



**Maluki & 3 others v Mutua & another (Civil Application  
E297 of 2023) [2024] KECA 886 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KECA 886 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E297 OF 2023  
PO KIAGE, P NYAMWEYA & PM GACHOKA, JJA  
JULY 31, 2024**

**BETWEEN**

**BERNARD MASINGA MALUKI ..... 1<sup>ST</sup> APPLICANT  
ALPHONCE MBATHA KISYULA ..... 2<sup>ND</sup> APPLICANT  
JOSHUA MUTETI KILONZO ..... 3<sup>RD</sup> APPLICANT  
DAVID OSANO RAGIRA ..... 4<sup>TH</sup> APPLICANT**

**AND**

**JOHN KIOKO MUTUA ..... 1<sup>ST</sup> RESPONDENT  
SARAH NZEMBI MUTUA ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of execution from the judgment of the Environment and Land Court of Kenya at Machakos (C. Ochieng', J.) delivered on 14<sup>th</sup> November, 2022 in Machakos ELC Constitutional Petition No. 7 of 2019 as consolidated with Machakos ELC case No. 116 of 2019)*

**RULING**

1. The applicants have approached this Court through a Notice of Motion dated 8<sup>th</sup> July, 2023, seeking a raft of reliefs which are reproduced verbatim as follows:
  1. ... Spent;
  2. That this Hon. Court be pleased to grant the applicants leave to appeal out of time against the judgment delivered by the Hon. Lady Justice Christine Ochieng', J. on 14<sup>th</sup> November, 2022 in ELC Const. Petition No. 7 of 2019 as consolidated with ELC case no. 116 of 2019;
  3. ... Spent;



4. That this Hon. Court be pleased to issue an order of stay of execution of the judgment entered and delivered against the applicants by Hon. Lady Justice Christine Ochieng', J. on 14<sup>th</sup> November, 2022 in ELC Const. Petition No. 7 of 2019 as consolidated with ELC case no. 116 of 2019 pending the hearing and determination of the intended appeal;
  5. ... Spent;
  6. That this Hon. Court be pleased to issue an order of stay of execution of the judgment entered and delivered against the applicants by Hon. Justice O.A. Angote, J. on 15<sup>th</sup> February, 2019 in ELC case no. 62 of 2018; John Kioko Mutua & another vs. John Wambua Kilonzo & 11 others pending the hearing and determination of the intended appeal in ELC Const. Petition No. 7 of 2019 as consolidated with ELC case no. 116 of 2019;
  7. That this Honorable Court be and is hereby pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case;
  8. That costs of this particular application be provided for.
2. It is instructive to note that by the ruling of this Court dated 15<sup>th</sup> December, 2023 (Gachoka, JA.), the applicants were granted leave to appeal out of time. They subsequently filed their notice of appeal dated 20<sup>th</sup> December, 2023. We will thus only determine the other prayers sought in the application.
  3. The applicants are aggrieved by the judgment of the Environment and Land Court (C. Ochieng, J.) which gave several declaratory orders to the effect that the respondents are the lawful owners of the land in dispute.
  4. The application is supported by the grounds on the body of the motion and the supporting affidavit of the 1<sup>st</sup> applicant. The application is further supported by the further affidavit dated 17<sup>th</sup> July, 2023, and the supplementary affidavit dated 3<sup>rd</sup> April, 2024 both deposited by the 1<sup>st</sup> applicant.
  5. Each party has a narrative of how they acquired the land that is the subject of the dispute and this being an application primarily seeking an order of stay, we will reject the temptation by the parties to engage in a historical analysis of how each acquired the title to the land.
  6. To put the application in context we shall summarize the long winding verbose story of how the land, the subject of the application, ended up with more than one title. According to the applicants, they are the registered, legal and beneficial owners of all that parcel of land namely L.R. No. 29666 measuring approximately 370.9 ha. The said suit land is in the possession and occupation of over 1010 members having entered into the suit premises in the 1960s. Those members comprise a list of former workers and/or descendants of an Asian employer known as Rohet.
  7. The applicants state that at one-time, heavy rains led to the overflow of Athi River subjecting Rohet to huge losses resulting in the closing down of his company operations. However, the closing was done surreptitiously by Rohet without informing his former workers. He ultimately took off without paying his workers their dues. This, according to the applicants, compelled them to continually live on the said premises.
  8. Following that occupation, the applicants contended that the occupants had legitimately acquired ownership of the suit land by way of adverse possession having lived on the suit premises for over 40 years. Desirous of safeguarding their right of ownership, the occupants formed a committee electing the applicants as the officials. Consequently, on 17<sup>th</sup> December, 2018, they were issued with a certificate of lease namely L.R. No. 29666 I.R. No. 203477. A letter of allotment dated 22<sup>nd</sup> October, 2008 preceded the issuance of the title deed.



