



REPUBLIC OF KENYA



**Ogato v Nyaguthii & another (Civil Application E120 of 2023)
[2024] KECA 733 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KECA 733 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E120 OF 2023
S OLE KANTAI, FA OCHIENG & WK KORIR, JJA
JUNE 21, 2024**

BETWEEN

DR. JULIUS OGATO APPLICANT

AND

JENIFFER NYAGUTHII 1ST RESPONDENT

PAULINE RUTO 2ND RESPONDENT

(An application for injunction pending the lodging, hearing, and final determination of an intended appeal from the judgment and decree of the Environment and Land Court of Kenya at Nakuru (D. O. Ohungo, J.) dated 29th June 2023 in ELC Case No. 625 of 2013)

RULING

1. Before us is an application brought pursuant to Rule 5(2)(b) of the [Court of Appeal Rules](#). The applicant has requested the Court to issue an injunction to restrain the 2nd respondent from entering, occupying, charging, carrying on any development, or otherwise dealing with the parcel of land known as Njoro/Ngata/Block 1/6182, hereinafter, “the suit land” until the appeal is heard and determined.
2. In the alternative, the applicant requested that the court do grant an order preserving the prevailing status quo until the appeal is heard and determined.
3. The application is supported by the applicant’s affidavit, in which he deponed to the following facts;
 - a. The trial court dismissed his suit, in which he had asserted ownership of the suit property. His claim was founded upon a sale agreement dated 24th May 2011, between him and John Macharia, who has since died.
 - b. The applicant’s case was that he paid the agreed purchase price, of Kshs. 1,400,000/- save Kshs. 175,000/- that was payable upon the transfer of the title, to the applicant.



- c. In accordance with the terms of the sale agreement, the applicant was given possession, and he remains in occupation of the suit property.
 - d. The suit land was also sold, thereafter, to the 2nd respondent herein, and she obtained a title for it. Although the applicant held the view that the transaction between the 2nd respondent and John Macharia was marred by fraud, the trial court made a finding that the applicant failed to prove his assertion of fraud.
 - e. The trial court delivered a judgment in favour of the 2nd respondent, holding that she was the lawful proprietor of the suit land.
4. Following the said judgment, the 2nd respondent issued a notice of eviction dated 1st August 2023, and the applicant is at risk of being evicted if he does not vacate the suit land voluntarily.
 5. The eviction notice prompted the applicant to move this Court seeking the grant of an injunction against the 2nd respondent.
 6. The applicant further deponed that after the trial Court had delivered its judgment, several people visited the suit land as prospective buyers.
 7. Those actions are said to have created apprehension in the mind of the applicant that he might not only be evicted but also that the suit land would be sold off to third parties.
 8. The applicant stated that his appeal would be rendered nugatory if he was evicted from the suit land.
 9. The applicant also stated that his appeal had a high chance of success.
 10. In answer to the application, the 2nd respondent pointed out that prior to the institution of the application herein, the applicant had filed and canvassed an application before the trial Court, seeking orders for the maintenance of the status quo, pending appeal.
 11. The 2nd respondent asserted that the application before us was res judicata.
 12. The 2nd respondent was apprehensive that an order of stay execution of the decree would be tantamount to allowing the applicant to continue enjoying the benefits of the 2nd respondent's land which he had already occupied for more than 10 years.
 13. The 2nd respondent stated further that since the applicant's claim had been dismissed, following his failure to prove the fraud that he had alleged, allowing the present application would be unfair to her.
 14. The 2nd respondent also submitted that the applicant had failed to provide any proof that she was intent on selling off the suit land.
 15. The 2nd respondent stated that the applicant's claim had been dismissed, and as such, there was no order to execute against the negative order.
 16. This Court has made it clear that in cases where a negative order was made by the Court appealed from, there cannot issue an order for stay of execution. In the case of *Kaushik Panchamatia & 3 Others v Prime Bank Limited & Another* [2020] eKLR, this Court stated:

“...that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.”



17. Similarly, in the case of *Western College Farts and Applied Sciences v Oranga & Others* [1976] KLR 63, the Court whilst considering whether an Order of Stay can be granted in respect of a negative order and which we fully adopt stated inter alia as follows:

“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 restrain by injunction.”

18. However, in this case, the applicant was not seeking an order for stay of execution. The application before us is one in which the order sought is an injunction.

19. In an appropriate case, if a claim is dismissed and the claimant wishes to pursue an appeal, he may apply for an injunction, with a view to maintaining the status quo until the appeal, (or the intended appeal) is determined.

20. Furthermore, even when an earlier application for an injunction pending appeal, had been dismissed by the Court appealed from, that is not a bar to a new application before the appellate Court. Accordingly, the dismissal of the earlier application by the ELC Court does not give rise to res judicata.

21. It is *trite* that Rule 5(2)(b) is a procedural provision that allows the Court to protect the subject matter of an appeal or an intended appeal. In the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR, the court held that:

- i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
- ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
- iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
- v. An applicant must satisfy the court on both of the twin principles.
- vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
- 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. *Joseph*



Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.

- 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. *Damji Pragji (supra)*.
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile, or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
 - 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.
 - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”
22. We note that whereas the 2nd respondent states that the applicant has not proved that she wishes to sell off the suit land, the said 2nd respondent had not given a commitment that she would not sell the suit land. The 2nd respondent has also not denied the applicant’s deposition, that some potential purchasers had visited the suit land.
23. In the circumstances, it would appear to us that there is a real possibility that unless an injunction is granted, the 2nd respondent could well dispose of the suit land whilst the appeal was still pending.
24. Secondly, we hold the considered opinion that the applicant’s appeal raises at least one arguable issue. In the case of *Dennis Mogambi Mang'are v Attorney General & 3 others* [2012] eKLR, this Court held that:
- “An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”
25. Considering that the applicant is in possession of the suit land, we find that the possible sale of the suit land may not only put the title thereof into the hands of a third party, (thus complicating legal issues) but may well result in the eviction of the applicant whilst the appeal was pending.
26. We are satisfied that the applicant has demonstrated that he has an arguable appeal, and also that if the 2nd respondent was not restrained by an injunction, the appeal could be rendered nugatory.
27. Accordingly, we hereby issue an injunction order to restrain the 2nd respondent, whether by herself or by her employees, servants, agents, or otherwise howsoever, from entering onto, occupying, charging, carrying on any development upon or in any manner dealing with the suit land, until the appeal is determined.
28. Costs of the application shall abide by the determination of the appeal and shall be deemed to have been issued in favour of the party who succeeds in the appeal herein.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024.

S. Ole KANTAI

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

