



**Njoroge v Maina (Civil Application E491 of 2023)
[2024] KECA 1216 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1216 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E491 OF 2023
PO KIAGE, A ALI-ARONI & LA ACHODE, JJA
SEPTEMBER 20, 2024**

BETWEEN

MARGARET NJOKI NJOROGE APPLICANT

AND

ERNEST MUNENE MAINA RESPONDENT

*(An application for stay of execution against the Judgment and Decree
of the Environmental Land Court of Kenya at Nairobi (Angote,
J.) delivered on 28th September 2023 in ELC Case No. 239 of 2017)*

RULING

1. Before the court is the applicant's notice of motion dated 24th October 2023 expressed to brought under Article 48, 50 (1) and (2) of the Constitution of Kenya, Section 3A and 3B of the Appellate Jurisdiction Act, Rules 1(2) and 5(2)(b) of the Court of Appeal Rules, 2022, seeking stay of execution of the impugned judgment of the Land and Environment Court (ELC), delivered on 28th September 2023 in ELC Case No. 239 of 2017, pending the hearing and determination of the intended appeal.
2. The application is supported by the grounds on the face of it which include; that on 28th September 2023, the ELC delivered its judgment in favour of the respondent inter-alia declaring that the notice issued by the applicant rescinding the agreement for sale in respect of L.R No. 4894/479 Garden Estate 77 was illegal and unlawful; issuing a permanent injunction against the applicant restraining her and/or anyone acting on her behalf from selling, trespassing, alienating, entering into or in any other way taking possession of any part of the suit property; vacant possession in respect of the suit property; compelled the applicant to execute the transfer documents of the suit property in favour of the respondent failure of which the Deputy Registrar of the court was directed to execute the transfer document and/or relevant documents in favour of the respondent; dissatisfied with the judgment the applicant intends to file an appeal; on 26th September, 2023, the applicant was granted a 30 day stay of



execution of the judgment by the trial court which was to lapse on 30th October, 2023; the applicant is fearful that once the stay granted lapses the respondent will proceed to execute the judgment before the intended appeal is heard and determined by this Court.

3. In support of the application the applicant has filed an affidavit sworn on 24th October 2023 where she rehashes the grounds on the face of the application. In addition, she deposes that; the intended appeal raises triable issues; that the trial judge in dismissing the suit and allowing the respondent's counterclaim, in the absence of the applicant's testimony and evidence condemned the applicant unheard, despite the applicant's readiness, and willingness to testify; denying her the opportunity to testify and adduce evidence as to the breach of contract on the part of respondent; that on 29th March 2017 the respondent's advocates served the applicant's previous counsel with a letter of intention to take possession of the suit property by 30th March 2017; that the respondent admitted that on 30th March 2017 he entered the suit property in the company of unknown youths who erected a fence; that the abovementioned actions by the respondent were unlawful, illegal and contrary to the terms of the contract which directed that the respondent would take possession of the property upon completion of the conveyance; the trial court despite taking note of the above actions by the respondent failed to find that the actions of the respondent were in breach of the terms of the contract and amounted to a violation of the applicant's right to property
4. On the nugatory aspect, the applicant deposes that; the intended appeal stands to be rendered nugatory and a mere academic exercise should the respondent execute the judgment before the appeal is heard; the suit property is part of the applicant's matrimonial home and the applicant has been keen on developing and improving the home and stands to lose should the respondent be allowed to execute the judgment; the suit property holds immense sentimental value for the applicant; she is elderly and has no other source of income other than her savings and retirement benefits; is fearful that the enforcement of the judgment would lead to undue hardship and potentially result in her inability to secure necessary housing and support; she will suffer irreparable damage; the application has been filed without any delay and it is in the interest of justice that the orders sought herein are granted.
5. The respondent has opposed the application by filing a replying affidavit sworn on 4th April 2024, where he deposes that: the applicant comes to court with tainted hands and is undeserving of the orders sought; she has failed to disclose material facts; frustrated the sale process between the parties; filed suit against the respondent after declining to transfer the suit property; a subdivision from LR No. 4894/345; that the applicant and her husband were the registered owners of the property known as LR No. 4894/345 that had been charged to Standard Chartered Bank Limited; towards the end of October 2015 the respondent was introduced to the applicant and her husband by Leakey's Auctioneers who had been instructed by the bank to advertise the property for sale through public auction: at the time of introduction, the charged property had been advertised for sale and was on the verge of being sold by public auction in less than 7 days if the applicant failed to redeem the outstanding loan in the sum of Kshs.9 million, legal fees, and auctioneer charges;

