



Chepkeres & 3 others v Kipngochoch Farm Company Ltd & 2 others (Civil Application E061 of 2023) [2024] KECA 799 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KECA 799 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E061 OF 2023
FA OCHIENG, JM MATIVO & WK KORIR, JJA
JULY 12, 2024**

BETWEEN

**JAPHETH K. CHEPKERES 1ST APPLICANT
OBADIAH K. KIPKORIR 2ND APPLICANT
JOHN MARK MOI 3RD APPLICANT
WELDON LABBAT 4TH APPLICANT**

AND

**KIPNGOCHOCH FARM COMPANY LTD 1ST RESPONDENT
NAKURU LAND REGISTRAR 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

(An application for stay of execution pending an intended appeal against part of the Judgment and Decree of the Environment and Land Court at Nakuru (A.O. Ombwayo, J.) delivered and dated 8th May, 2023 in EL&C No. 305 of 2012)

RULING

1. The notice of motion before us is filed pursuant to rules 5(2)(b) and 44(1) of the [Court of Appeal Rules](#) and is dated 25th July 2023. Therein, Obadiah K. Kipkorir, John Mark Moi, Japheth K. Chepkeres and Weldon Labbat, the respective 1st to 4th applicants seek to stay the judgment and orders of A. Ombwayo, J. dated 8th May 2023 in Nakuru Environment and Land Court (E&LC) Case No. 305 of 2012. The application is premised on the grounds on its face and buttressed by the supporting affidavit sworn by the 1st applicant.
2. Kipngochoch Farm Company Ltd, Nakuru Land Registrar and the Attorney General are the respective 1st to 3rd respondents.



3. The applicants aver that on 8th May 2023 the learned Judge of the E&LC entered judgment in favour of the 1st respondent declaring that the 1st respondent was the owner of the parcels of land numbers Solai/ndunguri Block 1/232 and Solai/ndunguri Block 1/235 (suit properties) and directing their eviction therefrom. It is the applicants' deposition that they have an arguable appeal as demonstrated in their annexed draft memorandum of appeal. They also aver that since they have lived on the suit properties for close to four decades, they will be greatly prejudiced if the orders of cancellation of title and eviction are executed. They express their apprehension that if stay is not granted, the 1st respondent will swiftly move to execute the orders of the E&LC and this will erode the substratum of the appeal as their titles will not only be cancelled but they will also be evicted. According to the applicants, allowing execution of the judgment to take place will result in losses that cannot be adequately compensated by an award of damages.
4. The application was opposed by the affidavit sworn on 1st August 2023 by Dickson K. Yatich, the Chairman of the 1st respondent. The application is opposed on the grounds that although the applicants were given a 90 days' grace period within which to vacate the suit premises, the period has since lapsed without their doing so. It is averred that an order staying the execution of the judgment will be prejudicial to the property rights of the 1st respondent's members. Further, that the continued occupation of the suit properties by the applicants will deny the 1st respondent an opportunity to run its activities and may result in its winding up. It is the 1st respondent's averment that the 1st applicant continues to let and occupy portions of the suit properties despite the parcels of land being registered in the name of the 1st respondent. In conclusion, the 1st respondent prays for the dismissal of the application, asserting that the applicants have not met the threshold for staying the execution of a judgment pending appeal.
5. When the application came up for hearing, learned counsel Mr. Odoyo appeared for the applicants while learned counsel Ms. Nduta appeared for the 1st respondent. The 2nd and 3rd respondents had not filed responses and neither were they represented during the hearing.
6. In the submissions dated 4th August 2023, counsel for the applicants referred to the case of *Reliance Bank Ltd v. Norlake Investments Ltd* [2002] eKLR for the proposition that an appropriate order will issue where there is an arguable appeal which is likely to be rendered nugatory should execution of judgement not be stayed. It is their assertion that this application has met the stated threshold. Counsel disclosed that the applicants have already filed Nakuru Civil Appeal No. E052 of 2024. As to whether that appeal is arguable, counsel submitted that among the issues raised in the appeal are whether the suit was bad for limitation of time and whether the 1st respondent had locus standi to institute the suit. Counsel cited *Dennis Mogambi Mong'are v. Attorney General & 3 others* [2012] eKLR and *Jonathan Kiplang'at Bor & 253 others v. Angata Baragoi Farmers Co-operative Society Ltd & 88 others* [2021] KECA 283 eKLR for the proposition that it is sufficient for a supplicant for an order of stay to only demonstrate that the intended appeal or appeal is arguable because an arguable appeal is not one that must succeed.
7. Turning to the question as to whether the appeal will be rendered nugatory if their application is declined, counsel argued that if the titles are revoked, the suit properties risk being sold to third parties, posing a difficulty to their recovery should the appeal succeed. According to counsel, an award of damages will not adequately compensate the applicants should their appeal succeed. He also submitted that the applicants have been in possession of the suit properties and if stay is not granted, they will be subjected to more suffering as their homes are situate on the suit properties. Counsel urged us to allow the application stating that is the only way of preserving the substratum of the appeal. On the



importance of preserving the substratum of the appeal, counsel relied on [*Teachers Service Commission v. Kenya Union of Teachers & 3 others*](#) [2015] eKLR.

