



REPUBLIC OF KENYA



**Adanjo & another v Omeno (Civil Appeal (Application)
E091 of 2023) [2024] KECA 401 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 401 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E091 OF 2023
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
APRIL 26, 2024**

BETWEEN

AMBROSE OCHIDO ADANJO 1ST APPELLANT

BENEDICT ODHIAMBO OKETCH 2ND APPELLANT

AND

PETER OKOTH OMENO RESPONDENT

(Being an Application for stay of execution of Judgment of the Environment and Land Court at Kisumu, (Odeny, J.) dated 13th May, 2021 in ELC No. 48 of 2018)

RULING

1. The Applicants in the present application were defendants in Kisumu ELC Case No. 48 of 2018. The suit was founded by way of an Originating Summons dated 28th May, 2004 by the respondent herein seeking for certain declaratory orders over the parcel known as Plot No. 3 Bondo Township (“Suit Property”). The respondent’s claim was based on adverse possession.
2. After a fully-fledged trial, the learned Judge found that the respondent had established his claim on a balance of probabilities and, in a judgment dated 13th May, 2021, ruled that the respondent had “acquired the suit plot by way of adverse possession and is, therefore, entitled to the orders sought in the Originating Summons together with costs.”
3. The orders sought in the Originating Summons dated 28th May, 2004, which the court granted are:
 - a. That the applicant is entitled to the whole parcel in Plot 3 Bondo Township as a purchaser for value from predecessor of the respondent.
 - b. That the applicant be declared to be entitled to a portion of the plot formerly referred to as Side A and Side B.



- c. That the Honourable Court be pleased to declare that the 1st and 2nd respondents are holding the land in trust for the applicant.
 - d. That the Honourable Court be pleased to declare that the applicant is entitled to the whole parcel of land by virtue of adverse possession.
 - e. That the Honourable Court be pleased to compel the 1st and 2nd respondents to transfer land parcel Bondo/Market 3 to the applicant.
 - f. That in the alternative, and if the 1st and 2nd respondents refuse to sign the transfer documents, the court be pleased to allow the deputy registrar to sign the same.
4. The applicant is aggrieved by the judgment of the ELC and has timeously filed an appeal to this Court. He has also brought the present application dated 28th of September, 2023. It seeks the following prayers:
1. – Spent -
 2. Spent -.
 3. That the execution and proceedings to enforce the trial court’s Judgment and Certificate of Costs herein be stayed pending the outcome of the appeal and or on such terms as the Court may deem just.
 4. That costs of this application be in the cause.
5. The grounds upon which the prayers are sought are summarized and listed on the face of the application. Since they accurately rehash the totality of the applicant’s arguments as repeated in his written submissions, I will reproduce them verbatim here:
1. That the Honourable Court delivered Judgment in the matter herein on 13th May, 2021 in favour of the respondent against the appellants.
 2. That there is an impending threat of execution of the Judgment and Certificate of Costs by the respondent following his threats of demolishing appellants’ permanent business premises erected on the said land valued at Kshs. 4,500,000.
 3. That unless the application herein is urgently heard and orders sought granted, the appeal shall be rendered nugatory leading to violation of our fundamental rights to fair hearing.
 4. That [the applicants] stand to suffer irreparable loss and damages if the respondent successfully proceeded in carrying out the execution being he won’t be able to repay the amount in case the appeal succeeds.
 5. That circumstances have risen in this matter necessitating the application of the applicants be heard on a priority basis.
 6. That such extreme and highly prejudicial consequences before the hearing and determination of the appeal would subvert the ends of justice and render the appeal nugatory.
 7. That the application herein has been diligently and expeditiously lodged and [the applicants are] willing to abide by any conditions set by this Honourable Court for the grant of the Orders sought herein.
 8. That it is in the interest of justice and fairness that the prayers sought in the application filed herewith be granted.