9. The applicants cited several reasons challenging the findings of the learned Judge to justify the filing of the present appeal. In support of the grounds disputing the findings of the learned Judge, they annexed a draft memorandum of appeal to the application adding that they had demonstrated that their appeal was arguable with a high chance of success.
10. They stated that since there is a decree in force, execution may be issued at any time and that they would be evicted from the suit land. As a matter of fact, the 1<sup>st</sup> applicant deposed that on 25<sup>th</sup> January, 2024, they were served with an eviction notice ordering them to vacate the suit premises within 14 days. For those reasons, the appeal would be rendered nugatory if stay was not granted.
11. The applicants also stated that they had filed ELC JR No. E009 of 2023 seeking to challenge the decision of the director of survey to issue deed plans over L.R. No. 29666. In their view, the actions were unfounded and fraudulent since the Land Registrar was in the process of preparing title deeds premised upon those deed plans. In addition, they justified the inclusion of the prayer for stay of the judgment in Machakos ELC No. 62 of 2018 for the reason that it was inherently connected with the present appeal.
12. It is for the above reasons that the applicants urged this Court to grant the application as prayed.
13. Opposing the application, the respondents filed an amended notice of preliminary objection dated 4<sup>th</sup> August, 2023. They challenged the competency of the application on the ground that it offended section 80 of the *Civil Procedure Act* and order 45 of the Civil Procedure Rules since the applicants had already lodged separate review applications challenging the impugned decisions.
14. The respondents also filed a replying affidavit sworn on 13<sup>th</sup> July, 2023 and two further affidavits sworn on 31<sup>st</sup> July, 2023 and 5<sup>th</sup> April, 2024 by the 1<sup>st</sup> respondent. The respondents opposed the application on the following grounds: that the applicants were intent on introducing fresh evidence at the appellate stage; that Rohet never lived on the suit land; that the averment that there were 1010 members settled on the suit land was not true; that the applicants have never been in occupation of the suit land as demonstrated in the letter from the director of survey; that in all suits in which the applicants have extensively participated, they had never filed suit on behalf of those purported 1010 members but on their own behalf and as such, the applicants were changing the character of the suit; that in fact, the letter of allotment was issued to them in the personal capacity and not as officials or trustees; that be that as it may, that letter of allotment was not authentic; that their process of acquisition of title to the suit land was never aptly demonstrated by the applicants; that the documents running up to the issuance of title were fraudulent; that the property rightfully belongs to the family of James Kasyula Mutua; that together with other properties, they had properly acquired registration and ownership of the suit land; that they placed caveats on the suit property upon discovery that unsuspecting third parties wanted to sell their parcel of land; that they subsequently filed Machakos ELC No. 62 of 2018 against 12 persons intent on disposing of the suit land; and that the said judgment affirmed their interests over the suit parcel of land having been declared as proprietors of the suit land.
15. Continuing, the respondents later discovered that the applicants occasioned the subdivision and change of user of the property without their authority and without any powers to do so; that they objected to issuance of that application; that the applicants were aware of this objection; that they subsequently filed Machakos ELC Constitutional Petition No. 7 of 2019 wherein judgment was obtained in their favor; that the applicants were properly enjoined in the dispute; that they lodged a complaint before the DCI when they discovered that the applicants had forged documents with a view to fraudulently obtaining title to the suit land; that the applicants were subsequently arraigned and charged in court in Kiambu Criminal Case No. 121/21/2020; that after being enjoined in Machakos



ELC No. 27 of 2020, the respondents successfully set aside the consent order that had been obtained by corrupt means; and that the title document produced by the applicants was fraudulent for having the words “original NIL”. In addition, the respondents pointed out that by application dated 5<sup>th</sup> February, 2024, the applicants sought stay of execution of the two judgments which is irregular. For those reasons, they urged this Court to dismiss the application with costs.

