



Ong'onga & 39 others v Tanui (Sing as the administrator of the Estate of Kaptingei Chemwor - Deceased) & 5 others (Civil Application E008 of 2023) [2024] KECA 1137 (KLR) (19 August 2024) (Ruling)

Neutral citation: [2024] KECA 1137 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E008 OF 2023
FA OCHIENG, LA ACHODE & WK KORIR, JJA
AUGUST 19, 2024**

BETWEEN

**BENTA AKEYO ONG'ONGA 1ST INTENDED APPELLANT
WILLIAM OMOLLO OHULO 2ND INTENDED APPELLANT
FREDRICK W WANJALA 3RD INTENDED APPELLANT
DAVID SILA ASITIWA 4TH INTENDED APPELLANT
BENSON AKOYI OSIMB 5TH INTENDED APPELLANT
MARY MOSE 6TH INTENDED APPELLANT
JERMAH KOECH 7TH INTENDED APPELLANT
ENOKA OLWOCH ALOO 8TH INTENDED APPELLANT
ANASTACIA A OLUOCH 9TH INTENDED APPELLANT
MARGARET A MUTHIGA 10TH INTENDED APPELLANT
DR JOSEPH K GITHOGO 11TH INTENDED APPELLANT
JULIUS A ONDUU 12TH INTENDED APPELLANT
HESBON O OCHOLLA 13TH INTENDED APPELLANT
FREE APOSTOLIC CHURCH 14TH INTENDED APPELLANT
ROSE J ANYANGO 15TH INTENDED APPELLANT
HELLEN W CHEGE 16TH INTENDED APPELLANT
WALTER OKUMU OKOL 17TH INTENDED APPELLANT
JACQUELINE NJERI KAMAU 18TH INTENDED APPELLANT**



ELIAS OTIENO MBEWA	19 TH INTENDED APPELLANT
MARY JUNGE	20 TH INTENDED APPELLANT
MUHIA KAMAU	21 ST INTENDED APPELLANT
ERICK K NGEIYWA	22 ND INTENDED APPELLANT
BEATRICE JUMA NUTA	23 RD INTENDED APPELLANT
AUGUSTINE MAKOKHA	24 TH INTENDED APPELLANT
ANDREW O OBONYO	25 TH INTENDED APPELLANT
WARUINGI KIBINU	26 TH INTENDED APPELLANT
DANIEL K ROTICH	27 TH INTENDED APPELLANT
JONATHAN K ROTICH	28 TH INTENDED APPELLANT
DICKSON MBUYA AKUTA	29 TH INTENDED APPELLANT
JOHN KIMUTAI RUTTO	30 TH INTENDED APPELLANT
FRANCIS W KAMONDIA	31 ST INTENDED APPELLANT
GIBSON KABUI KAMURU	32 ND INTENDED APPELLANT
LUCY W GITHINJI	33 RD INTENDED APPELLANT
JOSEPH N NJOROGE	34 TH INTENDED APPELLANT
LUCIA N MWANIKI	35 TH INTENDED APPELLANT
HENRY NGARI CHEGE	36 TH INTENDED APPELLANT
JAMES KIMANI MIRITU	37 TH INTENDED APPELLANT
HEM SINGH BHAMRA	38 TH INTENDED APPELLANT
APOLLO MWANGI	39 TH INTENDED APPELLANT
SINGH ENG WORKS	40 TH INTENDED APPELLANT

AND

RAEL JEBET TANUI (SING AS THE ADMINISTRATOR OF THE ESTATE OF KAPTINGEI CHEMWOR - DECEASED)	1 ST RESPONDENT
SUSAN CHERUBET CHELGUI & DAVID K CHELUGUI (SUED AS THE ADMINITRATORS OF THE ESTATE OF LATE NOAH K CHELUGUI - DECEASED)	2 ND RESPONDENT
STANLEY ARAP METO	3 RD RESPONDENT
RAMJI D VEKARIA	4 TH RESPONDENT
ATTORNEY GENERAL	5 TH RESPONDENT
NATHANIEL K LAGAT	6 TH RESPONDENT



