



REPUBLIC OF KENYA



KENYA LAW
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**Chemitei v Yano & 2 others (Civil Application E049 of 2023)
[2024] KECA 820 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 820 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E049 OF 2023
S OLE KANTAI, FA OCHIENG & WK KORIR, JJA
JULY 12, 2024**

BETWEEN

TRUPHENA J CHEMITEI APPLICANT

AND

PIUS KIPTUM YANO 1ST RESPONDENT

REUBEN KIPKEMOI KOGO 2ND RESPONDENT

JOSEPHAT KIPROTICH KIKONO 3RD RESPONDENT

(An application for stay of execution pending an intended appeal from the Judgment and Decree of the Environment and Land Court at Eldoret (E.O. Obaga, J.) dated and delivered on 8th September 2023 in ELC Case No. 12 of 2020)

RULING

1. The notice of motion of Truphena J. Chemitei (the applicant) dated 16th October 2023 is filed pursuant to rule 5(2)(b) of the *Court of Appeal Rules*. Through the application she seeks to stay the execution of the ruling dated 28th September 2023 as well as the judgment dated 24th April 2023 and the decree arising therefrom pending the hearing and determination of her intended appeal. The applicant also prays for the costs of the application. The application is premised on the grounds on its face as well as the averments in the applicant's supporting affidavit sworn on 16th October 2023 and the further affidavit of 29th November 2023. Pius Kiptum Yano, Reuben Kipkemoi Kogo and Josphat Kiprotich Kikono are the respective 1st, 2nd and 3rd respondents.
2. In a nutshell, the applicant avers that upon delivery of the impugned judgment on 24th April 2023, she immediately filed a notice of appeal against it. Subsequently, she moved the trial Court for stay of the execution of the judgment and in a ruling delivered on 28th September 2023 her application was allowed on condition that she deposited KSh. 1,000,000 within 21 days. The applicant avers that she



has been unable to abide by the condition set by the trial Court as she is without means owing to her advanced age.

3. The applicant deposes that her intended appeal is arguable and it is in the interest of justice that the substratum of appeal be preserved. It is her deposition that the respondents will not be prejudiced if the orders of stay are granted. It is also her deposition that the intended appeal raises issues of both fact and law and if the stay is not granted, the appeal will be rendered nugatory. Still on her argument that the appeal is likely to be rendered nugatory if the execution of the judgment is not stayed, the applicant avers that she risks being evicted at her advanced age despite all along having lived on the suit property which is the only place she calls home.
4. The 2nd and 3rd respondents opposed the application through an affidavit sworn by the 2nd respondent on 20th November 2023. They aver that the intended appeal is not arguable as no memorandum of appeal has been filed or annexed to the application. According to the 2nd and 3rd respondents, although the applicant was granted a conditional stay, she opted to let the timelines run out before filing the present application. It is their case that the applicant has not tendered any reasons to warrant interference by this Court with the exercise of discretion by the trial Court and that the applicant is not acting in good faith. The 2nd and 3rd respondents assert they reside on the suit property and use it for agricultural purposes, hence they stand to be prejudiced if the application is allowed. Further, that the applicant has continued to interfere with the suit property even after the delivery of the impugned judgment and is therefore not deserving of the orders sought. They consequently prayed that the application be dismissed with costs.
5. When the matter came up for hearing on the Court's virtual platform on 7th February 2024, learned counsel Mr. Gikandi appeared for the respondents. There was no appearance for the applicant. Since both parties had filed their written submissions, Mr. Gikandi opted to rely on the filed submissions which he briefly highlighted.
6. For the applicant, the firm of Ombego & Co. Advocates filed submissions dated 29th November 2023. Counsel commenced the submissions by referring to the case of *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* [2013] eKLR to highlight the two limbs that must be satisfied for execution to be stayed. Counsel submitted that because the applicant lives on the suit property then the appeal is arguable. According to counsel, the applicant is unable to comply with the condition attached to the order of stay of execution issued by the trial court. As to whether the appeal will be rendered nugatory, it was counsel's submission that if execution is not stayed, the applicant risks being evicted from the suit property which move will subject her family to psychological and economic torture. Counsel relied on the case of *Housing Finance Co. Kenya Ltd v. Sharok Kher Mohammed Ali Hirji & Another* [2015] eKLR to submit that undue hardship is one of the factors to be considered in an application for stay of execution of a judgment. Counsel therefore urged us to allow the application and award her costs.
7. In response, Mr. Gikandi filed submissions dated 21st November 2023. Counsel reiterated the grounds in the replying affidavit and submitted that the intended appeal is not arguable as the grounds in its support have not been stated. Counsel also argued that the applicant is abusing the discretion of this Court because she has an order staying execution but has simply declined to abide by its conditions. Further, that the applicant has not given any reason for not complying with the condition set by the trial Court. Counsel submitted that the applicant has not laid a basis to warrant this Court's interference with the trial Court's discretion to grant a conditional order. Reliance was placed on *Mbogoh v. Shab* [1968] EA 93, as cited in *Marti Telecommunications Ltd v. G4S Security Services (K) Ltd* [2015] eKLR, in support of the submission that an appellate court can only interfere with the decision of the trial Court where it is clearly wrong, or is based on the wrong principles, or has occasioned miscarriage of justice. Counsel ultimately implored the Court to dismiss the application with costs contending that