16. The applicants filed written submissions dated 5<sup>th</sup> April, 2024 and a case digest dated 30<sup>th</sup> October, 2023, which were orally highlighted at the hearing by learned counsel, Mr. Orlando on 9<sup>th</sup> April, 2024. They submitted that their appeal was arguable and would be rendered nugatory if the order for stay was not granted. The respondents on their part filed their written submissions and case digest both dated 8<sup>th</sup> April, 2024 which were also orally highlighted at the hearing by learned counsel Mr. Katasi. They submitted that this Court lacked jurisdiction to hear and determine the application since a similar application dated 5<sup>th</sup> February, 2024 was before the trial court. In addition, the application was an abuse of the process of the court as it sought stay of execution of two distinct judgments under the same umbrella. Finally, the respondents submitted that the application had failed to meet the threshold set out in applications for stay.
17. The principles enunciated in applications invoking rule 5 (2) (b) of this Court’s Rules are well settled. To be successful, an applicant must demonstrate the following conjunctive twin limbs; firstly, in seeking stay of execution pending appeal or an intended appeal, the intended appeal or appeal (if any) is arguable and not merely frivolous. Secondly, the appeal, or intended appeal, if successful, would be rendered nugatory if stay is not granted (See Stanley Kang’ethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR).
18. On whether the appeal is arguable, this court has held that an arguable appeal/intended appeal is one that need not succeed but one that warrants the court’s interrogation on the one hand and the court’s invitation to the opposite party to respond thereto. (See Kiu & another vs. Khaemba & 3 others [2021] KECA 318 (KLR) (17 December 2021). It is also instructive to note that only one single ground that is arguable sufficiently meets this test.
19. We have considered the grounds of appeal as set in the draft memorandum of appeal. In our view, those grounds are arguable as to warrant the audience before this Court. As to whether those grounds are merited, the bench hearing the appeal will determine thus.
20. On the second limb, this court in Stanley Kang’ethe Kinyanjui vs. Tony Ketter & 5 others (supra) held that the nugatory aspect of the appeal depends on whether or what is sought to be stayed, if allowed to happen, is reversible and if the answer is in the negative, whether damages will reasonably compensate the party aggrieved.
21. In this case, the applicants are apprehensive that if stay is not granted, they will be evicted from the suit premises and render the appeal an academic exercise. The applicants deposed that on 25<sup>th</sup> January, 2024, they were served with an eviction notice compelling them to vacate the suit premises within 14 days. Instead of annexing the said eviction notice, the applicants attached photographs of purported persons who served the eviction notice.
22. It is further critical to note that the judgment of the court was delivered on 14<sup>th</sup> November, 2022 and the application was filed on 8<sup>th</sup> July, 2023. Throughout that duration, and even when the application was heard before this Court, there was no mention that execution had taken place.
23. We also note that the actual position on the ground is highly contested and the allegation that the applicants and 1010 families are settled on the suit land is disputed. The applicants did not place any



cogent evidence to demonstrate such occupation. We are not satisfied that in fact there is any imminent threat as the applicants purported to suggest.

24. In addition, the respondents pointed out that by application dated 5<sup>th</sup> February, 2024, the applicants sought stay of execution of the two judgments, the subject of these appeal proceedings. That argument was not disputed. The applicants furthermore failed to demonstrate how an order for stay of two separate judgments can be sought in one application. Ultimately, we are not satisfied to hold that the appeal will be rendered nugatory if stay is not granted.
25. Before we pen off, we must point out that the parties' counsel herein filed prolix affidavits almost going outside the scope of applications under rule 5 (2) (b) of this Court's rules. The drafters were extraneous, verbose and too superfluous when they could only have limited themselves to the principles governing stay of execution. Parties are urged to strictly confine themselves within principle on any matter before this Court.
26. The upshot of the above is that we find that the applicants have failed to meet the conjunctive threshold set out in principles under rule 5 (2) (b) of this Court's Rules. Accordingly, the Notice of Motion dated 8<sup>th</sup> July, 2023 lacks merit and it is hereby dismissed with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY 2024.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**M. GACHOKA C.Arb, FCIArb.**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

