



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wanjohi v Karimi & 5 others (Civil Application
E052 of 2023) [2024] KECA 773 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KECA 773 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E052 OF 2023
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
JULY 5, 2024**

BETWEEN

CYRUS GITHINJI WANJOHI APPLICANT

AND

THOMAS THUKU KARIMI 1ST RESPONDENT

CATHERINE WAWIRA MURIUKI 2ND RESPONDENT

MURIUKI SAMSON MUREITHI 3RD RESPONDENT

WESTON KANYIRI MURIUKI 4TH RESPONDENT

JOSEPH KAMAU MURIUKI 5TH RESPONDENT

ISAAC MWANGI MURIUKI 6TH RESPONDENT

(An application for an injunction, stay of proceedings and/or conservatory orders against the judgment of the High Court of Kenya at Kerugoya (E. C. Cheron, J.) dated 25th May, 2023 in Kerugoya ELC No. 17 of 2019)

RULING

1. The applicant, Cyrus Githinji Wanjohi, being aggrieved by the dismissal of his suit by the Environment and Land Court (ELC), (E. C. Cheron, J.) in Kerugoya ELC no 17 of 2019 on 25th May, 2023 has timeously filed a notice of appeal. He also filed a notice of motion dated 6th June, 2023. The application has been expressed to be brought under Rule 5(2)(b) of the [Court of Appeal Rules](#) (this Court's Rules), Section 3A and 3B of the [Appellate Jurisdiction Act](#) and Rules.

Thomas Thuku Karimi, Catherine Wawira Muriuki, Muriuki Samson Mureithi, Weston Kanyiri Muriuki, Joseph Kamau Muriuki and Isaac Mwangi Muriuki are the 1st to 6th respondents respectively.



2. The application seeks orders in the main:
 - i). That this Court be pleased to issue conservatory orders on all that property known as LR no Kiine/Kibingoti/Nguguine/2683 (the suit property) pending the hearing and final determination of this application and/or intended appeal herein, and;
 - ii. That the costs of this application be provided for.
3. The application is premised on the grounds that the applicant has a good appeal with very high chances of success; that the intended appeal will be rendered nugatory if the orders sought are not granted; that the instant application has been brought without delay; that it is only just and fair that the orders sought be granted; and that the respondents will not suffer any prejudice if the orders sought are granted.
4. The application is supported by the affidavit sworn by the applicant in which he deposes inter alia that he has a good appeal with high chances of success on the grounds that the ELC erred in law and fact: by completely ignoring the applicant's suit before him on the issue of fraud. The applicant deposed that the ELC misdirected itself in failing to find: that the suit property ostensibly having been sold by private treaty, the consent of the area Land Control Board was paramount by dint of Section 6 of the Land Control Act; that the suit property having been sold by private treaty a written sale agreement was mandatory by dint of Section 38(1) of the Land Act; that the suit property having been sold in execution of a court judgment Order 22 Rule 70 (1) and (2) of the Civil Procedure Rules, 2010 ought to have been complied with; and that the suit property ought to have been re-advertised once the attempt to sell by public auction failed.
5. The applicant further deposed that the respondents are in occupation of the suit property and will therefore not suffer prejudice if the orders sought are granted; and that it is in the interest of justice that the orders sought are granted.
6. The application is opposed by the respondents vide the replying affidavit of Joseph Kamau Muriuki (Muriuki), the 3rd respondent on his own behalf and that of the other respondents. Muriuki deposed inter alia that the ELC delivered a judgment dismissing the applicant's claim; that the same was a negative order, which is not capable of being stayed; and that there is therefore nothing to stay in this matter.
7. Muriuki further deposed that he and the 4th and 5th respondents are the registered owners of the suit property; that they have had occupation of the suit property since 2011 when the applicant was evicted and the suit property transferred to their father and subsequently to them; that if the orders sought are issued, the respondents stand to suffer irreparably as the applicant has already threatened the respondents that he will obtain orders of this Court to gain entry into the suit property which will lead to the respondents being evicted which could cause a breach of peace; that the intended appeal has no chances of success; that the applicant has not shown that the intended appeal will be rendered nugatory absent stay; that the applicant vacated the suit property and the respondents are in occupation and are cultivating on the suit property and this Court is therefore being asked to act in vain as ownership of the suit property has already changed in favour of the respondents; and that the application is without merit and should be dismissed with costs in this Court and in the ELC.
8. Both parties filed written submissions, which they sought to rely on during the plenary hearing. The applicant contends that he has an arguable appeal with high chances of success. Further, that he has raised substantial grounds of appeal in his supporting affidavit all of which constitute arguable points of law. The applicant outlined the arguable points as being that the learned Judge ignored clear provisions of the law namely: S.6 of the Land Control Act, S.38 (1) of the Land Act, S.3 of the Contract



