. Nakitare referred to the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR as highlighting the principles underpinning the grant of stay orders before this Court. On whether the intended appeal is arguable, counsel reiterated the grounds of appeal as enumerated in the memorandum of appeal to submit that the appeal is indeed arguable. As to whether the appeal will be rendered nugatory if stay orders are not granted, counsel submitted that the respondent had moved and served the decree from the E&LC and had also secured an order for the eviction of the applicant from the suit land. Counsel submits that to preserve the substratum of the appeal, stay orders should be issued to allow the parties argue the appeal without rendering it nugatory. Counsel relied on the case of *M. Mwenesi vs. Shirley Luckhurst & Another*, Civil Application No. Nai 170 of 2000 to urge that where an injustice is apparent, as in this case, a stay order must be issued. He therefore urged us to allow the application.
 6. In opposition, Mr. Kiarie equally relied on *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [supra] to point out the dual principles for grant of orders of stay which he asserted that the applicant had not established. Counsel submitted that the applicant did not have an arguable appeal as litigation between the parties over ownership of the suit property had long been concluded and that the applicant's grounds of appeal are therefore res judicata. With regard to whether the appeal will be rendered nugatory, counsel submitted that the applicant took possession of the portion of the suit land when there was an existing court order barring such a move. He submitted that as a result, the applicant's possession is unlawful and a result of the applicant's impunity and disobedience of a court order, hence execution of the eviction orders cannot render any appeal whatsoever nugatory. Counsel consequently asked us to dismiss the application with costs to his client.
 7. We have duly considered the application before us, the affidavits and the submissions of the parties. For an applicant to make out a case for the orders sought herein, two principles must be established, namely, that the appeal is arguable and that if the orders sought are not granted, the appeal will be rendered nugatory. The jurisprudence surrounding the exercise of the discretionary power of this Court to grant stay orders was succinctly expounded in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [supra] which has also been relied upon by both parties. We shall proceed to consider the present application on this basis.
 8. Is the intended appeal arguable? To answer this question, we have considered the attached memorandum of appeal against the impugned judgment. At the center of the dispute between the parties is the ownership of the suit property. The core issue in the intended appeal is the applicability of the principle of adverse possession. In our view, we find this is an issue that could warrant a relook by this Court. In stating so, we are alive to the fact that even a single ground of appeal that deserves the consideration of this Court renders the appeal arguable.



9. Without the orders sought, will the appeal be rendered nugatory? On this issue, the applicant contends that the respondent has already extracted the decree and obtained eviction orders which orders have already been served upon the OCS Kwanza Police Station for implementation and which execution is imminent. This averment is not disputed by the respondent who confirms that the eviction order is actually awaiting the green light of the Inspector General of Police. However, it is not enough to demonstrate that an impugned decision is on the verge of execution in order to earn a stay order. As was stated in Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others [supra] an additional factor to be considered is 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. The applicant seeks to stay the execution of an eviction order. We have had the occasion of considering all the documents filed before this Court and specifically, the affidavit of the respondent which has highlighted the historical background of the litigious journey that the parties have undergone and how the applicant came into possession of the suit property. The respondent has averred, and that deposition has not been rebutted by the applicant, that the question of the ownership of the suit property was determined in his favour in earlier proceedings and that the decision the applicant intends to appeal is limited to the orders granted to him to evict the applicant from his property. In our view, we do not think, that all factors considered, the pending appeal will be rendered nugatory if the order of stay is not issued. The applicant, if evicted and in the event the appeal succeeds, can be compensated by way of damages for the period she will have been out of the suit property. There is no indication that the respondent intends to dispose of the suit property and even if he was to do so, the property can still be valued and the applicant compensated by way of damages. We say cognizant of the fact that in exercising our discretionary jurisdiction the bigger picture we should focus on is to preserve the ends of justice which includes letting a deservedly winning party enjoy the fruits of their judgment.
11. The upshot of the foregoing is that the applicant has not established to our satisfaction, that the appeal, if successful, will be rendered nugatory. In the end, the application fails to meet the threshold for grant of stay orders.
12. Consequently, the notice of motion dated 2nd June 2023 is found to be without merit and is hereby dismissed. As for the costs, there being a pending appeal, the costs shall abide the outcome of that appeal.

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

F. SICHALE

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