(Being an application under Rule 5(2) (b) of the Court of Appeal Rules 2022 for stay pending the hearing and determination of the intended appeal from the Judgment of the Environment and Land Court at Eldoret (Ombwayo J) dated 31st March 2022 in Eldoret ELC Case No 404 of 2013)

RULING

1. Hesbon Otieno Ocholla, the 13th applicant and chairman of the residents living in the suit property, filed this motion dated 3rd March 2023 on behalf of the other applicants under Articles 159 2 (d), 164 of the Constitution of Kenya, 2010, Section 3 and 3A of the Appellate Jurisdiction Act Cap 9 and Rules 1(2), 5(2)(b) of the Court of Appeal Rules 2022 seeking for substantive orders of:
 - i. Stay of execution pending the hearing and determination of this application inter parties against the execution of the Judgment and Decree of Hon Justice Antony O. Ombwayo in the Eldoret ELC Case No 404 of 2013; *Rael Jebet Tanui and 40 Others v Susan Cherubet Chelugui and 4 Others*
 - ii. Stay of execution pending the hearing and determination of the Intended Appeal against the execution of Judgment and Decree of Hon. Justice Anthony O. Ornbwayo delivered on the 31st of March 2022 in the Eldoret ELC Case No, 404 of 2013; *Rael Jebet Tanui and 40 Others v Susan Cherubet Chelugui and 4 Others*.
2. The application is premised on the grounds on its face and the supporting affidavit of even date sworn by the Applicant.
3. The judgment was delivered on 31st March 2022 by Ombwayo J in the Eldoret ELC Case No, 404 of 2013 dismissing the Applicants' Claim and allowing the 4th Respondent's Counter Claim. The learned Judge issued a declaration that the Applicants herein are trespassers on the 4th Respondent's land L.R No. Eldoret Municipality Block 15/1816 (Suit Property), therefore ordering the Applicants to vacate within 60 days of the judgment, failure to which, eviction orders shall be issued.
4. Dissatisfied with the judgment, the Applicants filed a Notice of Appeal on 7th April 2022 and also moved the trial court for stay of execution orders, pending appeal vide an application dated 24th of May 2022. On 16th February 2023, Onyango J granted a stay of execution of the judgment on condition that the applicants herein furnish security of Kenya Shillings Ten Million within 30 days, failure to which the stay order would automatically lapse.
5. In this appeal, the applicants state that compliance with the said order is not tenable for reasons that: the judgment did not grant a monetary decree and therefore, the condition of stay ought not to be monetary: the ruling did not indicate how much each of the 42 applicants was to deposit as security: the applicants are not able to raise the said Ten Million shillings within the time frame ordered by the court.
6. The applicants state that they are in active occupation of the suit property, whereon they have made massive developments, and it is not humanly possible to vacate the suit premises within 60 days as ordered by the trial court.
7. The applicants state that they have an arguable appeal with good chances of success. The time line within which they were to deposit the security lapsed on 15th March 2023, necessitating this application and if it is not allowed, the intended appeal will be rendered nugatory as the Applicants will have been



