



**Ahmed & 6 others v Godad (Civil Appeal (Application)
E416 of 2024) [2024] KECA 1500 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1500 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E416 OF 2024
SG KAIRU, AO MUCHELULE & WK KORIR, JJA
OCTOBER 25, 2024**

BETWEEN

**MOHAMED OMAR AHMED 1ST APPLICANT
AHMED G GABOW 2ND APPLICANT
KUSOW HASSAN KHALIB 3RD APPLICANT
IBRAHIM MOHAMED ABDULAHI 4TH APPLICANT
NOOR KASAY 5TH APPLICANT
ADEN MOHAMED MOHAMUD 6TH APPLICANT
NASIB FARM LTD 7TH APPLICANT**

AND

DUBEY MOHAMED GODAD RESPONDENT

(Being applications for striking out an appeal and for stay of execution pending the hearing of the intended appeal arising from the judgment and decree of the Environment and Land Court at Garissa (Mutungi, J.) dated 28th February 2024 in ELC Case No. 4 of 2019)

RULING

1. Before us are two applications. Mohamed Omar Ahmed, Ahmed G. Gabow, Kusow Hassan Khalib, Ibrahim Mohamed Abdulahi, Noor Kasay, Aden Mohamed Mohamud and Nasib Farm Ltd, the respective 1st to 7th applicants (“the appellants”), filed two motions dated 23rd May 2024 and 14th August 2024 seeking to stay the execution of the judgment of Mutungi, J., emanating from Garissa Environment and Land Court (E&LC) Case No. 4 of 2019. When learned counsel, Mr. Waigwa who held brief for learned counsel, Ms. Ndegwa for the appellants was asked to indicate which of the two applications he was pursuing, he told the Court that it was the one dated 23rd May 2024 as the one of



- 14th August 2024 was spent having been filed for the sole purpose of seeking the certification of the application dated 23rd May 2024 as urgent. On the other hand, the respondent to the appeal, Dubey Mohamed Godad (“Ms. Godad”), filed an application dated 12th June 2024 seeking to strike out the appellants’ appeal. Learned counsel, Mr. Waigwa for the appellants and learned counsel, Mr. Amuga for Ms. Godad agreed that the two applications be heard together and we obliged them.
2. In support of the application for stay of execution, the appellants aver that the respondent has initiated steps of executing the impugned judgment, and if an order of stay is not granted, the appellants will suffer irreparable damage, and the appeal will be rendered nugatory. They state that the appeal is arguable and it is in the interest of justice that an order of stay be issued to preserve the substratum of the appeal.
 3. Ms. Godad swore a replying affidavit on 13th June 2024 in opposition to the application. She avers that the appeal is not tenable as it was filed out of time and does not raise any arguable point. It is also her deposition that an order staying execution would only perpetuate the appellants’ illegal occupation of her property, which has been the case since 2009. She additionally avers that she is capable of refunding the decretal sum of Kshs. 1,000,000 should the appellants’ appeal succeed.
 4. In support of her application seeking to strike out the appellants’ appeal, Ms. Godad avers that whereas the notice of appeal was served within the stipulated time after the impugned judgment was delivered on 28th February 2024, the appeal was filed on 3rd June 2024 way beyond the 60-day timeline prescribed by the rules of the Court and without leave.
 5. In opposition to the application for striking out, Ibrahim Mohamed Abdulahi (the 4th appellant), through the affidavit sworn on 15th June 2024, avers that the appeal was lodged late as a result of the delay in securing typed proceedings from the trial court’s registry. It is his deposition that although the letter bespeaking proceedings was filed together with the notice of appeal on 4th March 2024, the certified copy of the record was availed to his counsel on 23rd May 2024. Further, that the certificate of delay was issued on 10th June 2024. He subsequently prays for the dismissal of the respondent’s motion, adding that the appeal was served within a day of its filing.
 6. In supporting the motion for stay of execution pending appeal, counsel for the appellants referred to the case of *Kui & Another vs Khaemba & 3 Others* [2021] KECA 318 (KLR) to point out that an arguable appeal is that which warrants the Court’s interrogation but need not be one that should eventually succeed. Counsel referred to *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd - Civil Application No. Nai 345 of 2005* in support of the proposition that a single bona fide arguable issue is sufficient to render an appeal arguable. Counsel reiterated the grounds of appeal and urged that the pending appeal was arguable.
 7. Turning to the question as to whether the appeal will be rendered nugatory if the order sought is not granted, counsel referred to the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR to submit that an appeal is rendered nugatory if its outcome becomes worthless, futile or invalid. According to counsel, without stay orders, the appeal, if successful, will be rendered nugatory because their loss cannot be adequately compensated by an award of damages. It was also counsel’s submission that there was a risk of the suit property being transferred to third parties. Counsel thus urged that we allow the notice of motion and grant the orders of stay as prayed.
 8. Counsel for the appellants in response to Ms. Godad’s application orally submitted that a certificate of delay had been provided through a supplementary record of appeal to demonstrate that the delay in filing the appeal was occasioned by the E&LC registry.



