



**Mbia v Nyaga & 3 others (Civil Application E026 of 2024)  
[2024] KECA 792 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KECA 792 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E026 OF 2024  
W KARANJA, LK KIMARU & AO MUCHELULE, JJA  
JULY 5, 2024**

**BETWEEN**

**BEATRICE GACHUGU MBIA ..... APPLICANT**

**AND**

**SUSAN MUTHONI NYAGA ..... 1<sup>ST</sup> RESPONDENT**

**MWANGANGI NYAGA ..... 2<sup>ND</sup> RESPONDENT**

**MURIUKI NYAGA ..... 3<sup>RD</sup> RESPONDENT**

**WANJIRU NYAGA ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for an injunction and stay of execution of the Judgment and Orders of the Environment of Land Court of Kenya at Embu (Angima, J.) dated and delivered on 1st October, 2020 in E. L. C. Case No. 10 of 2017)*

**RULING**

1. The applicant, Beatrice Gachugu Mbia, filed a notice of motion pursuant to Rule 5(2)(b) of the Court of Appeal Rules, 2022 seeking an order of stay of execution of the judgment and consequential orders of the Environment and Land Court (ELC) delivered on 1<sup>st</sup> October 2020, and the orders issued on 25<sup>th</sup> July 2022 “in relation to the Court Executive Officer being authorized to execute all documents in the place of the applicant herein to facilitate sub-division and transfer of ½ acre out of land parcel known as Embu/Kithunthiri/548, the Land Registrar being ordered to dispense with the production of the original title during the sub-division and the OCS, Kitiri Police Station providing security during the sub-division of the suit land parcel pending the hearing and determination of the appeal so file, Civil Appeal No. E032 of 2020”.
2. The applicant further prayed for an order of the Court to restrain the respondents from interfering with the suit parcel of land pending the hearing and determination of the appeal.



3. The application is supported by the grounds on the face of the notice of motion and the affidavit of the applicant.
4. In essence, the applicant states that she was aggrieved by the said decision of the ELC and had filed an appeal challenging the said decision before this Court. The applicant is of the view that the grounds of appeal that she has raised before this Court were weighty and raise serious issues which ought to be allowed to be ventilated on appeal before this Court.
5. The applicant is of the view that if an order of stay of execution is not granted, her appeal will be rendered nugatory. She was of the further opinion that if stay of execution is not granted, and her appeal succeeds, an award of damages will not be sufficient to remedy her imminent loss of the suit parcel of land.
6. The application is opposed. The 1<sup>st</sup> respondent, Susan Muthoni Nyaga, swore a replying affidavit in opposition to the application. She swore the said affidavit on her own behalf and on behalf of the other respondents who are her children. The 1<sup>st</sup> respondent gave a narration in her affidavit of how she came to be in possession of the suit parcel of land and how the appellant sought to evict her from the said parcel of land after filing succession proceedings in court without informing her.
7. The 1<sup>st</sup> respondent deposed that she was in agreement with the decision rendered by the ELC. She stated that by the time the ELC issued the subsequent orders directing that the suit parcel of land be sub-divided, and the portion decreed to her be excised therefrom, she had not been served with either the notice or the record of appeal. There was no order of stay preventing her from executing the decree of the ELC. She denied the applicant's assertion that she had undertaken any further construction on the suit parcel of land but reiterated that she had been in possession of the said portion of the suit parcel of land since 1995 and therefore there is no basis upon which the application sought by the applicant can be granted.
8. This Court has considered the written submissions filed by both the applicant and the respondents. This Court's jurisdiction when determining an application filed under Rule 5 (2) (b) of the Court of Appeal Rules is without doubt. In *Trust Bank Ltd. & Another v Investech Bank Ltd & 3 Others* [2000] eKLR, the Court held thus:

“The jurisdiction of the Court under Rule 5(2)(b) aforesaid is original and discretionary, and it is trite law that to succeed applicant has to show firstly, that his appeal or intended appeal is arguable, or put another way, it is not frivolous; and secondly, that unless he is granted a stay, the appeal or intended appeal, if successful will be rendered nugatory.”
9. In the present application, we have carefully perused the memorandum of appeal that the applicant wishes to canvass before this Court. Being a second appeal, the issues that the applicant can raise and canvass on appeal before this Court are of law only. We are not prepared at this stage of the proceedings to dismiss the said grounds of appeal as frivolous. We, therefore, hold that the grounds of appeal raise arguable issues which will be canvassed during the hearing of the appeal. The applicant has therefore satisfied the first limb to enable this Court grant the order of stay of execution under Rule 5 (2)(b) of the Court of Appeal Rules, 2022.
10. However, it is trite that for the applicant to succeed in her application, she must also satisfy the second limb. As regards the second limb, whether the appeal will be rendered nugatory if the order of stay of execution is not granted, we make the following observations; the respondents have been in possession of the suit parcel of land since 1995; the sub-division and excision of the said portion of ½ an acre was done pursuant to an order of the court when there was no order staying the execution of the same; and



finally, there is no danger or likelihood that the suit parcel of land will be sold because the respondents indicated that they are residing on the same. The said parcel of land is the only parcel of land that they own.

11. In light of the above observations, we are not persuaded that the appeal lodged by the appellant will be rendered nugatory. If applicant succeeds in her appeal, the parcel of land will be reverted back to her by an order of the court. Since she has not been in possession, she cannot suffer any loss or damage that cannot await the hearing and the determination of this appeal. We therefore hold that the applicant failed to establish the second limb on the aspect that she was supposed to prove; i.e. that the appeal would be rendered nugatory if the order of stay of execution craved for in the application is not granted.
12. From the foregoing it is clear that the application lacks merit and is hereby dismissed with costs to the respondents.

**DATED AND DELIVERED AT NYERI THIS 5TH DAY OF JULY, 2024.**

**W. KARANJA**

**JUDGE OF APPEAL**

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**L. KIMARU**

**JUDGE OF APPEAL**

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**A. O. MUCHELULE**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