following discussions the respondent instructed his advocates to carry out due diligence on the property, after which he entered into an agreement for sale dated 4th November 2015 with the applicant jointly with her husband for the plot identified as B to be excised from the suit property for consideration of Kshs.14 million; upon execution of the agreement for sale, the respondent paid Kshs.9 million to Standard Chartered Bank being the outstanding loan balance; Kshs.300,000 to Leakey Auctioneers being their charges, Kshs.60,000 to COG Consultant Limited as valuation fees and Kshs.179,800 to M/s Mucheru Oyatta & Co. Advocates being their legal fees; after which the original title and the discharge of charge were released to the respondent's advocates to hold pending approval of the subdivision into portions A and B; in a surprising turn of events, the applicant and



her husband lost interest in concluding the sale; were no longer communicating with the respondent or their counsel; after a lot of back and forth, the applicant's husband executed the transfer in the respondent's favor but the applicant declined to sign her part; the issue of the applicant losing her matrimonial property does not arise as the original title has long been subdivided to create two portions, where one belongs to respondent and the other is where the applicant and her family have their matrimonial home; and therefore the intended appeal will not be rendered nugatory; that the application is an abuse of the court process, brought in bad faith and is a well calculated scheme to frustrate and deny the respondent the fruits of his judgment that he has awaited for close to 10 years now.

6. The applicant has filed submissions and a list of authorities dated 06.04.24 and 14.11.23 respectively. In the submissions, the applicant reiterates the depositions made in her affidavit and we need not repeat them here. Save to add that the applicant has already filed the intended appeal and has been assigned a case number, Civil Appeal Number E923 of 2023 which is pending directions. She relies on the case of *Charles Wabome Gethi v. Angela Wairimu Gethi* [2008] eKLR, where this Court held that since the appeal has already been filed, it would be prejudicial to the applicant for the court to examine the evidence at this stage and make a finding whether or not the appeal is frivolous. She also relies on *National Industrial Credit Bank Ltd v. Aquinas Francis Wasike & Another* [2006] eKLR, where the court held that all an applicant is required to do is to point out to the court the grounds which he believes are arguable and leave it to the court to decide on the issue of whether or not the matters raised are arguable. She submits that all the grounds raised in her memorandum of appeal are arguable.
7. On the nugatory aspect, the applicant submits that well over 30 days have lapsed since the judgment of the trial court; that the respondent's advocates served the applicant with a draft decree in 2023; that accompanying the draft decree was a letter dated 10th November 2023 informing the applicant that the respondent would be presenting the draft decree for approval if he did not hear from them in the next 7 days; that the respondent has the intention of executing the judgment and there being no orders preventing the respondent from proceeding with execution and effectively transferring ownership of the title to himself, the applicant is fearful that once the suit property is vested in the respondent, he may dispose of the property before the hearing of the appeal; that the respondent in his response does not ascertain his capability of reimbursing the applicant should the appeal succeed. In support of her assertion she relies on the High Court cases of *Ringera Maitira v. Geoffrey Murithi & another* [2004] eKLR & *Jeremiah Otemo Okonyo v. Registered Trustees African Divine Church & another* [2021] eKLR and submits that a full execution of the decree would vest a part of the suit property in the respondent and the applicant would not have control over what he does with the land upon successful registration of the land in his favor.
8. The respondent filed submissions dated 04.04.24 and a list of authorities dated 20.11.23. He submits that he has demonstrated that LR No. 4894/345 has long been subdivided into LR No. 4894/479 and LR No. 4894/480 and that he purchased LR No. 4894/479, and the applicant has her matrimonial home on LR. No. 4894/480; that the respondent has demonstrated that he has already parted with Kshs.14 million as the purchase price for the suit property in 2015. In support of this contention he relies on the case of *Reliance Bank Limited (In Liquidation) v. Norlake Investments Limited*, Civil Application No. 37 of 2007 and *Multimedia University & Another v. Professor Gitile N. Naituli* [2014] eKLR, where the court held that for an applicant to succeed he must satisfy that the appeal is arguable and that if the order of stay is not granted the appeal, were it to succeed, would be rendered nugatory.
9. The respondent submits further, that although the applicant has told the court that she was denied a hearing before the lower court, he has demonstrated otherwise in his replying affidavit, the subject



