



**Waningilo v Baraza & another (Civil Application E021 of 2023)  
[2024] KECA 52 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KECA 52 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E021 OF 2023  
P NYAMWEYA, FA OCHIENG & WK KORIR, JJA  
FEBRUARY 2, 2024**

**BETWEEN**

**JOSEPH SAWENJA WANINGILO ..... APPLICANT**

**AND**

**SAMMY BARAZA ..... 1<sup>ST</sup> RESPONDENT**

**EDDAH BARAZA ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of execution pending the hearing and determination of an intended appeal from the Judgment of the Environment and Land Court at Kitale, (Mwangi Njoroge, J.) dated 11th August 2022 in ELC Cause No. 2 of 2019)*

**RULING**

1. Before us is an application dated 19<sup>th</sup> May 2023, in which the applicant prays for an order of stay of execution of the impugned judgment pending the hearing and determination of the intended appeal.
2. The application is brought under Rules 1(2), 5(2)(b), and 47 of the Court of Appeal Rules, and Article 159(2)(d) of *the Constitution*. The application is based on the following grounds:
  - “ a) A notice of appeal has been filed without delay.
  - b. The applicant has been in possession of the land known as Trans Nzoia/ngorongal1, hereinafter, “the suit land” since 1985.
  - c. The judgment in question has ordered the applicant to vacate the suit land.
  - d. The impugned judgment prohibits the applicant from utilizing the suit land.
  - e. The applicant is likely to suffer substantial loss and damage if the decree is executed, and he will be prejudiced.



- f. The intended appeal shall be rendered nugatory unless the orders sought are granted.”
3. The application was further supported by the applicant’s affidavit in which he reiterated the grounds on the face of the application, save for the additional averment that his application for stay before the trial court was dismissed.
4. The respondents in their replying affidavit sworn by the 2<sup>nd</sup> respondent stated that:
- “a) The applicant’s application for stay of execution before the trial court was dismissed for failing to meet the required threshold.
- b. The applicant is not in actual possession of the suit land and he does not live on the suit land.
- c. The applicant has been leasing the suit land to third parties at a yearly rent of over Kshs. 500,000/-.
- d. The trial court found that the applicant had breached the sale agreement between him and the respondents’ father (now deceased), by failing to pay over Kshs. 224,000/- in fulfillment of the agreed purchase price of Kshs. 500,000/-.
- e. The applicant breached the sale agreement by refusing to grant possession of his Kitale site and service plot valued at Kshs. 175,000/-; while he continued to lease the suit land.
- f. If the stay is not granted, the applicant will only forfeit their lease payment for 2024.
- g. The appeal will not be rendered nugatory if the orders sought are not granted.”
5. When the application came up for hearing on 18<sup>th</sup> October 2023, Mr. Teti, learned counsel held brief for Ms. Arunga, for the applicant; whereas Mr. Samba learned counsel appeared for the respondents. Counsel relied on their respective written submissions which they opted to briefly highlight as follows:
6. The applicant cited the cases of Josephine Koki Raymond v Philomena Kanini Maingi (personal representative of Maingi Musila Mutava (Deceased) & another [2018] eKLR and Aguthi Enterprises Limited v Hussein Ibrahim Nuni [2015] eKLR to support their request for the court to grant the application.
7. The respondents have objected to the grounds set out in the applicant’s draft memorandum of appeal, stating that it contains distorted points of fact and law. They were of the view that the trial court had already decided the issue of ownership of the suit land and had determined that the applicant was in breach of the sale agreement. The respondents argue that the applicant has failed to prove that he has an arguable appeal and have cited the cases of Stanley Kang’ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR and Kenya Tea Growers Association & another v Kenya Plantation and Agricultural Workers Union [2012] eKLR to support their argument.
8. The respondents referred to the case of Reliance Bank Limited v Norlake Investments Limited [2002] 1 EA 227. They argued that whether an appeal will be rendered nugatory depends on whether the matter to be stayed can be reversed, and whether it can be adequately compensated through damages. They argued that since the suit land is vacant, execution of the decree would not make the applicant destitute.



9. We have thoroughly reviewed the application, along with the supporting documents, affidavits, counsel's submissions, relevant case law, and legal provisions. We recognize that our jurisdiction under Rule 5(2)(b) is original, independent, and discretionary. However, we must exercise this discretion judiciously and rationally, and not out of impulsiveness or sympathy.
10. Rule 5(2)(b) is a procedural provision that allows the court to protect the subject matter of an appeal when it has already been filed. In the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others*, (supra), the court held that:
  - "i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
  - ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
  - iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
  - iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
  - v. An applicant must satisfy the court on both of the twin principles.
  - vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
  - vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
  - viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. *Damji Pragji* (supra).
  - ix. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
  - 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.
  - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to



rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”

11. It follows therefore that, to succeed in an application for a stay of execution, the applicant must show that his intended appeal is arguable. Once this has been established, the applicant must also demonstrate that if his appeal were to be successful, it would be rendered nugatory. These principles were reiterated in the case of *Trust Bank Limited & Another v Investech Bank Limited & 3 Others* [2000] eKLR.
12. In the case of *Dennis Mogambi Mang'are v Attorney General & 3 Others* [2012] eKLR, this Court held that:

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”
13. On whether or not the applicant has established a valid basis for an arguable appeal, we have considered the applicant’s draft memorandum of appeal. The applicant has faulted the decision of the trial court in finding that he was in breach of the sale agreement between him and the respondents’ father. We find that the issue of ownership of the suit land as is closely intertwined with the issue of the applicant refusing to grant possession of the Kitale site and service plot to the respondents are issues deserving of a full hearing.
14. The argument put forward by the respondents that the applicant is not in actual possession of the land in question has not been disputed. However, the applicant has been leasing the suit land to third parties and receiving benefits therefrom. The applicant alleges that he was wrongfully ordered to vacate the land in question by the impugned judgment. In our view, the applicant will suffer a significant loss if the stay is not granted.
15. In the result, the applicant has demonstrated that he has an arguable appeal and that the appeal will be rendered nugatory if a stay of execution is not granted.
16. Accordingly, the application dated 19<sup>th</sup> May 2023 is allowed, on the terms that the execution of the judgment delivered on 11<sup>th</sup> August 2020 in *Kitale Environment & Land Case No. 2 of 2019* is hereby stayed pending the hearing and determination of the applicant’s intended appeal. Costs shall abide the outcome of the intended appeal.
17. Orders accordingly.

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

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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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**

