



REPUBLIC OF KENYA



**Mailanyi v Kigea & another (Civil Application E056 of 2024)
[2024] KECA 1085 (KLR) (21 August 2024) (Ruling)**

Neutral citation: [2024] KECA 1085 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E056 OF 2024
W KARANJA, J MOHAMMED & LK KIMARU, JJA
AUGUST 21, 2024**

BETWEEN

NAHASHON MWETERI MAILANYI APPLICANT

AND

JUSTER NCUURUBI MBIRITHIA 1ST RESPONDENT

GERVASIO MURIIRA KIGEA 2ND RESPONDENT

*(Application for stay of Execution of the Judgement and Decree of
the Environment and Land Court of Kenya at Meru (C.K. Nzili,
J) dated 6th March, 2024 in Meru ELCA Case No. 26 of 2023)*

RULING

1. Nahashon Mweteri Mailanyi, the applicant, being aggrieved by the judgment of the Environment and Land Court (ELC), (C. K. Nzili, J.) in Meru ELCA No.26 of 2023 delivered on 6th March, 2024 timeously filed a Notice of appeal. He also filed the Notice of motion dated 29th June, 2024, now under consideration. The application is expressed to be brought under Rule 5(2)(b) of the [Court of Appeal Rules](#) (this Court's Rules). Gervasio Muriira Kigea and Juster Ncuurubi Mbirithia are the 1st and 2nd respondents respectively.
2. The application seeks in the main, an order that this Court be pleased to stay execution of the decree issued in Meru ELC Appeal No. 26 of 2023 pending the hearing and determination of the intended Appeal.
3. The application is premised on the grounds that: the applicant faces a threat of imminent execution of the decree passed in Meru ELC Appeal No. 26 of 2023 and unless an order for stay of execution of the said decree is granted, the applicant shall suffer irreparable loss and that the intended appeal will be rendered nugatory.



4. The application is supported by the affidavit sworn by the applicant in which he deposes, *inter alia*, that; the status quo relating to the suit land was maintained throughout the trial and that he is in occupation; that he is apprehensive that the respondents will proceed to execute the said decree unless this Court intervenes and grants an order for stay of execution pending hearing and determination of the intended appeal; that he has been in full and uninterrupted occupation of the land for 17 years and if the said decree is implemented he will be evicted and the land transferred to his detriment; that the suit land P/No.6964 Antuamburi Adjudication Section is part of larger development which comprises a school, Mwema Junior Academy with over 600 pupils and is adjacent to an ongoing development of a multi-purpose dormitory to serve the growing needs of the school; and that execution of the decree will greatly interfere with the existing and ongoing developments on the land and frustrating recovery thereof should the appeal be successful.
5. The application is opposed by the respondents vide the replying affidavit of Gervasio Muriira Kigea (Gervasio), the 1st respondent on his own behalf and that of the 2nd respondent. Gervasio deposed, *inter alia*, that the applicant has failed to demonstrate that he has an arguable appeal with any chances of success as he has failed to attach a draft memorandum of appeal to afford this Court an opportunity to examine the same; that the application is brought in bad faith which is a tactic to further deny them access to the property which is rightfully theirs and yet the applicant continues to utilize the same to their detriment and that if any orders are issued they will be disadvantageous to them; that the applicant has failed to demonstrate what loss and damage he will suffer in the event that the orders are denied. Gervasio further deposed that the applicant has failed to offer or suggest any security to warrant the grant of the orders he has sought.
6. Both parties filed written submissions, which they sought to rely on during the plenary hearing. The applicant contends that his appeal raises pertinent and plausible issues of law which are arguable. Further, that he has raised substantial grounds of appeal in his supporting affidavit all of which constitute arguable points of law.

The applicant submits that the finding of the ELC that the transfer was forged, fraudulent and was illegal was not supported by any evidence is an arguable point.
7. 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 an order of stay is not granted as he may be evicted from the suit property and that the suit property might pass to 3rd parties thus rendering it out of the reach of this Court should the intended appeal succeed.
8. On the other hand, the respondents 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 it succeeds.
9. We have considered the applicant's motion, the contending affidavits and the submissions filed by the parties. The principles upon which this Court exercises its unfettered discretion to grant a stay of execution, stay of proceedings or an order of injunction are well settled. The applicant should satisfy the Court that the appeal or the intended appeal is not frivolous, that is to say, that, the appeal or intended appeal is arguable and, secondly, that unless the application is granted the results of the appeal, if successful would be rendered nugatory. (See *Madhupaper International Limited v Kerr* [1985] KLR 840.
10. On the limb on arguability, we note that an arguable appeal is not necessarily one that will succeed, but one that deserves to engage the Court's mind and raise issues that call for determination by the Court.



It is also apposite to note that it is not mandatory for an applicant in an application such as the one before us to attach a draft memorandum of appeal, as long as the grounds of appeal can be deciphered from the face of the application and the applicant's depositions. We are persuaded that the intended appeal is not frivolous.

11. As regards the nugatory aspect, the applicant has demonstrated that the decree issued by the learned Judge of the ELC includes an order for the applicant to give vacant possession of the suit property to the respondents or else he be forcibly evicted. It is obvious that if the decree is executed, the applicant will be dispossessed of the suit property and this will not only prejudice him but can also lead to the suit properties being alienated and falling into the hands of third parties. We note that the applicant has been in occupation for the last 17 years, and if he was to be evicted, and his appeal later succeeds, the prejudice suffered may be irreparable.
12. We are satisfied that the applicant has demonstrated both principles of arguability and the nugatory aspect. Accordingly, we issue an order of stay of execution on the condition, however, that the record of appeal be filed and served within 60 days from the date of this ruling, failure to which the order of stay shall automatically stand vacated. The appeal to thereafter be given a hearing date on priority basis.
13. We direct that the costs of the application shall be in the appeal.

DELIVERED AND DATED AT NYERI, THIS 21ST DAY OF AUGUST, 2024

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

