



REPUBLIC OF KENYA



**Muema v Denholm (Civil Application E114 of 2023)
[2024] KECA 827 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 827 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E114 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
JULY 12, 2024**

BETWEEN

CATHERINE NDUKU MUEMA APPLICANT

AND

LINN ALEXANDER JAMES DENHOLM RESPONDENT

(Being an application for stay of execution pending appeal from the judgement of the Environment and Land Court at Mombasa (L. L. Naikuni, J.) delivered on 22nd November 2023 in the ELC Case No. 32 of 2022)

RULING

1. The applicant, Catherine Nduku Muema, filed an appeal before the Land and Environment Court at Mombasa being Civil Appeal No 32 of 2022 from the judgment and decree of the Chief Magistrate's Court at Mombasa delivered on 8th August 2022 in CM ELC Case No. 158 of 2020. The applicant did not exhibit the trial court's judgement in the Motion before us.
2. Dissatisfied with the judgement of the trial court, the appellant filed the appeal aforesaid and, by the judgment delivered on 22nd November 2023 by L.L. Naikuni, J., the appeal was dismissed. Once again we note that only the 1st page of the said judgement was exhibited. Aggrieved by the said decision, the applicant lodged a Notice of Appeal dated 24th November 2023 on 30th November 2023.
3. The applicant then moved this Court *vide* a Notice of Motion dated 21st December 2023 in which he seeks orders for stay of execution of the decree and judgment dated 22nd November 2023 in the Environment and Land Court Case No. 32 of 2022 pending hearing and determination of the appeal.
4. In support of the application, the applicant swore an affidavit on 21st December 2023 in which she averred that the judgement appealed from arose from an appeal filed by the respondent in which a judgement was delivered in favour of the respondent against the applicant; that the applicant filed an



application dated 5th December 2023 in the same appeal under certificate of urgency seeking stay of execution of the judgement dated 22nd November 2023; that the duty court on 5th December 2023 declined to certify the application as urgent and issue an interim order pending hearing inter-partes, but the matter was fixed for inter partes hearing on 24th January 2024; that, on 14th December 2023, the respondent in the company of hired police officers and goons went to the disputed suit property and, using crude weapons, broke the entrance door to gain access into the suit property with the intention of evicting the applicant (something missing) Whereupon a confrontation with members of the public ensued leading to injuries; that the applicant occupies the suit property with her family and has nowhere to go; that the suit property is yet to be transferred into the names of the respondent who has resorted to unprocedural means of evicting the applicant therefrom; that, unless the orders sought are granted, the appeal will be rendered nugatory, and yet the applicant has obtained copies of the proceedings and is in the process of preparing the record of appeal; that her intended appeal has high chances of success; and that, since she is the one in occupation and possession of the disputed suit property where she lives with her family and has no alternative place to go, the intended appeal will be rendered nugatory in the event that the respondent proceeds with the execution.

5. The application was opposed vide a replying affidavit sworn by the respondent on 15th January 2024 wherein he averred that the application was anchored on the wrong provisions of the law; that, since the applicant was no longer a resident of Kenya having moved to the United States of America in 2019, the supporting affidavit was fraudulent as it was not notarized by an Attorney in the United States of America where the applicant has relocated; that the applicant lacked proprietary interest and locus standi to bring the application having fraudulently and unlawfully transferred the suit property to her brother Douglas Mutua Muema on 18th August, 2022 while the appeal was pending before the High Court; that an order for stay of execution can only be anchored where there exists an appeal and not an intended appeal; that the intended appeal is capricious and frivolous; that the applicant did not demonstrate that there is an issue of substantial and irreparable loss; that the applicant misled the Court when she averred that the respondent stormed the suit property with hired goons and police; and that the applicant has frustrated his right to peaceful ownership and occupation of the suit property having fraudulently orchestrated unlawful and irregular transfer of his property to her name and subsequently to her brother's name in order to circumvent procedural justice.
6. The respondent disclosed that the applicant filed a similar application in the court below dated 5th December 2023, which is pending hearing and determination. He lamented that he will be greatly prejudiced if the orders sought are granted, the applicant having admitted that she had not contributed towards the acquisition of the suit land. He urged the Court, in the interest of justice, to dismiss the application with costs.
7. When the matter was called out for virtual hearing before us on 5th March 2024, learned counsel, Ms. Apiyo held brief for Ms. Omollo for the applicant while learned counsel, Mr. Collins Ondeng, appeared for the respondent. While Ms. Apiyo entirely relied on the applicant's written submissions dated 12th January 2024 and filed by the firm of Angeline Omollo & Associates, Mr. Ondeng briefly highlighted the submissions dated 29th February 2024 and filed by the firm of Mutisya Mwanzia & Ondeng Advocates.
8. The applicant's submissions rehashed the contents of the supporting affidavit and reiterated that the applicant has an arguable appeal with high chances of success based on the authority in Nairobi High Court Misc. Application No. E488 of 2021 – [Charles N. Ngugi v ASL Credit Limited](#) - whose relevance to the present application was not stated.