matter is LR No. 494/479 which is different from LR No. 494/480 on which the matrimonial property sits; he has also demonstrated that the applicant is guilty of material non-disclosure to wit: that the applicant and her husband sold LR No. 494/479 for Kshs.14 million which the respondent already parted with in the year 2015 but to date has nothing to show for it.

10. The respondent further submits that the applicant has not demonstrated that she has an arguable appeal or that her appeal will be rendered nugatory; that the applicant has caused the respondent a lot of injustice since 2015 as she has refused to transfer the property to the respondent. In support of his contention, the respondent relies on the case of *John Njue Nyaga v. Nicholas Njiru Nyaga & Another* [2013] eKLR cited in *Mohamed Shally Sese v. Fulson Company Limited & Another* [2006] eKLR, where this Court held that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings.
11. To succeed in an application under Rule 5 (2)(b) of the *Court of Appeal Rules*, an applicant has to satisfy the twin principles that are enumerated in many decisions of this Court namely:
 - i. An applicant must demonstrate that he has an arguable appeal; and
 - ii. That the intended appeal (or appeal if already filed) will be rendered nugatory if the execution of the decree, order; or proceedings are not stayed.
12. On the first limb of this twin principle, this Court held in *David Morton Silverstein v. Atsango Chesoni* [2002] eKLR, that for an order of stay to be issued, the applicant must first demonstrate that the appeal or intended appeal is arguable, that is, it is not frivolous and that the appeal or intended appeal, would in the absence of a stay, be rendered nugatory.
13. Regarding the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay of the orders sought, this Court in *Yellow Horse Inns Ltd v. A.A Kawir Transporters and 4 Others* [2014] eKLR, observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice.
14. The applicant herein has in her memorandum of appeal raised several grounds including that; the learned judge of the High Court failed to consider the applicant's case; the learned judge ignored rules of natural justice by applicant been condemned unheard; the learned judge allowed the mistake of counsel to be visited upon the applicant; by holding that the notice to rescind the agreement for sale was illegal, and unlawful. The said grounds in our view need to be ventilated further. We appreciate that at this point it is not for us to determine the merits or the demerits of the appeal but just to appreciate that it cannot pass for a frivolous appeal.
15. On the nugatory aspect this court in the case of *Kenya Industrial Estate & Another v. Matilda Tenge Machia*, Civil Application No.211 of 2020 this Court stated; -

“On the nugatory aspect, 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.”
16. It is our view that the subject matter herein will not be rendered nugatory absent stay. Should the appeal succeed in the end the property can be restored to the applicant and if this is not possible, she can be reasonably compensated by way of damages.
17. Since the applicant has failed to demonstrate both limbs the application must fail.
18. It is accordingly dismissed with cost.



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

P.O. KIAGE

.....

JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

