



**Mukiri v Muga (Legal Representative of the Estate of Anita Karambu M'murunga - Deceased)
(Civil Appeal (Application) E141 of 2023) [2024] KECA 1130 (KLR) (6 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1130 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E141 OF 2023
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
SEPTEMBER 6, 2024**

BETWEEN

FESTUS RUBARA MUKIRI APPLICANT

AND

**JULIUS KINOTI MUGA (LEGAL REPRESENTATIVE OF THE ESTATE OF
ANITA KARAMBU M'MURUNGA - DECEASED) RESPONDENT**

*(Being an application for injunction and stay of execution of the
judgment of the Environment and Land Court of Kenya at Meru
(C.K. Nzili, J.) dated 12th July, 2023 ELC Case No. 323 of 2017 (O.S))*

RULING

Background

1. Festus Rubara Mukiri (the applicant) has vide a notice of motion dated 1st August, 2023 expressed to be brought pursuant to the provisions of Section 3, 3A and 3B of the [Appellate Jurisdiction Act](#) and Rules 5(2)(b), 44 and 49 of the Court of Appeal Rules (this Court's Rules), sought the following orders:
 - i. Spent
 - ii. That this Court be pleased to grant an order of stay of execution of the judgment delivered on 12th July 2023 and all consequential orders thereto, pending the hearing and determination of this application and the main appeal and/or until further orders of this Court.
 - iii. That this Court be pleased to grant orders of injunction restraining the respondent by himself, his agents, employees, servants or anyone acting on his behalf, from evicting the applicant, destroying and/or demolishing structures, selling, alienating and/or transferring, registering or in any other way interfering with Parcel No. Abothuguchi/Ruiga/206 (the suit land) pending



the hearing and determination of this application and the main appeal and/or until further orders of this Court.

iv. That costs of the application be provided for.

Julius Kinoti Muga (being a legal representative of the estate of Anita Karambu M’Murunga - deceased) is the respondent herein.

2. The motion is premised on the grounds inter alia that:

i. The applicant is greatly aggrieved and dissatisfied by the judgment delivered by the Environment and Land Court (ELC) (C.K. Nzili J.), on 12th July 2023 and has filed a notice of appeal dated 24th July 2023 against the impugned judgment and prays to be heard by this Court;

ii. That the respondent has, after delivery of the judgment, embarked on execution by depositing construction materials on the suit land and is in the process of beginning construction on the suit land;

iii. That the applicant has legal title and proprietary rights to the suit land. That unless this application for stay of execution of the judgment of the ELC is heard as a matter of urgency, the applicant is at risk of losing the suit land to the respondent. That this will render the appeal nugatory and at all times occasioning irreparable loss and damage to the applicant;

iv. That the applicant will suffer substantial loss if the respondent proceeds to execute and register the suit land in his name;

v. That the applicant has an arguable appeal with great chances of success on the grounds inter alia that the ELC misapplied the settled principles of law and more particularly the principle of adverse possession and the respondent will not suffer any loss if the orders sought are issued; and

vi. That the applicant has filed the instant application without unreasonable delay and undertakes to expeditiously prosecute the intended appeal.

1. The motion is supported by an affidavit sworn by the applicant rehashing the grounds on the face of the application and stating further that the respondent was granted the suit land by way of adverse possession. That the applicant was ordered to sign the transfer documents in favour of the respondent failing which the Deputy Registrar of the Court to execute the same. That the applicant has an arguable appeal as per the draft memorandum of appeal.

4. The motion was opposed vide a replying affidavit sworn by the respondent who deposed inter alia that the appeal cannot be rendered nugatory as the applicant has never lived on the suit land. That the applicant is not in occupation and will therefore not suffer any prejudice. Further, that there is no reason advanced for the grant of the orders of stay of execution.

Further, that the instant application before this Court is not merited and the same ought to be dismissed with costs.

5. A brief background will help place the application in context. The respondent filed a suit by way of originating summons dated 11th December 2017 seeking an order that he is entitled to the suit land registered in the name of the applicant by virtue of adverse possession. It was the respondent’s case that his mother, Anita Karambu M’Murunga (deceased) was the 2nd wife of the late Ayub M’Muga



M'itaro who gifted her the suit land in the year 1950 which she continued to occupy with her 6 children and that the respondent has lived on the suit land since birth.

