



REPUBLIC OF KENYA



KENYA LAW
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**Mboroki v M'Mboroki (Civil Application E089 of 2023)
[2024] KECA 1310 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1310 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E089 OF 2023
W KARANJA, J MOHAMMED & LK KIMARU, JJA
SEPTEMBER 27, 2024**

BETWEEN

GERRARD MARANGU MBOROKI APPLICANT

AND

PATRICK MURIUKI M'MBOROKI RESPONDENT

*(Application for stay of Execution of the Judgment and Decree of
the Environment and Land Court of Kenya at Meru (C.K. Nzili,
J.) dated 22nd March, 2023 in ELC Case No. 20 of 2020 (O.S))*

RULING

1. Gerrard Marangu Mboroki, the applicant, being aggrieved by the judgment of the Environment and Land Court (ELC), (C. K. Nzili, J.) in Meru ELC No. 20 of 2020(O.S) delivered on 22nd March, 2023 timeously filed a notice of appeal. He also filed the Notice of Motion dated 8th June 2023, 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). Patrick Muriuki M'Mboroki is the respondent.
2. The application seeks in the main, an order that this Court be pleased to stay execution of the decree issued in Meru ELC No.20 of 2020 (O.S.) pending the hearing and determination of this 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 No. 20 of 2020 (O.S.) and unless an order for stay of execution of the said decree is granted, he stands to lose ½ of L.R. No. Nkuene/Ukuu/844 which was gifted to him during the lifetime of both the parties' father, 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 respondent was awarded ½ share of L.R. No. Nkuene/Ukuu/844 by the Judgement of the



court on 22nd March,2023 which he is aggrieved with and has since filed the instant appeal and he believes that he has an arguable appeal as shown by his grounds of appeal; that he is apprehensive that the respondent 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 20 years and that he attaches great sentimental value of the suit property having been granted the same by his father as a gift when he was alive and that he has extensively developed the same; that he is willing to have an order of inhibition registered on the suit land and to surrender the original title deed to the registrar of the court as a sign that he is ready to preserve the suit land as it is pending the hearing and determination of the this Appeal.

3. The application is opposed by the respondent vide the replying affidavit sworn on 28th July 2023 wherein he deposes, inter alia, that the applicant is his brother and has failed to demonstrate that he has his own undisputed land being L. R No. Nkuene/Ukuu/843 which was gifted to him as a gift inter vivos by their father; that L. R No. Nkuene/Ukuu/844 which is the suit property was never meant for the applicant since he got his equal share from their late father's being Land Parcel No. 246; that the applicant grows subsistence crops on half of the suit property and that he has no permanent developments thereon and that the applicant has no arguable appeal with any chances of success and that the appeal will not be rendered nugatory.
3. Both parties filed written submissions, which they sought to rely on during the plenary hearing. The said submissions have expounded the depositions in the rival affidavits.
4. We have considered the application, the rival affidavits and submissions filed by the parties. 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- vs- 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.”

3. We have carefully perused the record of Appeal and more particularly the memorandum of appeal that the applicant wishes to canvass before this Court. We note that the parties herein are brothers and the bone of contention is whether the disputed portion was transferred to the applicant to hold in trust or it was a gift inter vivos given to him absolutely by his father. That is an issue that calls for determination by this Court on appeal. We do not think it is a frivolous one. All the applicant needed to do is demonstrate that he has one arguable point. Bearing in mind that an arguable appeal is not necessarily one that will succeed, we are prepared to find that the appeal before the Court is arguable. The applicant has, therefore, satisfied the first limb on arguability.
4. However, it is trite that for the applicant to succeed in his application, he must satisfy both arguability and the nugatory aspect. (See *Stanley Kangethe -vs- Tony Keter & 5 others* [2015]eKLR). 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; that the suit property L. R No. Nkuene/Ukuu/844 was ancestral land and it arose from the subdivision of L. R No. Nkuene/Ukuu/246; that pursuant to the judgement of the trial court on 22nd March, 2023, the respondent took possession of ½ acre of the suit property when there was no order staying the execution of the same and as such both the applicant and the respondent are in occupation of the same; and finally there is no danger or likelihood that the suit property will be sold because the respondent indicated in his replying affidavit that he has no intention of disposing of the land, which in any case is still in the applicant's name.



- 3. In light of the above observations, we are not persuaded that the appeal lodged by the applicant will be rendered nugatory if the order sought is not granted. If the applicant succeeds in his appeal the parcel of land will be reverted back to him.
- 4. We, therefore, find that the applicant has failed to establish the second limb as required under rule 5(2)b of the Court of Appeal Rules in order to reach the required threshold for his application to succeed. Consequently, the application is for dismissal. We dismiss it with costs in the appeal.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

