



**Mutahi v Ansett & 3 others (Civil Appeal (Application)  
E170 of 2023) [2024] KECA 1053 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 1053 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) E170 OF 2023  
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA  
APRIL 12, 2024**

**BETWEEN**

**ANTHONY KIMARU MUTAHI ..... APPLICANT**

**AND**

**FIONA LOUISE ANSETT ..... 1<sup>ST</sup> RESPONDENT**

**DAVID MORTON SILVERSTEIN ..... 2<sup>ND</sup> RESPONDENT**

**GEORGE ODINGA ORARO ..... 3<sup>RD</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for a stay of proceedings from the ruling of the  
Environment and Land Court of Kenya at Nanyuki (K. Bor, J.) dated 19th  
July 2023 in ELC No. 27 of 2023 (formerly Nyeri ELC Case No. 36 of 2014))*

**RULING**

1. The claim by Stuart Richard Cunningham, before the Environment and Land Court ( ELC) was that on 29<sup>th</sup> June 1994 he entered into a written agreement to buy L.R. No. 10422/13 (the suit property) from James Trench at Kshs.1,500,000 and paid a deposit of Kshs.150,000, leaving a balance of Kshs.1,350,000 which he was always ready and willing to pay. In 1995 he entered into possession, put up a house and begun to publicly live there. Before the suit property could be transferred, James Trench died and that was followed by a prolonged succession cause. Eventually a grant was issued to his widow Livia Le Poer Trench. Livia Le Poer Trench subsequently died, leaving George Odinga Oraro and David Morton Silverstein as the executors of her Will. On 3<sup>rd</sup> October 2015, it was pleaded, Anthony Kimaru Mutahi and a gang of rowdy people invaded the suit property, destroying it and attempting to forcefully evict Stuart Richard Cunningham. Anthony Kimaru Mutahi was laying a claim to the suit property.



2. When Stuart Richard Cunningham filed this suit at the Environment and Land Court at Nyeri he was claiming that he had had a peaceful, open and continuous, without interruption, possession of the suit property for over 12 years, and had therefore become entitled to the same by adverse possession. He wanted the court to declare so and to have the Chief Land Registrar to effect the transfer of the suit property into his name. Secondly, he wanted Anthony Kimaru Mutahi declared as a trespasser and be permanently enjoined in respect of the suit property, he sought damages. In the alternative he sought specific performance and damages.
3. Stuart Richard Cunningham died and was succeeded by Fiona Louise Ansett. The suit was later transferred to the Environment and Land Court in Nanyuki.
4. The hearing of the suit begun on 4<sup>th</sup> April 2019 in Nyeri. The file was then transferred to Nanyuki for further hearing. On 28<sup>th</sup> February 2023, in Nanyuki, the court gave directions to the parties to file and exchange trial bundles which included pleadings, issues, witness statements and documents within 14 days. The matter was to be mentioned on 15<sup>th</sup> March 2023 to fix a hearing date.
5. On 15<sup>th</sup> March 2023 the advocate for Anthony Kimaru Mutahi informed the court that he had not filed his trial bundle. The court directed that hearing be on 8<sup>th</sup> May 2023. On 8<sup>th</sup> May 2023 all parties were ready except for Anthony Kimaru Mutahi who was said to be unwell, having undergone a surgical procedure on 6<sup>th</sup> May 2023. The court was informed that Anthony Kimaru Mutahi's trial bundles had been filed and served late, and without leave; and that he had amended and filed his defence late and without leave. It was sought by the other parties that the filings by Anthony Kimaru Mutahi be struck out and expunged from the record on account of their having been filed outside the directed time, and without leave. Arguments were received through written submissions that the court directed that they be filed. The arguments were considered, and on 19<sup>th</sup> July 2023 the learned K. Bor, J. ruled that Anthony Kimaru Mutahi's amended defence and counterclaim, additional documents and witness statements filed in court on 10<sup>th</sup> February 2023 be struck out and expunged from the court record. Reliance was placed on Order 8 and Rule 6 of the Civil Procedure Rules. Hearing was slated for 18<sup>th</sup> October 2023.
6. This is the ruling that led to Antony Mutahi Kimaru (the applicant) to file an appeal before this Court. In the Memorandum of Appeal dated 6<sup>th</sup> September 2023, the applicant attacked the learned Judge's interpretation of Order 8 Rule 6 which he pleaded had denied him an opportunity to be heard.
7. Before us is an application for the stay of proceedings before the trial court pending the hearing and determination of the appeal. The application has been bought under Rules 5(2)(b) and 41 of the Court of Appeal Rules, 2022 and sections 3A and 3B of the *Appellate Jurisdiction Act*. According to the grounds and supporting affidavit, the applicant states his pleadings and documents were filed pursuant to leave that had been granted by the court in Nyeri; that the rejection of his pleadings and documents would cause him obvious prejudice; that if stay is not granted, the suit before the trial court will proceed without him being heard on his pleadings and documents and that, if the appeal succeeds, the same would have been rendered nugatory.
8. The response by Fiona Ansett (1<sup>st</sup> respondent) was that on 2<sup>nd</sup> October 2018 the court in Nyeri had given the parties directions to file and exchange pleadings, witness statements and other documents; on 18<sup>th</sup> June 2021 the applicant filed an application to amend his defence and counterclaim; on 26<sup>th</sup> October 2021 the application was allowed; on 16<sup>th</sup> January 2023 there was direction on filings; on 18<sup>th</sup> January 2023 and 30<sup>th</sup> January 2023 there were mentions to confirm compliance; by 28<sup>th</sup> February 2023 the applicant had yet to comply; on 15<sup>th</sup> March 2023 applicant was given yet another opportunity to comply;



