



**Chepkonga v Kuikui & 2 others (Civil Application
E061 of 2023) [2024] KECA 631 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KECA 631 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E061 OF 2023
FA OCHIENG, LA ACHODE & WK KORIR, JJA
JUNE 7, 2024**

BETWEEN

PETER KIPKEMEI CHEPKONGA APPLICANT

AND

HELLENA TARGOK KUIKUI 1ST RESPONDENT

AMOS TUITOEK 2ND RESPONDENT

HENRY TUITOEK 3RD RESPONDENT

*(An application for stay of execution pending an intended appeal against
the Judgment and Decree of the Environment and Land Court at Eldoret (E.
Obaga, J.) delivered and dated 27th July 2022 in ELC Case No. 173 of 2016))*

RULING

1. The applicant, Peter Kipkemei Chepkonga, has brought before us the notice of motion dated 17th November 2023 under rule 5(2)(b) of the [Court of Appeal Rules](#), through which he seeks an order of stay of the execution of the judgment of the Environment and Land Court at Eldoret in ELC Case No. 173 of 2016 pending the hearing and determination of his appeal in Eldoret CACA No. E022 of 2023. The application is premised on the grounds on its face as well as the applicant's depositions in his affidavit sworn on 17th November 2023 in support of the application. Hellena Targok Kuikui, Amos Tuitoek and Henry Tuitoek are the respective 1st to 3rd respondents.
2. In support of the application, the applicant avers that he is dissatisfied with the judgment of the trial Court and has since lodged an appeal against it. It is his deposition that there is a likelihood of the decree emanating from the impugned judgment being executed during the pendency of his appeal. The applicant avers that he stands to suffer irreparable loss if the execution of the judgment is not stayed



- as the suit property may be subdivided and transferred to the respondents. Further, that the intended appeal is arguable and the respondents will not suffer any prejudice if the orders sought are granted.
3. The application was opposed vide a replying affidavit sworn by the 1st respondent on 15th December 2023. It is the respondents' case that the application is vexatious and an affront to the Court process. The respondents assert that the applicant declined to comply with the decree of the trial Court hence a compelling order was issued on 21st September 2023 and the execution process has since been instituted and is at the tail end. The respondents also aver that the applicant has filed this application late in the day and is only seeking to bar the respondents from enjoying the fruits of the judgment. Further, that the applicant has not demonstrated the loss and prejudice he will suffer should the application be declined.
 4. When the matter came up for virtual hearing on 6th February 2024, learned counsel Mr. Momanyi was present for the applicant while learned counsel Mr. Sambu appeared for the respondents. They both relied on the written submissions accompanied by brief oral highlights.
 5. Learned counsel Mr. Momanyi relying on the submissions dated 5th December 2023 stated that the pending appeal was arguable as among the issues it raises are whether there existed a trust in favour of the respondents, whether the claim by the respondents was barred by limitation of time, whether adverse possession was proved by the respondents and whether the applicant lacked capacity to purchase the suit land. Asserting that the appeal will be rendered nugatory if execution is not stayed, counsel submitted that the suit property is likely to be subdivided and transferred to the respondents. Still arguing that the appeal may be rendered nugatory if the order sought by the applicant is not granted, counsel urged that the respondents will displace the applicant from the parcel which he occupies. Counsel consequently submitted that the dual limbs for grant of an order of stay of execution of a judgment pending the hearing of an appeal had been established by the applicant and the motion should be allowed.
 6. In opposition to the application, learned counsel Mr. Sambu relied on the submissions dated 16th January 2024. On the issue as to whether or not the appeal is arguable, counsel urged that the appeal was not arguable as a perusal of the judgment the applicant intends to appeal against shows that the trial court properly appreciated the law and evidence in arriving at its decision. Turning to the question as to whether the applicant has demonstrated that the appeal will be rendered nugatory if the application is declined, counsel submitted that the execution process had been set in motion and there is nothing to stay. According to counsel, the appeal will not be rendered nugatory as the application had been overtaken by events. Counsel consequently urged for the dismissal of the motion with costs, stating that this Court should not issue orders in vain.
 7. For an applicant to succeed in an application such as the one before us, he or she must firstly demonstrate the existence of an arguable appeal. The appeal should not be one that should eventually succeed as all that an applicant is required to do is to show that the appeal is arguable and not frivolous. Even a single arguable issue will suffice. Secondly, an applicant must also demonstrate that unless execution is stayed, the intended appeal stands the risk of being rendered nugatory. These principles have been expounded in a long list of the decisions of this Court, including *Attorney General & Another v. Eunice Makori & Another* [2021] eKLR and *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* [2013].
 8. Therefore, the first issue that falls for our determination is whether the applicant's pending appeal is arguable. In determining this issue, we are alert to the fact that the appeal is not for determination at this stage as that onus belongs to the bench that will eventually be tasked to hear and determine the appeal. At this stage, all that is required of us is to be satisfied that the applicant has demonstrated that the grounds of appeal deserve to be argued fully before the Court. It must also be recalled that a single



