



**Wanjohi v Maina & 3 others (Civil Appeal (Application)  
E572 of 2022) [2024] KECA 590 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 590 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E572 OF 2022  
A ALI-ARONI, LA ACHODE & JM MATIVO, JJA  
MAY 24, 2024**

**BETWEEN**

**JOHNSON GAITHO WANJOHI ..... APPLICANT**

**AND**

**JULIUS GATOTO MAINA ..... 1<sup>ST</sup> RESPONDENT**

**JACKSON MAINA RITHIA ..... 2<sup>ND</sup> RESPONDENT**

**THIKA LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for stay of the execution of the ruling/Order  
(Kimei J) dated 21st September 2023 in Thika ELC No 502 of 2017)*

**RULING**

1. Johnson Gaitho Wanjohi the applicant, approached this Court by way of a Notice of Motion dated 5<sup>th</sup> October 2023, brought under Rule 5 (2)(b) and Rule 43 of this [Court's Rules](#), for orders that:

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- a. spent
- b. This Honourable Court be pleased to stay execution of ruling/orders issued on 21<sup>st</sup> September 2023 dismissing the appellant's application dated 28<sup>th</sup> March and 6<sup>th</sup> June 2023 pending hearing and determination of the appeal herein.
- c. This Honourable Court be pleased to make an order of status quo in respect of land parcel Ruiru Kiu Block 2 (Githunguri)/4584 the status being that the applicant do continue residing, staying or being in possession of land parcel



Ruiru Kiu Block 2 (Githunguri)/4584 pending hearing and determination of this appeal.

- d. This honourable court be pleased to allow the applicant/appellant herein to deposit Kshs. 100,000 as conditional stay of execution of judgment delivered on 8<sup>th</sup> December 2021.
- e. This honourable court be pleased to issue an order of temporary injunction as against the respondents from evicting, harassing, intimidating, demolishing or in any other manner interfering with the appellant's possession, occupation of land reference number Ruiru Kiu Block 2 (Githunguri)/4584 pending the hearing and determination of this appeal."

Julius Gatoto Maina, Jackson Maina Rithia, Thika Land Registrar, and Hon. Attorney General are the 1<sup>st</sup> to 4<sup>th</sup> respondents.

2. The application is premised on the grounds on its face and the supporting affidavit of even date sworn by the applicant. The grounds are that; the applicant and his young family reside on Ruiru Kiu Block 2 (Githunguri)/4584 suit land. The 1<sup>st</sup> respondent filed a suit against the applicant in Thika ELC Case No. 502 of 2017 (ELC Suit) claiming ownership of the suit property. On 8<sup>th</sup> December 2021, judgment was delivered in favour of the 1<sup>st</sup> respondent. The applicant was dissatisfied with the judgment and preferred an appeal against it. He also filed an application for a stay of execution in the superior court pending the appeal. That the application was allowed on 17<sup>th</sup> November 2022 on condition that the applicant deposits Kshs. 100,000 within thirty days from the date of the ruling.
3. The applicant averred that on the date of the delivery of the ruling, he was working in Somalia as a mason and had lost touch with his family and his Advocate due to insecurity in Somalia. He deposed that he managed to cross the border to return to Kenya in March 2023 and only learnt of the status of his case when he was served with the eviction notice sometime in May 2023, and he visited his advocate. Consequently, he filed two applications, one for stay of execution and vacation of the eviction order dated 28<sup>th</sup> March 2023 and another dated 6<sup>th</sup> June 2023 for extension of orders to deposit the security. The two applications were dismissed by the trial judge on 21<sup>st</sup> September 2023.
4. The applicant averred further, that if the stay of execution order is not granted, he will be evicted from the only place he calls home, and he will suffer irremediable loss and damage. That the 1<sup>st</sup> Respondent has already commenced the wheels of execution of the eviction orders, as evinced by a call from a police officer at Ruiru Police Station on 5<sup>th</sup> October 2023 asking him to vacate the suit land.
5. Additionally, the applicant pleaded that the status quo be maintained before the intended appeal is determined. That failure to do so will make the appeal which has a high chance of success lose its purpose. In conclusion, he averred that he is willing to pay security for stay of execution pending the determination of the appeal.
6. The backdrop of this application is that the 1<sup>st</sup> Respondent filed a suit in the ELC against the applicant, claiming ownership of the suit land. The court found in his favour on 16<sup>th</sup> December 2021 and he subsequently obtained an eviction order against the applicant. In turn, the applicant filed an application for stay of execution in the superior court pending appeal. His prayer was granted on 17<sup>th</sup> November 2022 on condition that he deposits a sum of Kshs. 100,000 as security within a period of thirty days for due performance of the decree, failure to which the stay orders would lapse.
7. The applicant failed to comply with the orders, and at the expiry of the thirty days, the 1<sup>st</sup> respondent, through an application dated 27<sup>th</sup> January 2023, sought for eviction orders which were granted on 22<sup>nd</sup>



