



**Kehar v Busam Capital Limited & 2 others (Civil Application  
E021 of 2024) [2024] KECA 355 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 355 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E021 OF 2024  
DK MUSINGA, MSA MAKHANDIA & K M'INOTI, JJA  
APRIL 12, 2024**

**BETWEEN**

**REDEMPTA SUSAN CHETAMBE KEHAR ..... APPLICANT**

**AND**

**THE DISTRICT LAND REGISTRAR, KAJIADO ..... 1<sup>ST</sup> RESPONDENT**

**BUSAM CAPITAL LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**BRENDA JEROTICH CHEPKIYENG ..... 3<sup>RD</sup> RESPONDENT**

*(An application for stay of execution of the judgment of the Environment and Land Court at Kajiado (Gacheru, J.) delivered on 20th December 2023 in Kajiado ELC Case No. 41 of 2018)*

**RULING**

1. By way of a notice of motion dated 16<sup>th</sup> January 2024 brought under Rule 5 (2) (b) of the Rules of this Court and Section 3A & 3B of the *Appellate Jurisdiction Act*, the applicant seeks stay of execution of the judgment and decree of the Environment and Land Court (ELC) at Kajiado (Gacheru, J.) dated 20<sup>th</sup> December 2023 in ELC Case No. 41 of 2018 pending hearing and determination of an intended appeal.
2. The background of this application is that sometime in 2010, the applicant, who was the registered owner of a parcel of land known as L.R. No. NGONG/NGONG/42046 (the suit property), obtained a loan facility from the 1<sup>st</sup> respondent on security of the said title. Together with the title deed, the applicant also deposited with the 1<sup>st</sup> respondent a duly executed transfer and Land Control Board Consent application pursuant to the provisions of Clause 3.1 of the Loan Agreement. The clause provided that in case the loan was not repaid as stipulated in the agreement, the 1<sup>st</sup> respondent would transfer to itself or sell the suit property by public auction or by private treaty, upon issuance of a 7 days' notice to the applicant of its intention to sell the suit property.



3. On 22<sup>nd</sup> January 2013, the applicant filed a suit in the ELC at Nairobi against the respondents, contending that at all times she was the registered owner of the suit property until 9<sup>th</sup> August 2011 when it was transferred and registered in the name of Busam Capital Limited, the 1<sup>st</sup> respondent. She contended that the said registration was fraudulent. Several particulars of fraud were pleaded as against the 1<sup>st</sup> respondent.

She sought various orders, among them, an order to restrain the 1<sup>st</sup> and 2<sup>nd</sup> respondents from undertaking any further dealings with the suit property until determination of the suit; a declaration that the suit property was fraudulently transferred to the 1<sup>st</sup> respondent, and an order directing the 2<sup>nd</sup> respondent to cancel the current title and re-issue it in her name.

4. The suit was later transferred to Kajiado ELC and registered as Kajiado ELC Case No. 41 of 2018. The applicant amended her Complaint and included Brenda Jerotich Chepkinyeng (the 3<sup>rd</sup> respondent), who had since acquired the suit property.
5. In her defence and counterclaim, the 3<sup>rd</sup> respondent stated that on 15<sup>th</sup> May 2013 she entered into an agreement with the 1<sup>st</sup> respondent for the purchase of the suit property at a consideration of Kshs.6,000,000; that after paying the entire consideration and other costs inclusive of stamp duty, the suit property was duly transferred and registered in her name on 8<sup>th</sup> May 2014. She contended that the applicant was a trespasser thereon and sought her eviction.
6. On 24<sup>th</sup> November 2022 the applicant's suit was dismissed for her non-attendance. The Counterclaim by the 3<sup>rd</sup> respondent proceeded to hearing and the court reserved the judgment for 20<sup>th</sup> December 2023. Meanwhile, vide an application dated 16<sup>th</sup> December 2022, the applicant sought to have the orders of dismissal made on 24<sup>th</sup> November 2022 set aside. She also sought stay of the judgment scheduled for delivery on 20<sup>th</sup> December 2023. The application was dismissed vide a ruling delivered on 30<sup>th</sup> May 2023. The trial court held that the applicant and her advocate had done everything to delay the case, to disobey the court directions and orders, and to frustrate the other parties.
7. Vide a judgment delivered on 20<sup>th</sup> December 2023 (on the counterclaim), the trial court observed that on the date fixed for hearing of the matter, only the 3<sup>rd</sup> respondent turned up. The applicant and her counsel did not attend court even though the date had been taken by consent. The trial court held that the 3<sup>rd</sup> respondent had proved her claim on a balance of probabilities and that she was not only the registered owner of the suit property, but had also proved that she obtained title thereto lawfully and procedurally. The court ordered that the applicant be evicted from the suit property upon expiry of 60 days from the date of the judgment and decree if she will not have vacated therefrom; that the OCS Kiserian Police Station to enforce the eviction order; and that costs of the suit and for the eviction be met by the applicant.
8. Being aggrieved by that judgment and decree, the applicant filed a notice of appeal on which she premised her application. The applicant contended that the intended appeal is arguable and highlighted various grounds that she intends to raise, among them being that the learned judge erred in law and in fact by denying her a chance to be heard on merit, thus disregarding the principle of fair hearing espoused under Article 50 (1) of the *Constitution* and access to justice under Article 48; by disregarding the application dated 28<sup>th</sup> September 2023 seeking to arrest the judgment scheduled for 20<sup>th</sup> December 2023; and by failing to appreciate that the 3<sup>rd</sup> respondent did not inspect the suit property before she purchased it.
9. On nugatory aspect, she contended that should stay of execution be denied, she will be evicted from the suit property.



