



**Kubai v Kihoro & 3 others (Civil Application E041 of 2024)  
[2024] KECA 1218 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1218 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E041 OF 2024  
DK MUSINGA, MSA MAKHANDIA & P NYAMWEYA, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**LOYFORD MWITI KUBAI ..... APPLICANT**

**AND**

**MUTHANGANI WANYIRI KIHORO ..... 1<sup>ST</sup> RESPONDENT**

**JORETH LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**NDIRITHI MATENJWA (ALLEGED PERSONAL REPRESENTATIVES OF THE  
ESTATE OF ONESMUS MATENJWA KURIA) ..... 3<sup>RD</sup> RESPONDENT**

**ESTENJER INDUSTRIES LIMITED ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for stay of proceedings in ELC No. 135 of 2012 pending the hearing and determination of an intended appeal from the Ruling of the Environment and Land Court at Milimani - Nairobi (M. D. Mwangi, J.) dated 24th October, 2023 in ELC Cause No. 135 of 2012)*

**RULING**

1. The applicant's notice of motion dated 2<sup>nd</sup> February 2024 seeks stay of any further proceedings of Nairobi Environment and Land Court (ELC) No. 135 of 2012 pending hearing and determination of an intended appeal.
2. The applicant is the registered proprietor of a parcel of land known as L.R. No. 13330/60 (the suit property) which he bought from Joreth Limited, the 3<sup>rd</sup> respondent.
3. Elizabeth Wanjiru Matenjwa (Elizabeth) and Michael N. Njuguna (Michael), as personal representatives of Onesmus Matenjwa Kuria filed the aforesaid suit, to challenge the applicant's title over the suit property. However, Elizabeth and Michael died before the suit was finalized. Elizabeth died in December 2018, and Michael died on 5<sup>th</sup> August 2022.



4. On 8<sup>th</sup> August 2023 the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed an application to have themselves substituted as the plaintiffs in place of Elizabeth and Michael, being the personal representatives of the estate of Onesmus Matenjwa Kuria.
5. The applicant and the 3<sup>rd</sup> respondent opposed the application because the suit had abated since more than a year had lapsed since the death of the original plaintiffs, and since there was no proof that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were legal representatives of the estate of Onesmus Matenjwa Kuria. However, the trial court allowed the application for substitution.
6. Being aggrieved by that ruling, the applicant filed a notice of appeal on 31<sup>st</sup> October 2023. The applicant annexed a draft memorandum of appeal, and believes that the intended appeal has high chances of success.
7. The applicant argued that unless the orders sought are granted, the suit before the trial court shall proceed to hearing, in which event the intended appeal shall be rendered nugatory.
8. The 1<sup>st</sup> and 2<sup>nd</sup> respondent did not file a replying affidavit but filed submissions. They opposed the application, saying that they believe that the intended appeal is frivolous because it is the family of Onesmus Matenjwa Kuria, which has previously handled the matter since he died on 27<sup>th</sup> August 2008 that can deal with the question of his legal representatives and the family had decided that the two of them, being his grandson and son respectively, be the personal representatives of his estate. However, no evidence was adduced to that effect.
9. With regard to the prayer for stay of the trial court's proceedings pending appeal, the 1<sup>st</sup> and 2<sup>nd</sup> respondents urged us not to grant it so that this long standing land dispute can be finalized expeditiously.
10. When the application came up for hearing, Mr. Gachuhi appeared for the applicant. None of the respondents were in attendance, though they had been served with a hearing notice on 1<sup>st</sup> May 2024. Mr. Gachuhi relied entirely on his written submissions, which largely, replicated the contents of the applicant's affidavit in support of the application.
11. The principles that guide this Court in an application of this nature are well settled. An applicant must satisfy the Court that the appeal or intended appeal is arguable, and that unless the order sought is granted, the appeal, if successful, shall be rendered nugatory. See Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR. Even one arguable ground of appeal will suffice.
12. It is arguable whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents are the duly appointed legal representatives of the estate of Onesmus Matenjwa Kuria, and whether they filed the application for substitution before the suit abated. The applicant contended that although the application was dated 3<sup>rd</sup> August 2022, it was filed on 8<sup>th</sup> August 2022. In our views, the intended appeal is not frivolous.
13. On the nugatory aspect, unless we grant the order sought, the proceedings before the trial court shall be finalized before the intended appeal is heard and determined. If the appeal is successful, the same shall be rendered nugatory.
14. Consequently, we allow this application and grant the orders as sought. We make no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**D. K. MUSINGA, (P.)**

.....



**JUDGE OF APPEAL  
ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL  
P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

