



**Kitiyo v Bible Christian Faith Church & 3 others (Civil Application
E019 of 2023) [2024] KECA 522 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KECA 522 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E019 OF 2023
FA OCHIENG, PM GACHOKA & WK KORIR, JJA
MAY 9, 2024**

BETWEEN

MICHAEL FRANCIS CHEMONGES KITIYO APPLICANT

AND

BIBLE CHRISTIAN FAITH CHURCH 1ST RESPONDENT

STEPHEN LOWASKOU MWOI 2ND RESPONDENT

THE CHIEF LANDS REGISTRAR 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

(An application for stay of proceedings against the Ruling of the Environment and Land Court at Kitale (F. Nyagaka, J.) delivered and dated 23rd March 2023 in EL&C Petition No. 184 of 2016)

RULING

1. The applicant, Michael Francis Chemonges Kitiyo, has moved the Court vide the notice of motion dated 25th April 2023 for stay of further proceedings in Kitale Environment and Land Court (E&LC) Case No. 184 of 2016, Michael Francis Chemonges & Another v. Stephen Lowaskou Mwoi & 2 others pending the hearing and determination of the intended appeal against a ruling delivered on 23rd March 2023 by F. Nyagaka, J. He also prays for the costs of the application. The application is premised on the grounds on its face and the applicant's supporting affidavit.
2. In brief, the applicant's case is that proceedings are ongoing in Kitale E&LC Case No. 184 of 2016 which he has filed against Bible Christian Faith Church, Stephen Lowaskou Mwoi, the Chief Lands Registrar and the Attorney General, the respective 1st to 4th respondents. It is the applicant's averment that on 23rd March, 2023, the learned Judge delivered a ruling dismissing his notice of motion dated 30th September 2022 in which he had sought leave to amend his plaint. The applicant deposes that he has since lodged a notice of appeal against the impugned ruling and requested for typed proceedings.



According to the applicant, his intended appeal is arguable and will be rendered nugatory if the orders of stay are not granted.

3. The application is opposed through a replying affidavit sworn on 1st May 2023 by the 2nd respondent. It is averred that the application is devoid of merit and is meant to derail the defence case in the proceedings before the trial Court. The 2nd respondent deposes that there is no proper notice of appeal on record and neither has a notice of appeal been filed in respect to the ruling the applicant intends to appeal against. Further, that the intended appeal lacks merit and is an afterthought, the applicant having closed his case by the time he was seeking to amend his plaint. Additionally, the 2nd respondent avers that the applicant has not demonstrated that the intended appeal will be rendered nugatory if the proceedings are not stayed.
4. The 3rd and 4th respondents also opposed the application by filing grounds of opposition dated 3rd May 2023. The application is opposed on the grounds that it is frivolous, belated and devoid of merit. The motion is also said to be incompetent for violating rules 77 and 79 of the Court of Appeal Rules which require endorsement of the application by the Deputy Registrar and service upon the respondents. Further, that the motion is brought in bad faith as it is intended to derail the suit before the trial Court and that the appeal is not arguable as the proposed amendments seek to alter the cause of action.
5. The application came up for hearing on the Court's virtual platform on 22nd November 2023. Learned counsel Mr. Ambetsa appeared for the applicant having filed submissions dated 28th April 2023. Learned counsel Mr. Nyamu who appeared for the 2nd respondent had filed submissions dated 1st May 2023. There was no appearance for the 3rd and 4th respondents and neither had they filed any submissions. Counsel in attendance opted to rely on the submissions on record.
6. For the applicant, Mr. Ambetsa submitted that a notice of appeal has been filed against the impugned ruling and a copy of the proceedings requested from the trial court, hence this Court's jurisdiction has been properly invoked. Counsel submitted that the intended appeal is arguable as it questions the correctness of the decision of the trial Court. Counsel also argued that if a stay of proceedings is not granted and the E&LC hears and decides the suit against the applicant, the intended appeal, if successful, will be rendered an academic exercise. Counsel relied on *Nairobi City Council v. Tom Ojienda & Associates* [2022] KECA 1326 (KLR) to buttress these submissions and urged that the application be allowed.
7. In opposition to the motion, Mr. Nyamu submitted that the application is grounded on an illegality since the applicant did not tender evidence of the lodgment and service of a notice of appeal duly endorsed by the Deputy Registrar. According to counsel, the jurisdiction of the Court has not properly been invoked and the applicant's actions are an ambush upon the respondents. Counsel also submitted that the intended appeal is not arguable as the applicant had, before the E&LC, applied to amend his pleadings after the close of his case without seeking to reopen the plaintiff's case. Counsel argued that such a move was untenable as it would have given the applicant an opportunity to reopen his case contrary to the rule that parties are bound by their own pleadings. Counsel also submitted that the applicant has failed to demonstrate how the intended appeal will be rendered nugatory if the orders of stay are not granted. According to counsel, considering that the applicant already had his day in trial Court, he ought to have established that he has new evidence which if not produced would render his case futile. In the end, counsel urged us to dismiss the application with costs.