March 2023. The applicant in response filed an application dated 28<sup>th</sup> March 2023 seeking a discharge/ setting aside of the eviction orders, and another application dated 6<sup>th</sup> June 2023 seeking extension of time to deposit security as earlier ordered. Both applications were dismissed. As a result, the applicant filed the present application.

8. In rebuttal, the 1<sup>st</sup> respondent filed a replying affidavit he swore on 11<sup>th</sup> December 2023. He deposed that since judgment was entered in his favour on 16<sup>th</sup> December 2021, the applicant has been taking him in circles by filing numerous applications to deny him a chance to enjoy the fruits of his judgement and that all the applications were dismissed for want of merit.
9. The respondent deposed further, that the intended appeal is not based on any solid foundation and the memorandum of appeal does not raise a single triable issue. Further the applicant always alleges that he is not available in the country and is thus unable to comply with lawful court orders, an averment he has made once more to this Court without tangible evidence. This the respondent averred goes to show lack of seriousness and diligence on the applicant's part.
10. This application was disposed of by way of written submissions. The firm of M/s Kanyi Kiruchi & Co. Advocates filed written submissions dated 14<sup>th</sup> November 2023 on behalf of the applicant, and the firm of M/s Gachie Mwanza & Co. Advocates filed written submissions dated 24<sup>th</sup> January 2024 for the 1<sup>st</sup> respondent.
11. In his submissions the applicant rehashed his grounds in the application and supporting affidavit. In regard to whether he has an arguable appeal, he relied on this Court's decision of *Okiya Omtatah Okioiti & another v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 3 Others* [2015] eKLR in which the Court cited *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* (Civil Application 31 of 2012) to urge that 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.
12. In rebuttal, the 1<sup>st</sup> Respondent also rehashed his replying affidavit and added that he stands to suffer loss as he has been continuously deprived of his property and the present application is merely a means to continue doing so. Further, the applicant has not demonstrated any substantial loss that he might incur, which cannot be adequately compensated by an award of damages.
13. We have looked at the application, the replying affidavit, the rival submissions, and the law. This application is brought under rule 5(2)(b) of this *Court's Rules*. The Rule is discretionary and is guided by the interest of justice. It is now settled law that 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.
14. These principles are well entrenched in the decisions of this Court. A case in point is the decision in *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* (2000) eKLR where it was stated thus:

“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...”
15. The applicant need not show that such an appeal is likely to succeed, nor is he required to raise several issues. It suffices for him to show that there is at least one issue upon which the Court should



pronounce its decision. See *Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union* [2012] eKLR.

16. In respect to the nugatory aspect, this Court pronounced itself in *Stanley Kang'ethe Kinyanjui* (*supra*) as follows:

- “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. However, what is before us does not require us to delve into the twin principles that govern rule 5(2)(b). The applicant is seeking three substantive orders in his application: stay of execution orders, maintenance of status quo and a temporary injunction. All these three prayers entail staying the hand of justice from executing the orders emanating from the ruling/order dated 21<sup>st</sup> September 2023.

18. In determining whether or not to exercise our discretion in favour of the applicant in this matter, we bear in mind this Court’s decision in *George Ole Sangui & 12 others v Kedong Ranch Limited* [2015] eKLR in which the Court cited *Western College & Arts and Applied Sciences v Oranga & Others* [1976] KLR 63 where it was stated that:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. An execution can only be in respect of costs....

The High Court has not ordered any of the parties to do anything, or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an application for stay to enforce or to restrain by injunction.”

19. We note that in the ruling of 21<sup>st</sup> September 2023, Hon Kemei J dismissed the two applications of the Applicant dated 28<sup>th</sup> March 2023 and 6<sup>th</sup> June 2023 respectively, for lack of merit. There was therefore, nothing to be enforced in the orders that is capable of being stayed. We cannot also issue injunctive orders against the Respondent while the judgment dated 8<sup>th</sup> December 2021 has neither been stayed, nor overturned on appeal. Accordingly, we dismiss the application dated 5<sup>th</sup> October 2023 with cost to the 1<sup>st</sup> respondent.

**DELIVERED AND DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY, 2024.**

**ALI-ARONI**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**



I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