9. It was submitted on behalf of the respondent that, before the trial court, the respondent claimed proprietorship of the suit property being Plot No. 11616/III/MN situated in Mtwapa, which the applicant had fraudulently transferred in her name; that the trial court dismissed the respondent's suit with costs; that, on appeal in Civil Appeal No 32 of 2023, the ELC allowed the respondent's appeal; that the application is based on the Civil Procedure Rules rather than the Court of Appeal Rules and, hence, is dead on arrival; that the applicant filed two applications dated 5th December 2023 and 18th December 2023, which are still pending determination, and hence the present application amounts to an abuse of the process of the court; that there is no appeal on the basis of which the stay orders sought can be granted; that there is no demonstration that substantial and irreparable loss is likely to be occasioned to the applicant; that the applicant is no longer in occupation of the suit property having relocated to the United States of America; and that the respondent has taken over physical possession of the suit property from the caretakers who were in the property. In this regard, the respondent relied on the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] KLR to highlight the fact that mere execution, which is a lawful process, does not amount to substantial loss.
10. It was submitted that the Court ought to balance the interests of the applicant with those of the respondent and, in doing so, we were urged to find that the appeal will not be rendered nugatory; and that the applicant is hell-bent on continuing to frustrate the respondent's right to peaceful ownership and occupation of the suit property having fraudulently orchestrated an unlawful and irregular transfer of the suit property into her name and subsequently into her brother's name. We were urged to dismiss the application with costs.
11. We have considered the application, the submissions both written and oral, the cited authorities and the law.
12. For an applicant to succeed in the applications of this nature, he or she must have expressed an intention to appeal against the decision in question by filing a Notice of Appeal in order to properly invoke this Court's jurisdiction. The respondent's submission that this Court cannot entertain the application if the appeal has not been filed is, with due respect, misconceived. It should then be demonstrated that the appeal or intended appeal, as the case may be, is arguable, or as is often said, not frivolous and, in addition, that the appeal or intended appeal would be rendered nugatory, absent stay. Explaining the rationale for the twin principles, this Court in Peter Gathecha Gachiri v Attorney General and 4 Others Civil Application Nai 24 of 2014 (unreported) held that:

“Rule 5(2)(b) of the Rules of this Court on which the application is premised confers on us independent discretionary jurisdiction exercisable in accordance with the twin principles, namely, that the appeal must be shown to be arguable and, in addition, that the appeal, if successful, shall be rendered nugatory if stay is not granted. These principles have been developed by the court as a guide in the exercise of its discretionary power in determining an application premised on Rule 5(2)(b). The rationale in these principles is intended to balance two parallel propositions; first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and; secondly that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it in the next higher court (see Butt v Rent Restriction Tribunal [1982] KLR 417. See also Kenya Shell Ltd v. Kibiru & Another [1986] KLR 410...It is imperative for an applicant seeking an order under Rule 5(2)(b) to satisfy the Court on both principles. An applicant must show that the appeal is not frivolous and is arguable. It is now settled that an applicant need not demonstrate a plethora of arguable points. It is sufficient even if there be a solitary arguable point. An



applicant must further show that the appeal, if successful, will be rendered futile if stay is not granted.”

13. Regarding the first condition, this Court in *Stanley Kang’ethe v Tony Keter & 5 others* [2013] eKLR emphasised that it is sufficient if a single bonafide arguable ground of appeal is raised. See also *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004. Further, 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. See *Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
14. On the nugatory aspect, which an applicant must also demonstrate, the term ‘nugatory’ has to be given its full meaning since it does not only mean worthless, futile or invalid, but also means trifling. In addition, whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen, will be reversible, or if it is not reversible whether damages will reasonably compensate the party thereby aggrieved. See *Stanley Kangethe Kinyanjui v. Tony Ketter and 5 others (supra)*.
15. In this case, the applicant has not given any indication of the nature of her intended appeal whether by way of a draft memorandum of appeal or otherwise. The applicant has simply stated, without more, that its intended appeal has high chances of success. In a similar application where the applicant did not indicate the nature of the intended appeal, this Court in the case of *Priscilla Wambui Mathenge v Mary Wairimu Mathenge & Another* [2020] eKLR held that:

“The applicant did not annex a draft memorandum of appeal to this application. Therefore, we are not in a position to tell whether the grounds intended to be raised in the appeal are arguable or not. It is not enough for the applicant to just state that she was dissatisfied with the impugned ruling.”
16. The applicant has therefore failed to satisfy the first condition and, since the two conditions are conjunctive, once a party fails to satisfy the first condition, it becomes unnecessary to consider the second condition. However, in this case we do not see how the intended appeal will be rendered nugatory when the applicant is no longer in possession of the suit property and after she has disposed of her interest.
17. Before we make the final orders, we wish to state that, in applications of this nature, parties ought to disclose the nature of the judgement or order intended to be appealed against so as to enable the Court make an informed decision regarding the arguability of the appeal or intended appeal, and without which the application cannot be granted. It is not enough for the parties to simply state that they have an arguable appeal or to simply set out the grounds or intended grounds without disclosing the substance of the decision sought to be appealed against.
18. The result is that this application has no merit and is hereby dismissed with costs.
19. It is so ordered.

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

A.K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.



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JUDGE OF APPEAL
G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original
signed
Deputy Registrar