Act, S.104 of the Stamp duty Act, Order 22 Rule 70(1) of the Civil Procedure Rules, Order 22 Rule 70(2) of the Civil Procedure Act and Rules and Order 22 rules 69(1) of the Civil Procedure Act and Rules. Further that the ELC misdirected itself by holding that the suit before him was *res-judicata*.

9. On the question whether the appeal would be rendered nugatory, the applicant contends that he has demonstrated that he is bound to suffer substantial loss if the conservatory orders are not granted as the suit property might pass to 3rd parties thus rendering it out of the reach of this Court should the intended appeal succeed.
10. On their part, the respondents contended that the applicant has not demonstrated that he has an arguable appeal and that the grounds raised in the supporting affidavit are not arguable. Further, the respondents submit that the instant application lacks merit on the grounds that the applicant does not have an arguable appeal against the impugned judgment; and that the appeal will not be rendered nugatory in the unlikely event that it succeeds and the orders sought are not granted. Counsel urged that an award of damages would be an adequate remedy.
11. The respondents further contend that the applicant has not demonstrated that the respondents are incapable of paying such damages as may eventually be ordered if the applicant is successful on appeal. For these reasons, the respondents submit that the applicant has not demonstrated that the intended appeal will be rendered nugatory if the intended appeal succeeds, and the orders sought are not granted. Counsel urged this Court to dismiss the application.

Determination

12. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction under Rule 5(2) (b) of this Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the intended appeal will be rendered nugatory.
13. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled. This Court in Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to 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.

These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
14. These principles were summarized by this Court (differently constituted), in the case of Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.
15. In the instant application, the applicant seeks an injunction, stay of proceedings and/or conservatory orders against the judgment of the ELC. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be considered on its merits. The position in law is that this depends on whether or not what is sought to



be stayed if allowed to happen is irreversible; or if it is not irreversible whether damages will reasonably compensate the party aggrieved. See *Reliance Bank Ltd v Norlake Investments Limited* (2012) 1 EA 227.

16. The respondents contend that the intended appeal will not be rendered nugatory if the orders sought are not granted and the intended appeal succeeds. From the record, the 3rd, 4th and 5th respondents are in occupation of the suit property and are the registered proprietors of the suit property. The applicant did not controvert the respondent's contention that he moved out of the suit property in 2011 when he was evicted or that the 3rd, 4th and 5th respondents are the registered proprietors of the suit property. The applicant has also not proved that payment of damages will not be an adequate remedy in the event that the intended appeal succeeds and the orders sought are declined. It is notable that the applicant does not suggest, in any event that the respondents are incapable of paying such damages. In the circumstances, we find that the intended appeal will not be rendered nugatory, if the orders sought are not granted and the appeal succeeds. One limb of Rule 5(2)(b) of this Court's Rules has therefore not been established.
17. It is well settled that for an application under Rule 5(2)(b) of the [Court of Appeal Rules](#) to succeed, the applicant must satisfy both limbs of the twin principles. (See: [Republic v Kenya Anti-Corruption Commission & 2 others](#) (2009) KLR 31, and *Reliance Bank Ltd v Norlake Investments Limited* (2012) 1 EA 227. Having failed to satisfy one limb of Rule 5(2)(b), we need not proceed to determine the 2nd limb on whether the intended appeal is arguable.
18. In the circumstances, the instant application fails to meet the threshold set for applications of this nature. In the result, the same is dismissed with costs to the respondents.
19. Orders accordingly.

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

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

