



**Maingi & another v Baragu & 6 others (Civil Application
80 of 2022) [2024] KECA 1009 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 1009 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 80 OF 2022
W KARANJA, J MOHAMMED & LK KIMARU, JJA
APRIL 12, 2024**

BETWEEN

CHARITY WANJIKU MAINGI 1ST APPLICANT

BENJAMIN MAINGI KARIMI 2ND APPLICANT

AND

ELIJAH NDUNGU BARAGU 1ST RESPONDENT

ALI NDIRITU NJOROGE 2ND RESPONDENT

SALIM NJOROGE SAIDI 3RD RESPONDENT

ASUMAN NGUGI 4TH RESPONDENT

SARAH WAMBUI NDERITU 5TH RESPONDENT

JOHNSON KIRAGU WACHIRA 6TH RESPONDENT

LYDIA WAMUCII 7TH RESPONDENT

*(An application for an injunction pending the hearing and determination of
an appeal from a Ruling of and order of the Environment and Land Court
at Nyeri (J. O. Olola, J.) dated 28th September, 2022 in ELCA No. 54 of 2021)*

RULING

1. Before us is a notice of motion dated 25th October, 2022 in which Charity Wanjiku Maingi and Benjamin Maingi Karimi (the applicants) pray for orders in the main that:
 - i. ... spent



- ii. An order of injunction issues restraining the respondents jointly and severally, their servants and or agents or anyone claiming under them from entering into or in any other way interfering with the plaintiffs' quiet possession of the suit properties pending the hearing and determination of the intended appeal; and
 - iii. The costs of this application be provided for Elijah Ndungu Baragu, Ali Ndiritu Njoroge, Asuman Ngugi, Salim Njoroge Saidi, Sarah Wambui Ndiritu, Johnson Kiragu Wachira and Lydia Wamucii are the 1st to 7th respondents respectively.
2. The application is premised, inter alia, on the grounds that: the applicants are the jointly registered proprietors of the suit properties; the applicants have been in occupation and possession of the suit properties since 2016 upon their registration; that the applicants are purchasers for value of the suit properties; that the applicants have been parties in Nyeri CM ELC 42/2021 and Nyeri ELCA 54/2021; that there have been attempts at encroachment on the suit properties which have been restrained by the two courts; that on 28th September, 2022, the application for injunction as well as the appeal in (ELCA 54/2021) were struck out which has resulted in the 6th respondent trying to further encroach on the suit properties; that there has not been any order of eviction issued by the court to warrant such trespass; that the applicants are desirous of appealing against the findings of the two courts and have already filed a notice of appeal as well as a letter bespeaking the proceedings; that the intended appeal is arguable and has high chances of success; and that it is just and fair to allow the hearing and determination of the appeal to avoid the same being rendered nugatory and or cause substantial and irreparable loss to the applicants.
3. The application was further supported by the applicant's affidavit sworn by the 2nd applicant in which he reiterated and expounded on the above grounds.
4. {The application is opposed. The 5th and 6th respondents filed a replying affidavit sworn by Johnson Kiragu Wachira, the 6th respondent deposing that he is an administrator to the estate of the late Wachira Githiomi the registered proprietor of all the land known as Mahiga/Kihome/391 pursuant to the court's decision of 16th March 2021; that he knows of his own knowledge that in the year 2003 the 2nd respondent and one Daniel Maina Murugi (deceased) took out summons for the administration of the Estate of his late father, the late Wachira Githiomi vide Nyeri High Court Succession Cause No 307 of 2003; that on 14th July, 2005 the court issued the 2nd respondent and the late Daniel Maina Murugi (deceased) with letters of administration with respect to the estate. That the said letters of administration were confirmed to the said administrators on 7th October 2008; that on 2nd October, 2017 in Nyeri High Court Succession Cause No 307 of 2003 he and the 5th respondent took out summons for revocation of the said Grant on grounds that the same had been obtained by fraud and concealment of material facts; that vide a judgment dated 19th April, 2018 the said grant and confirmation of letters of administration were revoked by the High Court (Matheka, J.) for reasons that the petitioners of the said letters concealed material facts and acted with fraud; that indeed the applicants and their advocate on record are aware that the Title Deeds in respect of the suit properties are non-existent owing to the judgment of the High Court in Nyeri HC Succession Cause No 307 of 2003 dated 19th April, 2018 and hence no orders can premise on the same unless the said decision is overturned and that it is wrong and mischievous of the applicants herein to file the instant application basing the same on non-existent title deeds a fact well within their knowledge and a fact that they have attempted to appeal against.



