



Jane Njeri Karongo & Harrison Munga Karongo (Sued as the Legal Representatives of the Estate of Rongo Kiuri) & another v Karongo (Civil Appeal (Application) E055 of 2022) [2024] KECA 416 (KLR) (26 April 2024) (Ruling)

Neutral citation: [2024] KECA 416 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E055 OF 2022
HM OKWENGU, LA ACHODE & PM GACHOKA, JJA
APRIL 26, 2024**

BETWEEN

**MARGARET WAMAITHA KARANJA & STEPHEN NJENGA KARANJA
(SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF KARANJA
KIURI) 1ST APPLICANT**

**JANE NJERI KARONGO & HARRISON MUNGA KARONGO (SUED
AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF RONGO
KIURI) 2ND APPLICANT**

AND

**HANNAH WANJIRU KAMAU (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF KAMAU KIURI KARONGO) RESPONDENT**

(Being an application for stay of execution against the ruling of the Environment and Lands Court at Nairobi (Okong'o J.) delivered on 27th January, 2022) in ELC Case No. 25 of 2018)

RULING

1. Before this Court is an application by way of Notice of Motion dated 4th February, 2022 brought under rules 5 (2) (b) and 47 of the Court of Appeal Rules. The applicants therein seek orders of stay of execution of the ruling of Okong'o J, in Environment and Land Court (ELC) Case No. 25 of 2018, delivered on 27th January, 2022, pending the hearing and determination of the instant application and appeal.
2. The genesis of this application is that on 30th October, 2019, judgment was entered against the applicants and on their application for stay of execution, they were granted one (1) year stay of execution on condition that they deposit Kshs.1,000,000/= as security within 60 days from the date of the ruling which was delivered on 15th July, 2020. The applicants applied for review of the said orders of



- 15th July 2020 vide an application dated 11th November 2020 which was dismissed in a ruling delivered on 15th April, 2021.
3. The applicants went on to file a second application for review of the orders of 15th July, 2020 vide an application dated 8th June 2021, while on the other hand, the respondent filed an application dated 25th June 2021 for execution. The two applications were heard together. Okong'o J, in his ruling dated 27th January 2022 and which is the subject of the instant application, dismissed the applicants' motion on the basis of it being sub judice and allowed the respondent's application, noting that the conditional stay had lapsed and the applicants were yet to comply with the orders as issued.
 4. Aggrieved by the orders of the ELC, the applicants preferred and timeously filed an appeal in this Court against the said orders via Notice of Appeal dated 31st January, 2022. They subsequently filed the instant application predicated on the grounds set out on the face thereof and those found on the supporting affidavit of the 1st applicant sworn on 4th February, 2022.
 5. This Court has on various occasions pronounced itself on applications under rule 5(2)(b) of the Court of Appeal Rules and it is settled that for such an application to succeed, the applicant must establish first, that his/her appeal is arguable. However, this does not mean that it should be an appeal that should automatically succeed, but it should be one that is not frivolous. Secondly, the applicant must establish that if the orders of stay of execution as sought are not granted the appeal would be rendered nugatory. The extent to which the appeal would be rendered nugatory was well elaborated in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others (2013)* eKLR.
 6. It is the applicant's position that they have an arguable appeal with good chances of success. That their intended appeal raises serious pertinent issues of law which are meritorious and have to be determined by this Court. Attached to the application is a memorandum of appeal which raises nine (9) grounds of appeal boiling down to the question as to whether there was a trust relationship between the applicants and the respondents, over the parcels of land known as Kiambaa/Kihara/573 and Kiambaa/Kihara/584 respectively.
 7. The applicants are apprehensive that the respondent will proceed to execute the impugned ruling, and the judgment issued on 30th October, 2019 while the appeal is pending determination before this Court, thus rendering their appeal nugatory. In addition, they argue that they stand to suffer substantial loss and irreparable damage if the orders sought are not granted, unlike their counterpart who shall not be prejudiced if the same is granted. They pray that this Court grants the orders as sought.
 8. In reply, the respondent has filed her replying affidavit sworn on 18th February, 2022 in which she avers first, that the instant application is frivolous, vexatious and an abuse of the Court process, for reasons that an application seeking similar orders of stay of execution in respect of the judgment arising from the ELC case No. 25 of 2018, was filed in this Court. That the said application was dismissed by a ruling delivered on 19th March, 2021, on account of material non-disclosure on the part of the applicants. In addition, it was argued that the applicants have filed numerous applications at the ELC, seeking the same orders of stay and review of the orders of 15th July 2020 without success. All those applications were dismissed.
 9. On the twin principles to be established, the respondent avers that the applicants have no arguable appeal in law with any prospect of success with regards to the impugned ruling, there being no error pointed out on the part of the learned Judge. Further, it is averred that the ELC in its ruling delivered on 8th June, 2021, has since granted execution orders by directing the Deputy Registrar and County Surveyor to assist in the compliance of the Judgement of 30th October, 2019 following the applicants' flagrant disobedience.



