



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sana v Makokha (Civil Application E015 of 2022)  
[2024] KECA 741 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KECA 741 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E015 OF 2022  
F SICHALE, FA OCHIENG & WK KORIR, JJA  
JUNE 21, 2024**

**BETWEEN**

**ESTHER CHEROP SANA ..... APPLICANT**

**AND**

**DAVID LUTTA MUSUMBI MAKOKHA ..... RESPONDENT**

*((An application for interim stay of execution pending an intended appeal against the Judgment and Decree of the High Court at Eldoret (J.W.W. Mongare, J.) delivered and dated 24th January 2020 in HCCA No. 19 of 2020))*

**RULING**

1. The applicant, Esther Cherop Saina, is before us vide a notice of motion dated 28<sup>th</sup> March 2023 filed pursuant to Articles 50(1) and 159(2) of *the Constitution*, sections 3, 3A, 3B and 5 of the *Appellate Jurisdiction Act*, and Rules 47(1), (2), (4) and 49(1) of the Court of Appeal Rules. The applicant seeks an order restraining the respondent, David Lutta Musumbi Makokha, or his agents or servants or any other person whosoever from evicting the applicant from the property known as Eldoret Municipality Block 14/320. The application is premised on the grounds on its face as well as the depositions made by the applicant in her affidavit sworn on the date of the application.
2. The applicant averred that she is dissatisfied with the judgment delivered on 24<sup>th</sup> January 2020 by J.W.W. Mongare J. of the High Court at Eldoret and has filed a notice of appeal against it. She deposed that although she has applied for the proceedings from the trial Court, she is yet to be supplied with the same. In respect to the merits of the application, the applicant averred that her intended appeal is arguable as it raises the question as to whether the learned Judge had jurisdiction to handle the matter. It is her case that the intended appeal risks being rendered nugatory if execution of the judgment is not stayed. Further, that the respondent will not suffer any prejudice should her application be allowed.



3. The application was opposed through the replying affidavit sworn by the respondent on 18<sup>th</sup> April 2023. It was his deposition that the applicant intends to deny him the fruits of the judgment entered in his favour. Further, that the applicant's aim is to illegally continue enjoying occupation of the suit property without paying rent. He averred that the issue of ownership of the suit property was settled through a judgment delivered on 14<sup>th</sup> December 2011 in Eldoret HCCC No. 115 of 2006 and the appellant never appealed against that judgment. The respondent deposed that the applicant has not demonstrated that she will suffer substantial loss should her application be declined. In a further affidavit dated 30<sup>th</sup> October 2023, the respondent averred that the application has been overtaken by events because the judgment whose execution the applicant sought to stay was executed and the applicant had vacated the suit property on 26<sup>th</sup> June 2023.
4. This application came up for virtual hearing on 5<sup>th</sup> February 2024. There was no appearance for counsel from either side despite the hearing notice dated 3<sup>rd</sup> February 2023 having been duly served upon counsel. However, since counsel had filed their respective submissions, we opted to determine the application based on the filed pleadings and written submissions.
5. On behalf of the applicant, the firm of Kibet Lemito & Co. Advocates filed submissions dated 13<sup>th</sup> April 2023 and contended that the intended appeal is arguable as it concerns the question of jurisdiction of the learned Judge. Counsel relied on the case of *Kenya Airways PLC v. Alex Wainaina Mbugua [2018]* eKLR to urge that all that is required is for the applicant to demonstrate at least a single arguable point. Counsel submitted that if execution of the impugned judgment is not stayed, the applicant will suffer irreversible damage and the appeal will amount to an academic exercise. Counsel urged the Court to stay the execution of the judgment in order to save the substratum of the appeal. Counsel relied on *Stanley Kangethe Kinyanjui v. Tony Keter & 5 others [2013]* eKLR for the definition of a nugatory appeal. He further submitted that the respondent will suffer no prejudice should the application be allowed.
6. For the respondent, the firm of Isiaho Sawe & Co. Advocates filed submissions dated 24<sup>th</sup> April 2023. Counsel submitted that the applicant is underserving of an order of stay of execution as she has not met the conditions set in Order 46 Rule 6(2) of the Civil Procedure Rules. Further, that the application is aimed at delaying the conclusion of the matter thereby violating the spirit of section 1A (1) of the *Civil Procedure Act* which provides the overriding objective of the *Civil Procedure Act* as the facilitation of the just, expeditious, proportionate and affordable resolution of civil disputes. It is necessary and important to point out at this stage that this Court has its own rules (Court of Appeal Rules, 2022) and the provisions cited by the respondent's counsel are thus inapplicable to applications before this Court.
7. This being an application brought pursuant to rule 5(2)(b) of the Court of Appeal Rules, the applicant is required to demonstrate that she has an arguable appeal and that if execution of the judgment is not stayed then the intended appeal, were it to eventually succeed, will be rendered nugatory. The Supreme Court highlighted the applicable principles in *Gituru Peter Munya v. Dickson Mwenda Kithinji & 2 others [2014]* eKLR thus:

“Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- i. the appeal or intended appeal is arguable and not frivolous; and that
- ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.”



8. This application will therefore be determined by considering whether the applicant has an arguable appeal and whether the intended appeal or appeal will be rendered nugatory if execution of the judgment she intends to appeal against is not stayed.
9. When considering whether an intended appeal is arguable or not, the Court is not expected to conclusively render itself on the merits of the intended appeal. This is because the determination of the intended appeal belongs to the panel of judges that will eventually be tasked to hear the appeal. We are also aware that the existence of a single arguable point is sufficient for the Court to hold that there is an arguable appeal. In this application, the applicant asserts that her intended appeal revolves around the question as to whether the learned Judge had jurisdiction to hear and determine the matter. In our view, the question of jurisdiction as framed by the applicant deserves its day before this Court. We therefore find that the applicant has established that she has an arguable appeal.
10. Having determined that the applicant has an arguable appeal, the question that follows is whether her intended appeal will be rendered nugatory if her application for stay of execution of the judgment is declined. The dispute between the parties over the suit property commenced in 2002 when a suit was filed in court. Another suit was filed in 2014 through which the applicant sought to evict the respondent. It is the judgment arising from the second suit that is the subject of this application and the intended appeal. From the respondent's further affidavit, it was clear that during the pendency of this application, the applicant yielded vacant possession of the suit property to the respondent on 26<sup>th</sup> June 2023. It would appear therefore that this application has been overtaken by events. Even if the Court were to issue the orders of stay, the same would serve no useful purpose as the orders cannot reinstate the applicant to the suit property. Issuance of such orders would be an exercise in futility. When the Court was faced with a similar scenario in *Kaushik Panchamatia & 3 others v. Prime Bank Limited & another [2020]* eKLR, it stated that:

“Additionally, it is apparent in the further affidavit of George Mathui sworn on 17th July 2020 that the suit property known as Kisumu Municipality/Block 12/310 was sold to Pasaka Ventures Limited at the price of Kenya Shillings Twenty-four Million, one Hundred Thousand only and a deposit of Eight Million paid to the 2nd Respondent. The 1st respondent has therefore demonstrated that what the applicants seek to restrain has been overtaken by events. Any order made with regard thereto would therefore be an order granted not only in vain but also in the exercise of the courts mandate in futility.”
11. In the circumstances, we find that what is sought to be stayed has already taken place and cannot be undone by the Court as the action of repossessing the suit property from the applicant was taken as a result of a valid judgment which though subject to an intended appeal is yet to be overturned or set aside. Furthermore, the applicant can be compensated by way of damages if her intended appeal eventually succeeds.
12. The upshot of the foregoing is that the notice of motion dated 28<sup>th</sup> March 2023 lacks merit and is hereby dismissed.
13. On the question of costs, we find that the appropriate order is to let the costs abide the outcome of the intended appeal.
14. It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 21<sup>ST</sup> DAY OF JUNE, 2024.**

**F. SICHALE**



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**JUDGE OF APPEAL**

**F. OCHIENG**

.....  
**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

