



**Embu Resort Limited & another v Kabutu & 3 others (Civil Appeal (Application) E103 of 2023) [2024] KECA 1237 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1237 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) E103 OF 2023  
W KARANJA, J MOHAMMED & LK KIMARU, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**EMBU RESORT LIMITED ..... 1<sup>ST</sup> APPLICANT**

**BENSON G MUTAHI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**RAPHAEL GICHOVI MUNENE KABUTU ..... 1<sup>ST</sup> RESPONDENT**

**MUSYOKI MUNENE KABUTU ..... 2<sup>ND</sup> RESPONDENT**

**NJAGI MUNENE KABUTU ..... 3<sup>RD</sup> RESPONDENT**

**MUCHIRA MUNENE KABUTU ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for an injunction and stay of execution of the judgment and decree of the Environment and Land Court at Meru (L. Mbugua, J.) dated 23rd February, 2022 In ELC Case No. 74 of 2019)*

**RULING**

**Background**

1. Before us is a notice of motion dated 14<sup>th</sup> October, 2023 filed by Embu Resort Limited and Benson G. Mutahi (the 1<sup>st</sup> and 2<sup>nd</sup> applicants) expressed to be brought under Rules 5(2)(b) and 43 of the [Court of Appeal Rules, 2022](#) (this Court’s Rules). The application seeks orders in the main:
  - i. Spent
  - ii. Spent
  - iii. Spent



- iv. That this Court be pleased to issue a temporary injunction against the respondents restraining by themselves, their agents and/or servants or anyone claiming under them from subdividing, transferring, alienating and/or otherwise interfering with the applicants' rights in any way on L.R. Mbeere/Kirima/3184 (the suit land) or any part thereof pending the hearing and determination of this appeal;
- v. That this Court be pleased to issue an order of stay of execution of the decree/judgment dated 23<sup>rd</sup> February, 2022 pending the hearing and determination of the appeal herein;
- vi. That this Court be pleased to order that the status quo on occupation of the suit land as at the time of the delivery of judgment in the Environment and Land Court (ELC) be maintained pending the hearing of the appeal herein;
- vii. That in the alternative to the foregoing, this Court be pleased to order that this appeal be set down for hearing on priority basis; and
- viii. Costs of this application.

Raphael Gichovi Munene Kabutu, Musyoki Munene Kabutu, Njagi Munene Kabutu and Muchira Munene Kabutu are the 1<sup>st</sup> to 4<sup>th</sup> respondents respectively.

2. The application is based on the grounds, inter alia:
  - a. That on 23<sup>rd</sup> February, 2022 the ELC delivered a judgment and issued a decree whose effect will drastically change the ownership rights over the suit land which is registered in the name of the 1<sup>st</sup> applicant.
  - b. That the applicants were aggrieved by the said judgment and decree and filed an appeal before this Court.
  - c. That the applicants' appeal is not frivolous and may be rendered nugatory unless stay orders are issued.
  - d. That the respondents are in the process of executing the decree whereas this appeal is still pending.
  - e. The respondents have further threatened and are actually in the process of transferring the suit land to other persons who are not party to this case.
  - f. That the respondents have taken the entire river frontage which was the main reason why the 1<sup>st</sup> applicant purchased the suit land herein.
3. The motion is supported by a sworn affidavit of John Gichu Muraya, a director of the 1<sup>st</sup> applicant rehashing the grounds on the face of the application and annexing evidential documents including a draft memorandum of appeal averring that it demonstrates an arguable appeal that will be rendered nugatory if the orders sought are denied. The grounds of appeal raised are inter alia that the ELC erred in: declaring a trust in favour of the respondents; ordering a transfer of 28 acres of the suit land to the respondents; and in failing to hold that the relationship between the applicants and the respondents was very peculiar and could not give rise to a trust over the suit land.
4. A brief background of the matter will help place the application in context. The 2<sup>nd</sup> applicant filed suit vide a plaint against the respondents seeking their eviction from the suit land. The respondents filed an Originating Summons in Kerugoya Court being ELC No. 809 of 2013 (OS) against the 2<sup>nd</sup> applicant seeking a declaration that they are entitled to 60 acres of the suit land which is approximately 100 acres.



The two suits were consolidated. The 1<sup>st</sup> applicant bought the suit land from the 2<sup>nd</sup> applicant and was thus enjoined in the suit.