Submissions by Counsel

5. The application was heard by way of written submissions with brief oral highlighting by counsel. Learned counsel for the applicants, Mr. Nderi in written submissions reiterated the grounds in the supporting affidavit, and further submitted that in 2015, the applicants after carrying out due diligence formalized the sale transaction and were registered as owners of the suit properties; that they took possession and physical occupation of the suit properties and immediately embarked on massive, vast and extensive development on the suit properties which they fenced off.
6. Counsel further submitted that for two years the applicants enjoyed ownership of the suit properties but around 21st April, 2018 the applicants were informed that the grant from which the 1st, 2nd, 3rd and 4th respondents had derived their titles to the suit properties had been revoked by an order of the court dated 19th April, 2018.
7. Counsel further submitted that the applicants were not given an opportunity to participate in the proceedings leading to revocation. Counsel further submitted that under the Law of Succession Act (Rule 44(3)) enjoins the court to have any person likely to be affected by the orders on revocation to be served and appear in the matter before it progresses and that there was a clear breach in this case. Counsel submitted that against this backdrop, the applicants applied to be made parties in the succession cause and sought to review and or set aside these adverse orders to enable them to participate in the proceedings leading to the revocation. Counsel submitted that the applicants' attempts were thwarted by court orders dismissing their application.
8. Learned counsel for the 5th and 6th respondents, Mr. Kago opposed the application and submitted that the applicants herein took out summons dated 7th May, 2018 before the High Court at Nyeri Succession Cause No 307 of 2003 seeking inter alia a finding that the applicants are protected under Section 93 of the Law of Succession Act. That the High Court ruled on the said summons vide a ruling delivered on 6th February, 2020 where it was held that the applicants herein are not protected under Section 93 of the Law of Succession Act. The applicants preferred an appeal against the said ruling vide Nyeri Court of Appeal Civil Appeal No 52 of 2020 of which was withdrawn by the applicants on 6th December, 2021 before the same could be heard substantively; that the applicants commenced a suit at the Nyeri CM ELC No 042 of 2021 against all the respondents herein, a suit where the 5th and 6th respondents raised a Preliminary Objection on the following basis: that the suit was res judicata the ruling of Matheka, J. dated 6th February, 2020 in Nyeri High Court Succession Cause No 307 of 2003; that the Court lacked jurisdiction vide the provisions of Section 93 of the Law of Succession Act, and that the suit was sub-judice Nyeri Court of Appeal Civil Appeal No 52 of 2020.
9. Counsel further submitted that the trial court upheld the objection and dismissed the suit on the basis the same was res-judicata and sub-judice as claimed. Counsel further submitted that vide a memorandum of appeal dated 17th December, 2021 the applicants herein challenged the said finding vide Nyeri ELC Appeal No E054 of 2021, in which suit the ELC (Olola, J.) dismissed the appeal vide a ruling dated 28th September, 2022, hence the instant application.
10. Counsel further submitted that notably Civil Appeal No 52 of 2020 was filed in this Court on 15th April, 2020 by the applicants vide a memorandum of appeal of even date and the same was withdrawn on 6th December, 2021 by an order of this Court, vide a notice of withdrawal of appeal dated 4th July, 2021. Counsel urged us to dismiss the application with costs.



Determination

11. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction under Rule 5(2) (b) of this [Court's Rules](#) is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.
12. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this [Court's Rules](#) are well settled. For example, this Court in the case of [Trust Bank Limited and another v Investech Bank Limited and 3 others](#) [2000] eKLR delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
13. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.
14. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court. See [Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others](#) [2013] eKLR where this Court described an arguable appeal in the following terms:
 - vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
 - viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”
15. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view it is arguable, inter alia: whether the learned Judge of the ELC erred in law in misapprehending the jurisdiction boundaries of the probate court under the Law of Succession Act vis a vis the jurisdiction of the court under the Environment and Land Act. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
16. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in [Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others](#) (*supra*) this Court stated that:
 - ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.



- x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved”.

17. In the judgment of the High Court (Matheka, J.) dated 19th April, 2018 a substantive order was granted revoking all the title deeds in respect of the suit properties. The learned Judge stated as follows:

“Clearly, the petitioner concealed the fact of the existence of the applicant to the court, he conceded that the consent was not obtained, and proceeded to distribute the estate in a manner that disinherited her.

Hence the grant issued on 14th July, 2005 and confirmed on 7th October, 2008 be and is hereby revoked. All consequential orders and actions arising from the revoked grant are hereby set aside and the title to revert to its original status.

The deceased estate is governed by Section 38 of the *Law of Succession Act*. The deceased died, leaving no spouse but children. The provisions of the law are that the estate devolves in equal share to the children.”

18. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case to be determined on its merits. The titles in respect of the suit properties were cancelled vide the judgment of the High Court dated 19th April, 2018.

The applicants have not controverted this evidence. In the instant application, it is on record that the judgment dated 19th April, 2018 has neither been overturned, reviewed and/or varied. We find that the intended appeal will not be rendered nugatory absent the grant of the orders sought.

19. It is well settled that for an application under Rule 5(2)(b) of this *Court’s Rules* to succeed, the applicant must satisfy both limbs of the twin principles. See *Reliance Bank Ltd v Norlake Investments Limited* [2012] IEA 227. Having failed to satisfy the nugatory aspect of the twin principles, the application fails and is dismissed.

20. The upshot is that the instant application fails to meet the threshold set for applications of this nature. In the result, the same is dismissed with costs to the 5th and 6th respondents.

DATED AND DELIVERED AT NYERI THIS 12TH DAY OF APRIL, 2024.

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

