



REPUBLIC OF KENYA



Waweru v Njeru (Suing as the Attorney of Patrick Gitonga Nyaga) (Civil Appeal (Application) E109 of 2023) [2024] KECA 256 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KECA 256 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E109 OF 2023
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
MARCH 8, 2024**

BETWEEN

PETER MAINA WAWERU APPLICANT

AND

**JOHN KENNETH NJERU (SUING AS THE ATTORNEY OF PATRICK
GITONGA NYAGA) RESPONDENT**

(Being an application for an order of stay of execution pending an intended appeal from the judgment of the Environment and Land Court at Nanyuki (K. Bor, J.) dated 26th April 2023 in ELC NO. E009 of 2022 formerly Nyeri ELC No. 642 of 2014)

RULING

1. At the heart of this dispute is the ownership of Nanyuki Municipality Block II/33 measuring about 0.6414 hectares (the suit property). By letter of allotment dated 23rd October 1992, the applicant, Peter Maina Waweru, was offered the suit property by the Commissioner of Lands. One of the conditions was that he pays Kshs.30,110 within 30 days. The Environment and Land Court at Nanyuki, in a judgment delivered on 26th April 2023, found that the applicant did not accept the offer until 8th February 2019. A lease was thereafter prepared by the National Land Commission. The court noted that the offer contained in the letter of allotment of 23rd October 1992 had long expired, and that there was no evidence that it had been extended.
2. On the other hand, the court found Patrick Gitonga Nyaga had on 24th August 2011 bought the suit property from David Ngarariga and Lawrence Ndugu Ngigi and obtained a certificate of lease dated 30th August 2011. The sellers had held a 99 years' certificate of lease issued to them on 14th January 2003. It was found that when the applicant wrote to the National Land Commission on 8th February 2019 accepting the offer for allotment, the suit property had already been surveyed and registered in the



names of the sellers who had sold it to Patrick Gitonga Nyaga. The applicant was, as it were, accepting an offer of a property that was no longer available for allotment.

3. The suit before the Environment and Land Court was filed by the respondent John Kenneth Njeru who was a duly registered attorney of Patrick Gitonga Nyaga. The complaint was that Patrick Gitonga Nyaga was the registered proprietor of the suit property but that the applicant had on numerous occasions illegally trespassed thereon, destroyed the fence and barbed wire and caused great financial loss and damage. The total loss was worth Kshs.514,614. The suit was brought for a permanent injunction, general damages, special damages and costs. In defence, the applicant claimed he was the owner of the suit property and that what he had done in removing the fence and structures was well within his right as the owner of the property; that what he had done did not amount to trespass.
4. In the judgement, the learned K. Bor, J. found for the respondent and issued an order of permanent injunction. She awarded Kshs.100,000 in general damages, Kshs.285,314 in special damages, and costs. The applicant was aggrieved by the judgment and decree and lodged a notice of appeal on 3rd May 2023. He then filed the instant application by way of notice of motion dated 30th August 2023 seeking the stay of execution of the judgment and decree pending the hearing and determination of the appeal which has since been filed. The grounds of the appeal were contained in the Memorandum of Appeal dated 26th June 2023 as follows:-
 1. That a decree has been issued by the superior court in Nanyuki ELC Case NO. E009 of 2022 and costs have been taxed.
 2. That the execution of the decree of the superior court is imminent and if such execution proceeds this appeal will be rendered nugatory.
 3. That the substratum of this appeal is ownership of property known as title Number Nanyuki/ Municipality Block 11/33 which the superior court has decreed to the respondent herein.
 4. That if execution of the decree proceeds, the substratum of this appeal will be defeated.
 5. That the Appellant/Applicant will suffer substantial loss if execution of the decree proceeds.
 6. That the Appellant/Applicant has an arguable appeal.”
 1. In the application that was brought under Rule 5(2)(b) of the [Court of Appeal Rules, 2022](#), and based on the grounds on its face and supporting affidavit sworn on 30th August 2023, it was submitted by learned counsel for the applicant that, given the grounds in the Memorandum of Appeal, an arguable appeal had been demonstrated. The main argument was that the learned Judge had not properly interrogated the rival claims by the parties regarding the ownership of the suit property; especially, the learned Judge had failed to find that the respondent’s claim to the suit property was wanting since there was no evidence on the root of his title. It was submitted that the applicant had since obtained a certificate of lease whose copy he had annexed to the application. His case was that he was going to apply to call further evidence, to wit the certificate of lease, to further prove that he was the proper owner of the suit property.



6. On the question whether the appeal will be rendered nugatory if stay is not granted, it was submitted that the judgment and decree contained positive orders that were capable of stay, and that:-

“ if the order of stay is issued as prayed to preserve the suit land, and the property is dealt with in an adverse manner by the respondent or his agents, the applicant is apprehensive that the substratum of the intended appeal shall have been rendered nugatory.”
7. The respondent filed a replying affidavit and his learned counsel filed written submissions to oppose the application. It was contended that before the Environment and Land Court the applicant did not have a counterclaim, and instead filed a defence to deny that the respondent was the registered owner of the suit property who was protected by the law and who was entitled to quiet enjoyment; that the respondent had exhibited his title to the suit property, while the applicant had none. It was argued that the time for the production of the certificate of lease was during the trial, and not now. Consequently, the appeal was frivolous and not arguable.
8. On the question whether, if stay is not granted the appeal will be rendered nugatory, it was submitted that all that there was to execute were the general and special damages and costs, all of which could be repaid if the appeal were to succeed.
9. We have anxiously considered the application, the response and the rival submissions. We are aware that the applicant was obligated to demonstrate that the intended appeal is arguable and that, unless the order of stay is granted, the appeal will be rendered nugatory if it succeeds (see *Stanley Kangethe Kinyanjui v Tony Keter & 5 Others* [2013]eKLR; *J.K. Industries Ltd v Kenya Commercial Bank Ltd* [1982 – 98]KAR 1088). Both of these considerations have to be satisfied. (See *Republic v Kenya Anti-Corruption Commission & 2 Others* [2009] KLR 31).
10. An arguable appeal is not one which must succeed. It is one that raises even one bona fide issue that deserves the full consideration by the Court that will sit to hear and determine the appeal (See *Kenya Railway Corporation v Edermann Properties Ltd*, EA. No. Nai 176 of 2012).
11. We are not the court that will hear and determine the appeal, but, on the face, in this dispute of ownership of the suit property, the respondent backed his claim with a certificate of registration while the applicant basically relied on a letter of allotment whose terms he had not honoured. We are not persuaded that the arguability of the appeal has been demonstrated.
12. Regarding whether the appeal will be rendered nugatory if stay is not granted, having failed to satisfy the limb on arguability of the appeal, and since the law enjoins an applicant to demonstrate both arguability and the nugatory aspect, then we need not consider whether the appeal will be rendered nugatory if the orders sought herein are not granted.
13. The result is that the application lacks merit. We order its dismissal with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

.....

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

