



REPUBLIC OF KENYA



**KENYA LAW**  
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**Barngetuny v Shivji (Civil Application E019 of 2022)  
[2024] KECA 913 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 913 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E019 OF 2022  
SG KAIRU, FA OCHIENG & WK KORIR, JJA  
JULY 26, 2024**

**BETWEEN**

**OGLA JEMEI BARNGETUNY ..... APPLICANT**

**AND**

**VIRJI NARAN SHIVJI ..... RESPONDENT**

*(Being an application for stay of Ruling of the Environment and Land Court of Kenya at Eldoret (Kibunja, J.) dated 9th November 2022 in ELC Cause No. 157 of 2016)*

**RULING**

1. In her application dated 11<sup>th</sup> November 2022 canvassed before us on 23<sup>rd</sup> April 2024, the applicant, Oglamei Barngetuny, seeks an order that the Ruling delivered by the Environment and Land Court on 9<sup>th</sup> November 2022 be stayed pending determination of her intended appeal. In that Ruling, the ELC (Kibunja, J.) determined four applications, amongst them, an application dated 22<sup>nd</sup> February 2022 in which the respondent sought eviction orders against the applicant from Land Parcel Eldoret Municipality Block 13/886. Also sought in that application by the respondent was an order to the OCS, Eldoret Police Station to offer security and supervision to Femfa Auctioneers to enable them carry out eviction “as per this...court’s decree dated 29/08/2019, orders dated 15/03/2021 and Court Appeals decree dated 29/01/2021 in Kisumu Appeal No. 262 of 2019.”
2. Urging the application before us, the applicant who appeared in person, orally highlighted her written submissions dated 17<sup>th</sup> November 2022. She reappraised the contents of her supporting and further affidavits and pleaded she is under threat of eviction on account of the impugned ruling; that a matter of fair administrative justice, investigations ought to have been undertaken; that the sale agreement under which the respondent claims the property was forged; that there is a risk that the orders allowing eviction would be executed on a different parcel of land as opposed to the one pleaded by the



respondent; that the judge of the ELC ignored existence of a notice of intention to act in person and justified a fraudulent consent purportedly entered into on her behalf.

3. It is the applicant's case that her right to fair hearing was limited on account of fraudulent representation by an advocate without her instructions; that her written submissions before the lower court were not considered; that the respondent informed the court that he purchased vacant land and is claiming Eldoret Municipality Block 13/886 which is a subdivision of Eldoret Municipality Block 13/530 which was owned by the applicant after 28<sup>th</sup> May 2011.
4. Opposing the application, learned counsel Ms. Jeruto for the respondent relied on the respondent's replying affidavit and submissions and urged that the application is overtaken by events as the applicant was evicted from the property. In his replying affidavit, the respondent Virji Naran Shivji, deponed that judgment in his favour in respect of the property was delivered on 29<sup>th</sup> August 2019 in which the applicant was compelled to specifically perform her obligations under a sale agreement dated 28<sup>th</sup> May 2011 and transfer the property to him; that her appeal against that judgment was dismissed by this Court in a judgment delivered on 29<sup>th</sup> January 2021 in Kisumu Civil Appeal No. 262 of 2019 despite which the applicant persists in filing numerous petitions and the matters complained of are res judicata.
5. We have considered the application, the affidavits and the submissions. The principles guiding the Court in an application of this nature were summed up in Stanley Kangethe Kinyanjui vs. Tony Ketter & others [2013] eKLR where the Court expressed that an application under Rule 5(2)(b) of the Court of Appeal Rules entails exercise of discretion upon filing of a notice of appeal; that such discretion is wide and unfettered; that it is incumbent upon the applicant to demonstrate that the intended appeal is arguable; and that the appeal will be rendered nugatory unless the orders sought are granted and the appeal ultimately succeeds. On arguability, the Court expresses that:  

“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.”
6. With those principles in mind, it is clear to us that the ruling the subject of the present application was consequential to, and gave effect to the judgment of the ELC delivered on 29<sup>th</sup> August 2019 in favour of the respondent in which the applicant was ordered to transfer the property to the respondent. As already noted, the applicant's appeal against that judgment, being Kisumu Civil Appeal No. 262 of 2019, was dismissed by this Court in its judgment delivered 29<sup>th</sup> January 2021. The applicant's subsequent application dated 23<sup>rd</sup> February 2021 for leave to appeal to the Supreme Court, being Civil Application No. 14 of 2021, was dismissed by this Court in a ruling delivered on 23<sup>rd</sup> September 2021. In the circumstances, the matters the applicant complains of, the subject of the intended appeal, have since been finally determined. We are persuaded that the intended appeal is not arguable.
7. In any event, it has been demonstrated that the impugned ruling has already been executed and the application is therefore overtaken by events.
8. In the result, the applicant's application dated 11<sup>th</sup> November 2022 fails and is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAKURU THIS 26<sup>TH</sup> DAY OF JULY, 2024.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**



**F. OCHIENG**

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**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**