8. We have carefully considered the pleadings of the parties, the rival submissions and the law. The applicant's motion is a Rule 5(2)(b) application and the rule states that:

- “(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. ...; or
 - 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.”

9. Our discretion under Rule 5(2)(b) is unfettered and twin principles have been established to guide the exercise of the discretion under the rule. The principles require an applicant to establish that he has an arguable appeal and that unless the order of stay is granted the intended appeal stands the risk of being rendered nugatory. However, having an arguable appeal is not the same thing as saying that the appeal must eventually succeed. What is required is that the intended appeal or appeal should not be frivolous or amount to an idle judicial expedition - See *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others [2013]* eKLR.

10. Before we answer the question as to whether the applicant has satisfied the twin principles in order to merit an order of stay of proceedings, we need to dispense with the assertion by the 2nd, 3rd and 4th respondents that this Court lacks jurisdiction to entertain the application. It is the submission of the said respondents that the notice of appeal on record did not comply with rules 77 and 79 of the Court of Appeal Rules. Upon perusal of the record, we note that there is an undated notice of appeal lodged in the E&LC registry on 30th March 2023. There is also a letter addressed to the Deputy Registrar of that Court dated 24th April 2023 and lodged in the registry on the date of requesting for proceedings. In view of the foregoing, we find that there is a notice of appeal filed pursuant to rule 77 of the Court of Appeal Rules. The validity of the notice of appeal is not an issue before us and the respondents know what to do if they are of the view that the notice is defective. In that regard the holding of the Court in *National Industrial Credit Bank Ltd v. Aquinas Francis Wasike & Another [2006]* eKLR is apt. Faced with an argument like the one made before us by the 2nd, 3rd and 4th respondents, the Court held that:

“The applicant filed its notice of appeal against the said decision on 26th May, 2005; the Court accordingly has jurisdiction to hear and determine the motion for stay. Mr. Ohagga, learned counsel for the respondents Aquinas Francis Wasike (1st respondent) and Lantech Ltd. (2nd respondent) tried to argue before us that the notice of appeal filed by the applicant is invalid and that, therefore, the Court cannot grant the order of stay prayed for. We, however, take note of the fact that no application has been made by the respondents for the striking out of the notice of appeal and as the Court has repeatedly pointed out Rule 5 (2) (b) does not provide that "..... where a valid notice of appeal" the Rule simply provides that: -

"In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74....."

Rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of Rule 80 under which a notice of appeal can be struck out. We do



not see any reason for determining the validity or otherwise of a notice of appeal when an application under Rule 5 (2) (b) is being considered.”

11. Having established that there is a notice of appeal on record, the next frontier is the determination of the application on merit. In dealing with the question as to whether the intended appeal is arguable, it is imperative to set out a few facts. The applicant is the 1st plaintiff in Kitale E&LC No. 184 of 2016. After the plaintiffs’ case was closed and before the defence case could be heard, the applicant lodged an application seeking to amend his pleadings. That application was dismissed through the ruling which the applicant intends to appeal. The applicant has annexed to his instant application a draft memorandum of appeal raising grounds of appeal that decision of the learned Judge was plainly wrong, injudicious, based on irrelevant considerations, and based on a misdirection on the law as well as a misapprehension of the facts. With respect to the applicant and his counsel, we are unable to understand how the intended appeal is arguable when it is considered against the impugned ruling. At this point, we need not go into the details of our insight lest we prejudice the intended appeal. Perhaps we can only say that we are not persuaded that the intended appeal is arguable.

12. We can stop here and dismiss the applicant’s motion.

However, an exploration of the second limb will be beneficial to the parties. On this limb, the applicant argues that were the intended appeal to succeed, the same would be rendered an academic exercise in the absence of stay. In *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* (supra), it was held that:

“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.”

13. Save for the statement that absent stay the appeal will be rendered an academic exercise, the applicant has not disclosed how the intended appeal will be rendered nugatory. We note that the proceedings are ongoing and are open to an appeal by any aggrieved party. The appellant’s grievances regarding the impugned ruling are a matter that can still be taken up in a subsequent appeal. Furthermore, this being an application for stay of proceedings, we are alive to the views expressed by this Court in *Katangi Developers Limited v. Prafula Enterprises Limited & another [2018]* eKLR that:

“As noted in Halsbury’s Laws of England 4th edition volume 37 at paragraph 330:

“the stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and, therefore, the Courts general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue”.

14. In the end, we find that the applicant has failed to demonstrate that the intended appeal is arguable and will be rendered nugatory in the absence of an order staying the proceedings. Subsequently, an order of stay cannot issue in the circumstances of this case. Therefore, the notice of motion dated 25th April 2023 is devoid of merit and is hereby dismissed.

15. Finally, we have to address the question of who bears the costs of this application. Ordinarily, costs follow the event unless the court for good reason otherwise order. In this matter, there is no reason to warrant the exercise of our discretion to deny the respondents costs. Consequently, the 2nd, 3rd and 4th respondents shall have the costs of this application from the applicant.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2024



F. OCHIENG

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