10. In sum, the respondent states that the applicants have not satisfied the conditions for grant of stay orders and their application should therefore, be dismissed with costs.
11. The matter proceeded by way of written submissions which were highlighted in court. Ms. Karanja, counsel for the applicants, relied on the application, written submissions and annexures filed therein. She reiterated the contents of the application and urged that it be granted.
12. Mr. Omari, counsel for the respondent on the other hand, strenuously opposed the application in reliance on the respondent's replying affidavit and written submissions. In particular, he opposed the applicants' averment that their application is with regards to the judgment of 30th October 2019 and asserted that rather, it is with regard to the ruling of 27th January, 2022. Counsel submitted that the applicants are in continuous breach and/or abuse of the Court process, having filed numerous applications, both at the ELC and in this Court, seeking similar orders which were dismissed in all the instances. Additionally, he submitted that the instant application is sub judice.
13. Mr. Omari further submitted that the applicants' appeal is not arguable for the reason that the substratum of the appeal, is an attempt to review the court's earlier orders that declined an application for review and this is disallowed under Order 45 Rule (6) of the Civil Procedure Rules. Lastly, he submitted that the applicants have failed to establish the threshold for grant of orders of stay. Further, that having failed to disclose the existence of previous applications seeking similar orders, this Court ought to reiterate its previous finding that the instant application is equally an abuse of Court process and dismiss it with costs.
14. We have extensively and exhaustively interrogated the entire application, together with the supporting affidavit thereto, the replying affidavit, the rival written and oral submissions by counsels and the legal authorities relied upon. From the outset we observe that although this is an application under Rule 5 (2) (b), there are serious issues that need to be addressed other than the two principles applicable under the rule.
15. It is not in dispute that a judgment was rendered on 30th October, 2019 in ELC Case No. 25 of 2018 where the Court established that there was a trust relationship between the applicants and the respondent. Pursuant, to the existing trust the court ordered the applicants to transfer portions of land from parcel numbers Kiambaa/Kihara/573 and Kiambaa/Kihara/584 to the respondent. It is also not in dispute that the applicants applied for stay of execution of that judgment and on 15th July, 2020 they were granted a stay for one year, on condition that the applicants deposit in court security of Kshs.1,000,000/= (one million) within 60 days of the ruling.
16. The applicants applied for review of those orders and the application was dismissed on 15th April, 2021. The applicants filed a second application for review of the same orders issued on 15th July, 2020 and the court dismissed the application on 27th January, 2022, on grounds of it being sub judice. This Court agrees in totality with the finding of the trial Judge on this finding.
17. We note that in the meantime the applicants had also moved this Court for the same orders of stay of execution of the main judgment in ELC NO. 25 of 2018 in Civil Application No. 43 of 2020 which was dismissed by a ruling of this Court dated 19th March, 2021.
18. From the foregoing, it is clear that the applicants have come to this court with unclean hands. Not only have they disobeyed a Court order but, they have also failed to disclose material information that they had earlier filed an application seeking orders of stay in this Court and it was denied. When the court put this fact to Ms. Karanja during her oral submissions she denied knowledge of any application seeking orders of stay having been filed, heard and concluded by this Court. For this reason, and bearing



in mind that the grant of stay orders is an equitable remedy that is discretionary, then clearly, the applicants are undeserving of the orders sought.

19. In addition, we state that the applicants cannot have their cake and eat it. This Court expressed itself on the practice of filing and prosecuting an appeal and an application for review in the same matter in the case of *Yani Haryanto V. E.D. & F. Man (Sugar) Ltd Civil Appeal No. 122 of 1992 (UR)* as follows;

“The Board was at liberty to pursue the option of review of the orders despite the filing of a notice of appeal to challenge the same orders. However, upon the exercise of that option and pursuit therefrom until conclusion, there would be no further jurisdiction exercisable by an appellate Court over the same orders of the Court. That was the end of the matter and the notice of appeal was rendered purposeless. Both options cannot be pursued concurrently or one after the other.”

20. By the conduct of the applicants, what can be construed in the circumstances and we agree with the decision of the Court dated 19th March, 2021, is no less than forum shopping. The applicants appear to be deliberately evading, obstructing and/or delaying the course of justice and that amounts to abuse of court process. It contravenes the overriding objective envisaged under sections 3A of the *Appellate Jurisdiction Act* whose aim is to ensure that matters are disposed of expeditiously and multiplicity of proceedings is avoided. Even if we were to proceed to establish whether the applicants have satisfied the twin principles for grant of orders of stay, we would still have held in the negative since the intended appeal is frivolous and not arguable.

21. In light of the foregoing we are constrained to decline the exercise of our judicial discretion in favour of the applicant, and state that litigation must come to an end. This Court is only left with one option, that of declaring this application an abuse of court process, with dismissal as the prescribed outcome. In the premise, we find that the applicants’ application dated 4th February, 2022 lacks merit and is consequently dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024 HANNAH OKWENGU

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

L. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