6. The application is opposed. The respondent filed a replying affidavit dated 9th November, 2023. The replying affidavit, like the respondent's written submissions, raises two major points in opposition:
 - a. First, the respondent says that the applicants have not established that they have an arguable appeal which is a condition for the grant of the orders of stay under Rule 5(2)(b) of the Court of Appeal Rules. This is because, the respondent argues, the applicants have not attached a Draft Memorandum of Appeal from which the Court can deduce what may be arguable before it.
 - b. Second, the respondent argues that what is sought to be stayed is execution with respect to the costs awarded in the suit, which were subsequently taxed. The respondent says that since what is at stake is, in essence, a money decree, execution will not render the appeal nugatory since the money paid can always be refunded.
7. The application was argued by way of written submissions and oral highlighting. Mr. Yogo, learned counsel for the applicants, and Mr. Mwamu, learned counsel for the respondent appeared before us during the plenary hearing. During the hearing, upon queries by the Court, Mr. Yogo argued that what the applicants are truly worried about is that the Suit Property might be registered in the respondent's name and then to third parties hence rendering it out of the reach of the applicants should they win their appeal. When asked if the application is premature because the registration cannot happen without further processes by the superior court, Mr. Yogo insisted that the orders given by the superior court are capable of enforcement as things stand. Mr. Mwamu was of contrary opinion, pointing out that the superior court's judgment granted orders which are declaratory in nature and that, therefore, they are incapable of execution absent further application by the respondent. It is at that point that the applicants should seek execution, Mr. Mwamu argued.
8. Rule 5(2)(b) of the [Court of Appeal Rules](#), which the applicants have invoked before us provides that:

“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may -

 - (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or stay of any further proceedings on such terms as the Court may think just.”
9. It is now universally accepted that this rule clothes this Court with original jurisdiction to preserve the substratum of the appeal pending before it. Also accepted is that for an applicant to succeed under this rule, he must satisfy the twin principles enunciated in our jurisprudence: demonstration that the appeal is arguable; and a demonstration that the appeal would be rendered nugatory but for the prayed-for relief of stay of execution or injunction.
10. On the first principle, whether the appeal is arguable, we have to consider whether the appeal, as filed, raises at least a single bona fide arguable point noting, as the Court defined it in [Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others](#) [2013] eKLR, that an arguable appeal is not one with a high probability of succeeding; it is, instead, one which ought to be argued fully before the Court. Differently put, an arguable appeal is one which is not frivolous.
11. In the present matter, the applicants argue that the major issue they have presented to the Court of Appeal is whether the issuance of a new lease by the government to replace an expired one extinguishes a claim for adverse possession over the original lease. In sustaining the respondent's claim, the superior court held that adverse possession straddles over the period covered by the old and new leases, a legal position the applicants contest. The applicants also argue that the judge was wrong to grant adverse



possession yet there was evidence that the 2nd applicant was also in co-possession of the parcel. Given that the applicants are exercising their undoubted right of first appeal, these two issues, without more, cannot be said, by any standards, to be frivolous or idle. We are, therefore, satisfied that the applicants have satisfied the first limb for stay under Rule 5(2)(b).

12. How about the nugatory aspect of the Rule? The applicants argue that they are apprehensive that the appeal would be rendered nugatory if the registration of the Suit Property in the respondent's name happens. They also say that execution for the taxed costs will render the appeal nugatory – but do not explain how this would so. It is an established principle in our jurisprudence that the satisfaction of a money decree would not ordinarily render an appeal nugatory unless it can be credibly demonstrated that the judgment-creditor would be unable to refund the paid amounts. There is neither such a claim nor demonstration in this case.
13. The application, therefore, turns on the question whether the non-costs aspects of the judgment are capable of execution which would render the appeal nugatory. The respondent argues that the application is premature in this respect because the respondent would have to undertake a critical step before execution can ensue; and that, that step can only be done by way of a subsequent application to the superior court. Since execution is not possible at this stage in the proceedings, the respondent says that it would be futile for this Court to grant stay even on the non-monetary aspects of the judgment.
14. We have looked at the orders given by the superior court in the judgment dated 13th May, 2021. These orders have been reproduced in paragraph 3 of this Ruling. We note that orders
 - (a) to (d) are only declaratory orders incapable of execution at this stage. However, we note that order (e) is to compel the applicants to transfer the Suit Property to the respondent and, in the alternative, order (f) is to direct the Honourable Deputy Registrar of the superior court to sign the transfer forms in favour of the respondent. Given orders (e) and (f), it is eminently clear that the registration of the Suit Property could, in effectuation of the judgment of the superior court, change hands to the respondent with the attendant apprehension that he could, then, pass title to a third party. Only to this limited extent do we find that the appeal would be rendered nugatory. We agree that it is necessary for the preservation of the substratum of the appeal, to stay this aspect of the judgment of 13th May, 2021.
15. The upshot is that we allow the notice of motion dated 28th September, 2023 only to the limited extent that there shall be an order of stay only against orders (f) and (e) of the judgment dated 13th May, 2021. For the avoidance of doubt, the other aspects of the judgment – including the order for payment of costs which is now reflected in the Certificate of Costs – are not stayed.
16. Given our disposition, each party shall bear its own costs.
17. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL



JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