- pushed out of their businesses and homes. Furthermore, the Respondents will not suffer any prejudice if the orders are issued.
8. The 4th Respondent, in a replying affidavit dated 17th March 2023 aver that the Applicants have not demonstrated that the appeal would be rendered nugatory, as there is no evidence that they are in occupation of the suit property. They referred to a site visit by the trial court, where it was noted that, save for a few encroachments including a church and an academy, the parcel of land was substantially vacant.
 9. The Respondent avers that the Applicants disregarded the doctrine of lis pendens, as they leased out or sold the areas which they originally occupied to 3rd parties, after the site visit and prior to the judgment. This was in a bid to defeat the judgment and the eviction process. Additionally, the process server instructed by Chartless Auctioneers had difficulty effecting service upon the Applicants, as they were not physically on the ground.
 10. The Respondents argue that the Applicants' own survey report in support of their application for stay of execution in the superior court, shows that the 1st, 2nd, 3rd, 4th, 10th, 11th, 17th, 18th, 36th and 37th Applicants are actually in occupation of a different parcel of land being, L.R No. Eldoret Municipality Block 15/1813. Thus, they have no locus standi over the suit property and the application is incompetent. The 4th Respondent has been diligently paying rates and rent on the suit property to the exclusion of the Applicants, as evidenced by the clearance certificates. The Applicants do not therefore, have an arguable appeal.
 11. The Applicants' written submissions, filed through Munyaga Githaiga Advocates LLP are dated 10th March 2023. They submit that, the 2nd Respondent had no title to pass on to the 3rd Respondent and in turn, the 3rd Respondent had no lawful title to pass to the current owner the 4th Respondent. Therefore, the question of credibility and legitimacy of proprietorship provides a ground for an arguable appeal. They refer to the case of *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union Kenya* [2015] eKLR; to state that the order for stay of execution is deserved.
 12. The Applicants argue that granting the orders sought would mitigate the risk of eviction from the suit property, which would otherwise, occasion them substantial loss, irreparable harm and hardship. This is considering that they have occupied the suit property since 1988 having bought the suit property in 1984. They state that they lack the capacity to comply with the Decree, as they are not in a position to raise and deposit the sum of Ten Million Shillings within the required timeframe.
 13. The 2nd Respondent filed written submissions dated 5th August 2023, through Kibichiy & Co Advocates, while the 3rd and 4th Respondents filed theirs dated 20th March 2023 through Omollo Rotich Barasa & Co. Advocates. The submissions were centered around the argument that the Applicants failed to demonstrate an arguable appeal as they are not in occupation of the suit property. Additionally, the Applicants' attempts to alienate the property to 3rd parties to defeat the judgment is an abuse of the Court process. They relied on the case of *Gulf Timber & Hardware Supplies Limited v Ngaruiya & 5 others* (Civil Appeal E203 of 2021) [2022] KECA 87 (KLR) to illustrate this point.
 14. Our jurisdiction under Rule 5(2)(b) is original, independent, and discretionary. It must however, be exercised judiciously and rationally, and not out of impulsiveness or sympathy. The unfettered discretion is predicated on principles that are now well-settled. The applicants must prove first, that they have an arguable appeal. That is, that the intended appeal is not frivolous, or an abuse of the court. Second, that unless the order for stay of execution is granted the intended appeal will be rendered



nugatory. This Court in *Multimedia University & Another v. Professor Gitile N. Naituli* (2014) eKLR, restated these principles as follows:

" When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2)(b), the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of *Stanley Kangethe Kinyanjui v. Tony Ketter & Others* [2013] eKLR as follows:

- i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court.
 - v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
 - vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
 - vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
 - viii. An applicant must satisfy the Court on both the twin principles.
 - ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
 - x. 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.
 - xi. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.
 - xii. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling."
15. On whether the appeal is arguable, we keep in mind that it is sufficient if a single bona fide arguable ground of appeal is raised. The applicants' main issue for determination in the intended appeal revolves around who the rightful owner of the suit property is. Without analyzing the grounds lest we embarrass the bench that will be seized of the appeal, it is our considered view that this is not an idle ground and it ought to be given a chance to be heard.
16. On the second limb, it is argued that if the orders sought are not granted and the appeal succeeds, it will be rendered nugatory and the applicants will face substantial loss and harm. We are satisfied that if the stay is not granted, the 4th respondent, in the exercise of proprietorship rights over the property, will execute the judgment of the trial court and the intended appeal, if successful, will be rendered nugatory. It is therefore, necessary for the order of stay of execution to issue, so as to preserve the status quo ante regarding the suit property.



17. In light of the foregoing analysis, we are satisfied that the application dated March 3, 2023 has merit and is therefore, allowed. The costs of this application will abide the outcome of the intended appeal.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF AUGUST, 2024

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