arguable point is sufficient to demonstrate that the intended appeal or appeal is arguable. A perusal of the annexed memorandum of appeal discloses that the issues at the centre of the pending appeal are whether the doctrine of adverse possession was properly applied, whether the claim was bad because of limitation of time and whether there was sufficient evidence establishing the existence of trust in favour of the respondents. From the face of the memorandum of appeal, and without delving much into the grounds of appeal, we find that the applicant's appeal deserves its day before this Court. As such, we are satisfied that the pending appeal is arguable.

9. The question that follows is whether the applicant has demonstrated that the pending appeal will be rendered nugatory should his application for stay of execution of the judgment he intends to appeal against, is declined. According to the applicant, if execution of the judgment is not stayed, the suit property will be subdivided and transferred to the respondents. He also avers that he stands the risk of being evicted from the portion of the land he presently occupies. On their part, the respondents assert that the impugned judgment was to the effect that the suit property be subdivided into two equal portions with one of those pieces being retained by the applicant. Further, that the process of executing the decree was already in motion and what remained was the registration of the new titles.
10. From the averments of the parties, it would appear that what the applicant sought to bar has already been set in motion. The 1st respondent has averred and exhibited evidence to show that the process of subdivision, survey and transfer of the suit land had been set in motion in the fulfilment of the decree extracted from the impugned judgment. In *University of Eldoret & another v. Hosea Sitienei & 3 others* [2020] eKLR, the Supreme Court, when faced with a situation where execution had commenced, held that:

“ [42] In our view, the garnishee proceedings are as a result of lawful legal process arising from a decree issued by a competent Court. This in itself cannot therefore justify grant of stay particularly in the wake of the status of the appeal as already found. Accordingly, we are not persuaded to grant stay orders under the circumstances as it would serve no purpose.” [Emphasis ours]

11. Similarly, in *Kaushik Panchamatia & 3 others v. Prime Bank Limited & another* [2020] eKLR the Court when faced with a similar scenario 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.” [Emphasis ours]

12. From the foregoing, it is undoubtedly clear that where execution has been set in motion and is at an advanced stage, an order of stay should ordinarily not issue as the issuance of such an order would amount to exercising the authority of the Court in vain. In the case before us, it is also possible that the process the applicant seeks to stop can be undone should his appeal eventually succeed. Additionally, there is no evidence that any loss suffered by the applicant cannot be compensated by way of damages. In short, the applicant has failed to demonstrate that his appeal, were it to eventually succeed, will be rendered useless by the execution of the judgment by the respondents. The applicant has therefore failed to satisfy the nugatory aspect of the application and the application must fail.



13. Finally, we have to address the issue of costs. The general rule is that costs should follow the event. The exception to the rule is that the court can for good reason order otherwise. In the matter before us, the applicant has already filed an appeal. In those circumstances, the appropriate order is to direct that the costs for the application abide the outcome of the appeal.
14. The upshot of the foregoing is that the application dated 17th November 2023 is without merit and is hereby dismissed. The costs of the application shall abide the outcome of the pending appeal.

DATED AND DELIVERED AT NAKURU THIS 7TH DAY OF JUNE, 2024

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