6. On the other hand, the applicant opposed the claim on grounds inter alia that he become the registered owner of the suit land in 1994 through Meru H.C Succession Cause No. 177 of 1992 upon inheriting the suit land from his father and grandfather and that the respondent and his mother (Anita Karambu M'Murunga) who is now deceased lived on a separate piece of land L.R No. Abothuguchi/Ruiga/33. That the respondent's mother forcefully entered the suit land after the applicant's registration and erected a timber house and lived therein.
7. The ELC found as follows:

“In my view, therefore, entry into the land was not out of any permission or license by the initial owner and the successor to the title. Similarly, the plaintiff drove out and discontinued possession of the suit land's initial and subsequent owners. The evidence tendered by the plaintiff manifests the right to possess and occupy to the exclusion of the true owner's right to use the land for the purpose he intended in law. I find the ingredients of adverse possession proved to the required standards and declare the plaintiff entitled to the suit land by virtue of adverse possession. The defendant shall sign transfer forms in favor of the plaintiff within two months from the date hereof in default, of which the Deputy Registrar of this court shall execute them. Costs to the plaintiff.”

It is this finding that provoked the filing of a notice of appeal and the instant application

Submissions by Counsel

8. When the application came up for hearing Messrs Mutuma Gichuru & Associates Advocates appeared for the applicant while Messrs Mogeni & Co Advocates represented the respondent. Both counsel filed written submissions, which they relied on.
9. Counsel for the applicant submitted that the applicant stands to suffer substantial loss if the order of stay of the impugned judgment is not granted as the respondent has deposited construction materials on the suit land and has embarked on the process of construction of permanent structures on the suit land. That this act will prove prejudicial to the applicant if an order of stay is not granted. Counsel further submitted that the respondent may dispose of the suit land to 3rd parties. Counsel relied on the decisions of this Court case in Malcom Bell vs Daniel Toroitich Arap Moi & Another [2006] eKLR and RWW vs EKW [2019] eKLR in support of the proposition that “the purpose of stay pending appeal is to preserve the subject matter in dispute ...”.
10. On the question whether the appeal is arguable, counsel submitted that the claim for adverse possession was not proved as the respondent admitted the existence of several court cases filed between the parties hence breaking the continuous occupation of the 12-year period. Counsel further submitted that the respondent's possession and occupation of the suit land was by force and was constantly interrupted by the applicant through the court cases hence the appeal has high chances of success. The applicant relied on this Court's decision of Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR that:

“a single arguable issue is sufficient to determine that the applicant has an arguable appeal.”
11. Counsel for the respondent submitted that the issue before the trial Court was one of adverse possession and not ownership and the respondent has been in occupation of the suit land. Counsel contended that as such, there is nothing to stay. Counsel asserted that the balance of convenience tilts in favour of declining to grant the orders sought. Counsel further submitted that the record of appeal has



been filed and the applicant ought to urge the Court to list the appeal for hearing. Counsel conceded that the appeal is arguable but has no chances of success as all the ingredients for adverse possession were proved. Counsel emphasized that the construction materials were on the suit land even before the delivery of the impugned judgment. Further, that the respondent resides on the suit land with his family and therefore he cannot dispose of the suit land as feared by the applicant. Counsel asserted that in the circumstances, there is no danger of disposing of the suit land to warrant grant of injunctive orders.

In conclusion, counsel submitted that the conditions for grant of an order of stay and injunction have not been proved. Counsel urged this Court to dismiss the application with costs.

Determination

12. We have considered the application, the grounds in support thereof, 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.
13. 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. This Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited & 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...”
14. 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 applicants in order to warrant ventilation before this Court. See: *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (supra) 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.”
15. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In its written submissions, the respondent has conceded that the appeal is arguable. Our consideration of the grounds of appeal set out in the draft memorandum of appeal leads us to likewise conclude that, the appeal is arguable. An arguable appeal is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court.



16. 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”.
17. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. In the instant application, the applicant’s main contention is that the respondent has deposited construction material on the suit land and permanent structures may be constructed thereon. Further, that the suit land may be disposed of to third parties. On the other hand, the respondent maintained that he has been using the suit land as his residential home where he lives with his family and has no intention of selling it. The respondent further maintained that the applicant has never lived on the suit property and will therefore suffer no prejudice if the orders sought are not granted. Accordingly, we are not persuaded that the suit land is in imminent danger of disposal as claimed by the applicant. Further, the applicant has not shown that he is living on the suit land and risks eviction if the orders sought are not granted. In the circumstances, we are not satisfied that the appeal will be rendered nugatory if we decline to grant the orders sought are not granted.
18. It is well settled that for an application under Rule 5(2)(b) of this Court’s Rules to succeed, the applicant must satisfy both limbs of the twin principles. (See: *Republic v Kenya Anti-Corruption Commission & 2 others* (2009) KLR 31, and *Reliance Bank Ltd v Norlake Investments Limited* (2012) 1 EA 227).
19. In the circumstances, we find that the applicant has failed to satisfy both limbs of the requirements under Rule 5(2)(b) of this Court’s Rules. The upshot is that the notice of motion dated 1st August, 2023 is dismissed with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 6TH DAY OF SEPTEMBER, 2024.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

