



REPUBLIC OF KENYA



KENYA LAW
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**Solomon v Ogalo & 2 others (Civil Application E044 of 2023)
[2024] KECA 312 (KLR) (22 March 2024) (Ruling)**

Neutral citation: [2024] KECA 312 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E044 OF 2023
FA OCHIENG, PM GACHOKA & WK KORIR, JJA
MARCH 22, 2024**

BETWEEN

PETER MURIUKI SOLOMON APPLICANT

AND

LAND REGISTRAR TRANS NZOIA COUNTY 1ST RESPONDENT

PETER MIDIMO OGALO 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

(An application for stay of execution against the Judgment and Decree of the Environment and Land Court at Kitale (F. Nyagaka, J.) dated and delivered on 27th March 2023 in E&LC Petition No. 41 of 2016)

RULING

1. Before us is a Notice of Motion dated 5th September 2023 through which the applicant, Peter Muriuki Solomon, seeks, among other orders, an order of stay against the judgment and decree in Kitale Environment & Land Court (E&LC) Petition No. 41 of 2016 pending the hearing and determination of his intended appeal. The judgment sought to be stayed was delivered on 27th March 2023 by F. Nyagaka, J. The applicant is also asking for the costs of the application. The application is supported by the grounds on its face as well as those contained in the affidavit sworn on 5th September 2023 by the applicant in support of the application. The respondents named in the application are Peter Midimo Ogalo (1st respondent), Land Registrar Trans Nzoia County (2nd respondent) and the Attorney General (3rd respondent).
2. The applicant's case is that the E&LC at Kitale delivered a judgment partially allowing his claim to have the 1st respondent's title to Kitale Municipality Block 6/72 ("the suit land") cancelled and at the same time ordered him to be evicted from the suit land. He avers that if the orders of stay are not



granted, his intended appeal will be rendered nugatory as he is apprehensive that the respondents will move to execute the eviction orders. It is the applicant's case that he has been in occupation of the suit property since 1986 and has made massive developments and risks losing his source of livelihood. He also deposes that the respondents will not suffer any prejudice if the orders of stay are issued. He closes by telling us that he has an arguable appeal with chances of success.

3. The 1st respondent swore an affidavit on 4th October 2023 in opposition to the application. He avers that the applicant's intended appeal is not arguable and he has not demonstrated that it will be rendered nugatory absent stay orders. The 1st respondent additionally deposes that even if execution were to be undertaken, the act is reversible as the property in dispute is a piece of land and the applicant has not demonstrated that the 1st respondent intends to alienate it.

4. This application came up for virtual hearing on 21st November 2023.

Learned counsel for the applicant referred to the decisions in *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* [2013] eKLR and *Jeniffer Akinyi Osodo v. Boniface Okumu Osodo & others* [2021] eKLR in support of the submission that this Court has jurisdiction under Rule 5(2)(b) of its Rules to grant stay of execution pending appeal. Turning to the substance of the application, counsel relied on the annexed memorandum of appeal to urge that the intended appeal is not only arguable but has high chances of success. As to whether the intended appeal will be rendered nugatory if the impugned judgment is not stayed, counsel submitted that if the judgment is executed, the applicant will suffer irreparable damage as the applicant has been in occupation and has developed the suit property since 1986. To support the submission that the property is extensively developed, counsel pointed to the photographs annexed to the applicant's supporting affidavit. Counsel further submitted that the suit property is the applicant's home and the only source of livelihood as he carries out his furniture business on it. According to counsel, the execution of the impugned judgment will be prejudicial to the applicant and subject him to irreparable loss. In conclusion, counsel urged us to allow the application as the sentimental value attached to the suit land by the applicant cannot be compensated by monetary damages.

5. In opposition to the application, counsel for the 1st respondent through submissions dated 13th October 2023 referred us to the case of *Priscilla Wambui v. Mary Wairimu & Another* [2020] eKLR and submitted that stay of execution can only be granted where the applicant has an arguable appeal that may be rendered nugatory if stay orders are not granted. Turning to the issue as to whether the applicant has an arguable appeal, counsel submitted that the intended appeal was not arguable as the applicant had not challenged the manner in which the learned Judge of the E&LC had applied principles of law in arriving at the judgment. Counsel also asserted that the applicant had failed to demonstrate that the intended appeal will be rendered nugatory. In this regard, counsel argued that the applicant had not demonstrated that the respondent would evict him and alienate the suit property. Further, that even if the judgment of the E&LC was to be executed, the execution is not only reversible but damages would equally compensate the applicant. Counsel relied on *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* [supra] to buttress these arguments. Counsel additionally submitted that the applicant had not provided a valuation report to support his averment that he had substantively developed the suit property to the extent that money would not be adequate compensation. In the end, counsel urged us to dismiss the application with costs.