and that instead the applicant chose to comply two days to hearing. According to the 1<sup>st</sup> respondent there was proper exercise of discretion on the part of the trial Judge in rejecting pleadings filed late without leave, given the circumstances of the case. On the claim by the applicant that the application to stay proceedings had been brought timeously, it was the 1<sup>st</sup> respondent's response that that was not true as the application had been brought two months after the delivery of the ruling and a few weeks before the hearing date. It was the applicant's case that he had made an oral application to the trial court to stay the proceedings but he had been unsuccessful.

9. George Odinga Oraro (2<sup>nd</sup> respondent) swore a replying affidavit on his behalf and on behalf of David Morton Silverstein (3<sup>rd</sup> respondent) to oppose the application. According to him, like was stated by the 1<sup>st</sup> respondent, the applicant was given more than ample opportunity to file and serve an amended defence and counterclaim, following leave, but that he had failed to comply with the directions which had led to the late filings being struck out and expunged from the record.
10. In the written submissions filed on behalf of the applicant, it was argued that the memorandum of appeal had disclosed arguable points and, secondly, that his appeal will be rendered nugatory because the trial court will proceed with the case without his amended defence and counterclaim being considered which would cause him prejudice. Reliance was placed on the decisions in Nairobi City Council -vs- Tom Ojienda & Associates, Civil Appeal (Application) No. E080 of 2022 and Yooshin Engineering Corporation -vs- AIA Architects Limited [2020]eKLR, among others.
11. It was the submissions by learned counsel for the 1<sup>st</sup> respondent that the appeal was not arguable as the leave granted to amend and file an amended defence and counterclaim was subject to Order 8 Rule 6; that it took more than one year for the applicant to file and serve which would have been unfair on her part had the trial court not rejected these late filings; and therefore, that the trial court had exercised its discretion fairly. Lastly, it was argued that it had not been demonstrated that if the application is not granted, the appeal will be rendered nugatory. Learned counsel relied on Nairobi City Council -vs- Tom Ojienda case and on Patel -vs- Transworld Safaris Ltd [2014]eKLR.
12. According to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the appeal was not arguable as the learned Judge's interpretation of Order 8 Rule 6 was the correct one, the provision having been couched in mandatory terms. Learned counsel submitted that the proceedings sought to be stayed had gone on, and the applicant heard on his original defence, and therefore the application had been overtaken by events.
13. When the application came for hearing before us, learned counsel Mr. Orange was holding brief for Mr. Ng'ang'a for the applicant, learned counsel Mr. Amalemba appeared for the 1<sup>st</sup> respondent and learned counsel Mr. Rabut appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Each counsel was allowed to highlight his submissions.
14. We have considered the application and the rival submissions. The jurisdiction of this Court on an application for stay under Rule 5(2)(b) of the Court of Appeal Rules, 2022 is original and discretionary. (See Trust Bank Limited and Another -vs- Investech Bank Limited and 3 Others [2000]eKLR). The applicant has to demonstrate that he has an arguable appeal, and that, unless the stay is granted, the appeal, if successful, will be rendered nugatory. An arguable appeal is not an appeal that will necessarily succeed, but one which should be argued fully before the court can make a determination; it is an appeal that is not frivolous, but one that is deserving of the Court's consideration (See: Yooshin Engineering Corporation -vs AIA Architects Limited (Supra). Lastly, the applicant has to satisfy both the limb of arguability and the requirement that the appeal will be rendered nugatory,



if stay is not granted. If the applicant satisfies only one requirement, the application will not succeed. (See *David Morton Silverstein -vs- Atsango Chesoni, Civil Application No. NAI 189 of 2001*).

15. We have no hesitation in finding that the complaint that the trial court erred in its exercise of discretion in striking out the applicant's amended defence, counterclaim, list of documents and witness statements because they had been filed and served late without leave, discloses arguable points that merits consideration by the Court that will ultimately hear the appeal.
16. On the nugatory aspect, however, we consider that it was common ground that the trial court had since heard the case by receiving all evidence, including the applicant's defence. The applicant had closed his case. This means that, what the applicant sought to stay has in fact happened. If that is the case, the application has been overtaken by events. This means that the applicant has failed to satisfy the second requirement under Rule 5(2)(b).
17. In conclusion, therefore, the application fails. It is dismissed, but, given the facts of the application, costs shall abide the outcome of the appeal.

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

**W. KARANJA**

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**JUDGE OF APPEAL JAMILA MOHAMMED**

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**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**