10. The 1<sup>st</sup> and 3<sup>rd</sup> respondents opposed the application. They stated that the hearing date was taken by consent and, therefore, the trial court was right in dismissing the applicant's suit for non-attendance. Further, that the applicant did not appeal against or seek a review of the orders made by the court on 24<sup>th</sup> November 2022 as well as the ruling delivered on 30<sup>th</sup> May 2023, which dismissed her application that sought to set aside the dismissal of her suit for want of attendance.
11. They further contented that the applicant had not demonstrated that her intended appeal was arguable, and that the filing and prosecution of this application was only meant to deny the 3<sup>rd</sup> respondent enjoyment of the fruits of her judgment.
12. At the hearing the application, learned counsel Mr. Kurgat held brief for Mr. Wanyama for the applicant, while Mr. Kosgei was present for the 1<sup>st</sup> respondent. Learned counsel Mr. Macharia appeared together with Ms. Baraka for the 3<sup>rd</sup> respondent. There was no appearance for the 2<sup>nd</sup> respondent despite being served with a hearing notice. In addition, the 2<sup>nd</sup> respondent did not file any reply to the application and/or written submissions. The advocates made oral highlights of their client's respective written submissions along the lines that we have summarised above.
13. We have considered the application, the respective submissions as well as the applicable law. It is now well established that in an application of this nature, an applicant must satisfy this Court that the appeal or the intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR. Even one arguable ground of appeal will suffice. See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd.*, Civil Application No. Nai 345 of 2004.
14. Although the applicant seeks stay of execution of the judgment and orders of the trial court made on 20<sup>th</sup> December 2023, the grounds of appeal cited in the application, the affidavit in support and in the draft memorandum of appeal relate to orders made by the trial court on 24<sup>th</sup> November 2022 dismissing her suit for non-attendance, and further, to the orders made on 30<sup>th</sup> May 2023. The applicant did not appeal against the orders dismissing her suit for non-attendance but she instead sought to have the said orders set aside. In addition, the applicant did not file an appeal against the ruling delivered on 30<sup>th</sup> May 2023. Indeed, the notice of appeal dated 20<sup>th</sup> December 2023 and which is exhibited at page 168 of the record is against the decision of the trial court delivered on 20<sup>th</sup> December 2023. In essence, therefore, by bringing this application, the applicant is in our view ostensibly making a veiled attempt at not only seeking stay of the judgment and decree delivered on 20<sup>th</sup> December 2023, but also the orders made by the trial court on 24<sup>th</sup> November 2022 and 30<sup>th</sup> May 2023 respectively in the absence of proper notice(s) of appeal.
15. The jurisdiction of this Court under Rule 5(2)(b) of this *Court's Rules* arises only where an appeal has been filed or a notice of appeal has been lodged. Rule 5(2)(b) of the Rules provides:

- “(2) 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—
- a. ...
  - b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”



16. In the circumstances that we have highlighted, there is no consonance between the proposed grounds of appeal and the notice of appeal. The applicant has, therefore, not satisfied the first limb on arguability. It would be superfluous for us to consider the second limb if the first one has not been satisfied.
17. The upshot of the foregoing is that the notice of motion dated 16<sup>th</sup> January 2024 lacks merit and is accordingly dismissed with costs to the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF APRIL 2024.**

**I certify that this is a true copy of the original**

**SIGNED**

**DEPUTY REGISTRAR**

**D. K. MUSINGA (P)**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