6. We have duly considered the pleadings and submissions filed in this matter. This being a rule 5(2) (b) application, there are only two issues for determination; first, whether the intended appeal is arguable, and second, whether the intended appeal will be rendered nugatory absent stay orders. The jurisprudence surrounding this kind of application was succinctly expounded in *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* [supra] which has also been relied upon by both sides.



7. The first principle that an application for stay ought to satisfy is that the intended appeal should be arguable. In *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others [supra]*, an arguable appeal was said to be one which must not “necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.” Therefore, in assessing whether the applicant’s intended appeal is arguable, we are required to consider the grounds of appeal vis-à-vis the impugned judgment. In this case, we note that the applicant’s intended appeal is a first one and the applicant therefore has a wide playing field encompassing both matters of fact and law. A review of the annexed draft memorandum of appeal shows that the applicant, is, among other things, aggrieved by the alleged shifting of the burden of proof to him by the trial Court. This leaves no doubt in our minds that the intended appeal is arguable. It is trite that a single arguable point is sufficient. (See *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others [supra]*). Furthermore, we note that at the heart of the intended appeal is the right to property. In finding that the applicant has an arguable appeal, we are guided by the fact that an intended appeal must not be one which will succeed but one which deserves its day and determination by the Court. We also remain alive to the fact that the fate of the intended appeal will be decided with finality by the bench that will hear it. It is therefore required of us to be circumspect in making our determination on the issue as to whether the appeal is arguable. Without saying more, we are persuaded from the material place before us that the applicant’s intended appeal is arguable.
8. The next aspect of our interrogation is whether the applicant has demonstrated that his intended appeal will be rendered nugatory if stay is not granted. In determining whether an appeal may be rendered nugatory, the reversibility or otherwise of what is sought to be stayed is the main issue for consideration. If it is established that whatever is sought to be stayed is not reversible then the next issue for deliberation is whether damages can adequately compensate the loss to be occasioned by the execution of the judgment. If, however, the thing sought to be stayed is irreversible and damages cannot reasonably compensate an applicant, then it can be said that the appeal may be rendered nugatory. In *Permanent Secretary Ministry of Roads & another v. Fleur Investments Limited* [2014] eKLR the Court painted an appeal that has been rendered nugatory as one “of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law.”
9. In this application, the applicant averred that he has been living on the suit property since 1986 and this is the place that he calls home. He also deposed that he has developed the property and the same is his only source of income because that is the place where he carries out his trade. The applicant exhibited photographs depicting the developments he has undertaken on the property as well as a shop which he claims to be located on the suit property. In further support of his assertion that he has been residing on the suit property, the applicant attached a land rate receipt dated 26th May 2014 and a clearance certificate issued in his name by the Municipal Council of Kitale on 14th January 2013. He also attached a letter from the District Commissioner of Trans Nzoia indicating that he had lived on the suit property for 8 years as at 1994. The applicant submitted that the sentimental attachment he has for the suit property will not be adequately compensated by damages.
10. The respondent on his part has not challenged the applicant’s averments save to state that the suit property is not the applicant’s home and that there was no averment of possible execution. In our view, the fact that the applicant moved this Court for orders of stay means that he was apprehensive of the imminent execution of the impugned judgment. We cannot therefore dismiss his fears and let him live with them not knowing when the eviction will be carried out. The orders for stay issued by this Court are always meant to preserve the subject of the intended appeal and were we to ignore the applicant’s fears, we would be defeating the objectives of our discretionary powers under rule 5(2)(b). We are therefore inclined to accept the fears and apprehensions raised by the applicant. Furthermore,



we have not been shown any prejudice that the respondent is likely to suffer if the execution of the judgment is held in abeyance pending the hearing and determination of the intended appeal. It is only at the conclusion of the appeal that the parties will be sure of where they stand in relation to the suit property. We therefore find that the intended appeal may be rendered nugatory absent orders of stay.

11. There being an intended appeal, the costs of this application shall abide the outcome of the intended appeal.
12. The final decision of the Court is that the notice of motion dated 5th September 2023 is hereby allowed so that pending the hearing and determination of the applicant's intended appeal, there shall be stay of execution of the judgment dated 23rd July 2023 in Kitale E&LC Case No. 41 of 2016. The costs of the suit shall abide the determination of the intended appeal.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF MARCH, 2024

F. OCHIENG

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