allowing the application will prejudice the respondents who will be denied an opportunity to enjoy the fruits of a valid judgment.

8. This being an application seeking stay of execution under rule 5(2)(b) of the *Court of Appeal Rules*, an applicant desirous of enjoying the discretionary intervention of this Court in the form of an order staying execution of the impugned judgment ought to establish that the appeal or intended appeal is arguable and that without the Court's intervention, the appeal if eventually successful, will be rendered nugatory. An arguable appeal is not one that must necessarily succeed but should not be an idle one. These twin principles were expressed in *Attorney General & another v. Eunice Makori & another* [2021] eKLR as follows:

“Undoubtedly, this Court has unfettered discretion under Rule 5(2) (b) to grant an order of stay. The principles guiding the exercise of such discretion are well settled. Firstly, an applicant has to demonstrate that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory.”

9. The first issue would then be whether the applicant has an arguable appeal. Upon perusal of the application, the supporting affidavit and the annexures thereto, we are unable to pinpoint any single ground upon which the applicant intends to raise in the appeal. Other than making an averment that the intended appeal is arguable, there is no mention in the applicant's pleadings as to what her intended appeal is all about. In the minimum, the applicant ought to have alluded to the points upon which she intends to fault the trial Court's judgment. Unfortunately, this is not the case and neither has a draft memorandum of appeal been attached to the application. Instead, she focuses on the reasons as to why failing to stay the execution of the impugned judgment is likely to render the intended appeal, if successful, nugatory. That explains why she avers that she has lived on the suit property for a long period of time. Another issue the applicant expended her energy upon is her assertion that she was not in a position to meet the conditions attached to the stay of execution order issued by the trial Court. All these averments do not aid her case for she has not given the Court grounds for determining the arguability of her intended appeal by indicating the grounds upon which she intends to fault the impugned judgment.
10. By concentrating on one of the twin principles upon which an application for stay of execution is founded, the applicant failed to discharge the onus placed upon her to demonstrate that her intended appeal is arguable. Indeed, discharging the requirement to demonstrate the onus of establishing the an arguable appeal exists, is the easiest among the twin principles. However, in this matter the applicant has not mentioned any ground of appeal and neither has she attached a memorandum of appeal to her application. In the circumstances, we agree with the 2nd and 3rd respondents that the applicant has fallen short of demonstrating that the intended appeal is arguable. Having so found, it would be a futile exercise to explore the second limb as to whether the intended appeal will be rendered nugatory if the application is declined. Afterall, the twin principles upon which an application for stay of execution rides are inseparable as they must both be established before the execution of a judgment can be stayed.
11. The upshot is that we find the applicant's motion to be without merit. The application is accordingly dismissed with costs to the 2nd and 3rd respondents as they are the only respondents who opposed the application by filing an affidavit.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF JULY 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