5. The 2<sup>nd</sup> applicant's case was that he was the registered owner of the suit land having bought it from Ikambi Clan. The respondents denied the 2<sup>nd</sup> applicant's claim and maintained that they were on the suit land by right having occupied it for over 50 years and sought for a declaration that they are entitled to ownership of the land by virtue of the long occupation; or alternatively, the 2<sup>nd</sup> applicant be declared to hold 60 acres of the suit land in trust for them. From the record, the 1<sup>st</sup> applicant was enjoined in the suit on the ground that it is the registered owner of the suit land being a purchaser for value and in good faith from the 2<sup>nd</sup> applicant.
6. Upon hearing the suit, the ELC found in part as follows:

“It is therefore trite that trust must be proved by way of evidence and the burden of proving trust rests on the Defendants...The Defendants know no other home. They were born and raised on the suit land. Even when the suit land was undergoing change to tenure from communal land holding to individual tenure, the Defendants were not on the land.”
7. The ELC dismissed the applicants' claims and ordered in part as follows:
  - a. It is hereby declared that the registered owners of parcel of Mbeere/Kirima/3184 hold a portion thereof pegged at 28 acres in trust for the 1<sup>st</sup> -4<sup>th</sup> Defendants.
  - b. That a portion of 28 acres is to be hived off from parcel of Mbeere/Kirima 3184 and the same is to be shared equally amongst the 1<sup>st</sup> - 4<sup>th</sup> defendants each of them getting seven (7) acres.
  - c. Each party to bear their own costs of the various suits.
8. Aggrieved by that judgment, the applicant filed a notice of appeal and the instant application.
9. On their part, the respondents through the 1<sup>st</sup> respondent filed a replying affidavit in which they opposed the application. The respondents deponed that the applicant filed an application for stay before the trial court, which was dismissed, and their application seeking for assistance in executing the decree was allowed by the Court. That they are surprised that the applicant filed the appeal without serving them with a notice of appeal or an order granting them leave to file the appeal out of time. That the Land Registrar and the Sub- County surveyor visited the suit land and demarcated it as per the decree of the ELC in the presence of the 2<sup>nd</sup> applicant and a representative of the 1<sup>st</sup> applicant and all parties were in agreement regarding the demarcation. That the request of the applicants to have access to the river was granted.
10. The 1<sup>st</sup> respondent further deponed that beacons were put in place and the 1<sup>st</sup> applicant's director contributed for the costs of cementing the beacons. That the applicants undertook to cater for construction of the respondents' houses and transfer of their miraa onto the respondents' side in exchange of part of the respondents' land to be used by the applicants to access the river. The respondents averred that they were taken aback by the filing of the instant application. That the injunction sought if granted would amount to overturning the judgment of the ELC as the respondents have been in occupation of the suit land for over 50 years. The respondents urged this Court to dismiss the application with costs.



## Submissions by Counsel

11. On the hearing of the application, the applicants were represented by Mr. Mwangi Kinyua while the respondents were represented by Messrs Rose W. Njeru & Company Advocates. Counsel for both parties filed written submissions which they relied on.
12. Counsel for the applicants submitted that the appeal is arguable with high chances of success as demonstrated in the supporting affidavit and the draft memorandum of appeal annexed. Counsel further submitted that the appeal will be rendered nugatory, as the respondents have threatened to subdivide and transfer the suit land to 3<sup>rd</sup> parties.
13. Counsel to the respondents submitted that the application was filed after 10 months from the date of the judgment and the delay has not been explained, putting reliance on this Court's decision in *Njoroge v Kimani* (Civil Application No. E049 of 2022 (2022) KECA 1188 KLR where it was stated that "... the court must be appraised of all facts and circumstances relating to the delay ..."
14. Counsel further submitted that from the instant application, the applicants are not aggrieved by the judgment of the ELC as their complaint is that the respondents intended to take over the entire river frontage of the suit land thereby denying them the source of water for irrigation and that they are denied access to the suit land. The respondents further submitted that the applicants' supplementary affidavit confirms that the applicants participated in the subdivision process and negotiation; and that they participated in execution of the decree and are not entitled to grant of the orders sought.

## Determination

15. 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 appeal will be rendered nugatory.
16. 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. For example, this Court in the case of *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..."
17. 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.
18. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant



ventilation before this Court. See Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR where this Court described an arguable appeal in the following terms:

- “vii). 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.
- viii). 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.”

19. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view it is arguable inter alia whether or not the learned Judge erred in law and in fact in holding that an order for the declaration of a trust could issue in favour of the respondents without proving the requisite grounds for an award of the said declaration. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the appeal is arguable.

20. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others (supra) this Court stated that:

- “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved”.

21. In determining whether or not an appeal will be rendered nugatory, this court has to consider the conflicting claims of both parties and each case has to be determined on its own merits. The applicants have confirmed that execution of the decree has commenced and that there is a real danger that the suit land, having already been subdivided, may be disposed of which will render the appeal, if successful, an academic exercise. In the circumstances, we find that the intended appeal will be rendered nugatory, if the orders sought are not granted.

22. In the circumstances, we find that the applicants have satisfied both limbs of the requirements under Rule 5(2)(b) of this Court’s Rules. In the circumstances, the notice of motion dated October 14, 2023 has merit and is allowed.

23. Costs of the application shall abide by the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024**

**W. KARANJA**

**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**