8. In opposition to the application, counsel for the 1st respondent relied on the submissions dated 25th August 2023. According to counsel, the application has not met the threshold for the issuance of an order staying the judgment of the trial court pending appeal. Turning to the question as to whether the appeal is arguable, counsel submitted that the issue of the alleged defectiveness of the suit for being filed out of time was dealt with through a preliminary ruling which was never appealed and the issue is therefore res judicata. Consequently, counsel submitted that the appeal is not arguable.
9. As to whether the appeal, if successful, will be rendered nugatory, counsel submitted that the applicants have not demonstrated how the intended appeal would be rendered nugatory. Counsel cited [*Hassan Guyo Wakalo v. Straman East Africa Ltd*](#) [2013] eKLR to urge that the applicants must satisfy the dual limbs for orders they seek to issue. On the necessity to establish that in the absence of stay an appeal or intended appeal is likely to be rendered nugatory, counsel relied [*Stanley Kang'ethe Kinyanjui v. Tony Keter*](#) [2013] eKLR and [*Kenya Industrial Estate Ltd & Another v. Matilda Tenge Mwachia*](#) [2021] eKLR.
10. This is an application for stay of execution pending appeal brought pursuant to rule 5(2)(b) of the [*Court of Appeal Rules*](#). The applicants' notice of appeal dated 23rd May 2023 and filed on 26th May 2023 was regularized by a ruling delivered on 2nd February 2024 in Nakuru Civil Application No. E062 of 2023 which enlarged the time for filing the notice of appeal. Our jurisdiction to entertain the instant motion has therefore been properly invoked.
11. For an applicant to benefit from the Court's discretionary jurisdiction to grant stay pending appeal, one must demonstrate that he has an arguable appeal which is not frivolous or a mere judicial expedition and, that unless an order of stay is granted the intended appeal will be rendered nugatory. The twin principles must both be satisfied in order for the application to meet success. These principles were well expounded in [*Stanley Kang'ethe Kinyanjui v. Tony Keter*](#) (*supra*).
12. In dealing with the question as to whether the applicants' appeal is arguable, we must point out from the outset that it is sufficient if a single bona fide arguable ground of appeal is raised. Further, that an arguable appeal is not one that should necessarily succeed, but one which is not frivolous and ought to be argued fully before the Court. Again, this statement finds support in [*Stanley Kang'ethe Kinyanjui v. Tony Keter*](#) (*supra*).
13. The applicants in their notice of motion and supporting affidavit have alluded to two grounds of appeal, to wit, the question of limitation of time and the locus standi of the 1st respondent. Without saying much, it is apparent that these two grounds of appeal surely deserve their day before the Court. We therefore find that the applicants have demonstrated that they have an arguable appeal.
14. Having determined that the applicants have an arguable appeal, we move to consider whether the appeal is likely to be rendered nugatory if the application is declined. In [*Permanent Secretary Ministry of Roads & another v. Fleur Investments Limited*](#) [2014] eKLR, the Court painted a picture of an appeal that has been rendered nugatory thus:

“A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law.”



15. In *Stanley Kang'ethe Kinyanjui v. Tony Keter* (*supra*) the Court explained the parameters for determining whether an appeal is likely to be rendered nugatory by stating that:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
16. In this case, there is no dispute that the applicants are in possession of the suit properties. It was the averment of the 1st respondent that its members are 200 individuals and that it is on the verge of going bankrupt and being dissolved. The applicants on the other hand have averred that they have constructed their homes on the suit properties on which they have lived for several decades. This assertion has not been controverted by the 1st respondent and at the plenary their counsel disclosed that they had sought the assistance of the police with a view to evicting the applicants from the suit properties.
17. It is therefore apparent that were execution to happen, the applicants will be evicted from their homes of close to four decades. There is the risk, that the 1st respondent, whose financial soundness is said to be precarious may dispose part of the suit properties to keep afloat. It is on record that the suit properties are developed huge tracks of land. Failing to stay the execution would mean massive compensation to the applicants which the 1st respondent may not be in a position to meet considering its weak financial status which has been disclosed by its Chairman. The applicants are therefore correct that were the appeal to eventually succeed, recovering the suit properties might prove challenging. In the circumstances of this case, were the appeal to succeed, an award of damages may not adequately compensate the applicants for losses arising from the execution of the impugned judgment. Considering what we have stated, it follows that the appeal stands a risk of being rendered nugatory if the orders of stay are not granted.
18. On the issue of prejudice, we find that should the application be declined, the applicants are likely to be evicted from their homes. On the other hand, allowing the application will only delay the enjoyment of the fruits of the judgment by the 1st respondent. In those circumstances, it is apparent that greater prejudice will be suffered by the applicants should the application be dismissed.
19. We therefore find that the application dated 25th July 2023 has merit. The motion is allowed so that an order is issued staying execution of the judgment delivered in Nakuru E&LC Case No. 305 of 2012 pending the hearing and determination of the applicants’ appeal in Nakuru Civil Appeal No. E052 of 2024.
20. There being a pending appeal, we order that the costs of this application shall abide the outcome of that appeal.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF JULY, 2024

F. OCHIENG

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JUDGE OF APPEAL

J. MATIVO

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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