9. Counsel for Ms. Godad, filed two sets of submissions, one in response to the application for stay and the other in support of his client’s application for striking out the appeal. In opposing the application for stay, counsel urged that the appeal was incompetent having been filed out of time hence the same cannot be arguable; that none of the grounds of appeal raises any arguable point warranting the Court’s determination; that the appeal will not be rendered nugatory because the respondent is a person of means and thus capable of refunding the decretal sum should the appeal succeed.
10. Turning to the application for striking out, Ms. Godad’s counsel submitted that the appellants are not protected by the proviso to rule 84(1) of the Court of Appeal Rules since the letter bespeaking proceedings was for “certified copy of proceedings” and not “copy of proceedings” as stated in the rule. Counsel therefore maintained that the appeal was for striking out as it was filed out of time and without leave.
11. Owing to the nature of the two applications before us, it is necessary that we first address the application for striking out the appeal, notwithstanding that it was filed after the application for stay of execution. Under rule 86 of this Court’s Rules, an application to strike out an appeal should be filed within 30 days from the date of service with the record of appeal. It is not disputed that the record of appeal was filed on 3rd June 2024 and served upon the respondent’s counsel on 4th June 2024. We confirm that the application is competent having been filed on 12th June 2024 which was within 30 days from the date Ms. Godad was served with the appeal. Therefore, the only question for our determination is whether the appellants are entitled to benefit from the proviso to Rule 84(1) of this Court’s Rules. The proviso allows for the exclusion, from the sixty days within which an appeal must be filed, the time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of the copy of the proceedings. The notice of appeal having been filed on 4th March 2024, it would follow that the appeal ought to have been filed by 3rd May 2024. However, the appeal was filed on 3rd June 2024. The appellants attribute the delay to the late provision of a copy of the proceedings by the trial court’s registry. In essence, they seek the protection of the proviso to rule 84(1).
12. For clarity, rule 84(1) and (2) of this Court’s Rules provides that:

“ 84.

- (1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged -
 - a. a memorandum of appeal, in four copies;
 - b. the record of appeal, in four copies;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.



- (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant’s application for such copy was in writing and a copy of the application was served upon the respondent.”

13. It is the appellants’ deposition that a letter requesting certified copies of the proceedings, judgment, and decree was lodged at the trial court’s registry alongside the notice of appeal on 4th March 2024. The letter forms part of the record of appeal. On 24th April 2024, a follow up letter was addressed to the registrar of the superior court. Ms. Godad’s response is that the appellants cannot benefit from rule 84 because theirs was a request for “certified copies” and not “copies” as provided in the rule. In our view, the mere inclusion of the word “certified” cannot take away the primary intention of the letter dated 4th March 2024, which was clear that the requested copy of proceedings was to facilitate the filing of an appeal. What the appellants’ counsel was seeking was a copy of proceedings so as to facilitate the filing of an appeal. Whether those proceedings were certified or not is neither here nor there. The duty of providing the proceedings reposed in the registrar of the superior court who has tendered a certificate of delay confirming that a copy of the proceedings was availed to the appellants late. The issue of whether what was required was a “certified copy of proceedings” or a “copy of proceedings” being the only contestation raised in the application for striking out, we find the motion to be without merit. It is therefore dismissed. This paves way for our consideration of the appellants’ application for stay of execution.
14. As regards the application for stay of execution, it is a well- established principle that in applications under rule 5 (2) (b) of this Court’s Rules, an applicant ought to establish the existence of an arguable appeal and that absent stay, the appeal, if successful, will be rendered nugatory. In *Chris Munga N. Bichage vs. Richard Nyagaka Tongi, Independent Electoral & Boundaries Commission & Robert K. Ngeny* [2013] KECA 141 (KLR), the application of the twin principles was expressed as follows:
- “The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”
15. On the issue as to whether the appellants have an arguable appeal, we note that the appellants fault the learned trial Judge for the manner in which he analyzed the evidence adduced at the trial. Theirs is a first appeal and matters of fact as well as matters of law fall for the consideration of the Court. Having considered the grounds of appeal, and without delving into them least we embarrass the bench that will eventually be tasked to hear the appeal, we are satisfied that the issues raised in the memorandum of appeal deserve the Court’s determination on merit. We therefore conclude that the appellants’ appeal is arguable.
16. The next limb is whether the appellants have established that their appeal, should it eventually succeed, will be rendered nugatory if execution is not stayed. What may render an appeal nugatory was explained in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* (supra) as follows:
- “ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd vs. Norlake Investments Ltd* [2002] 1 EA 227 at page 232.



- 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. The appellants averred that Ms. Godad has started enforcing the impugned judgment, which includes evicting them from the disputed land, thereby causing potential loss of property and disruption of farming activities. They deposed that they risked suffering substantial economic loss since the suit land is used for commercial farming and an award of damages would not adequately compensate such a loss. They also stated that they had been in possession of the suit property since 1997 and it would be in the interest of justice to stay the execution of the impugned judgment and maintain the status quo. Ms. Godad’s answer is that, were the appeal to succeed, she is a person of means capable of refunding the decretal sum.
18. Despite Ms. Godad averring that she is a person of means, no evidence was adduced to establish her financial muscle. Be that as it may, there remains the other aspect of loss accruing out of closure of agricultural activities and the fear that the suit land may be sold to third parties. Ms. Godad did not challenge these assertions and going by the appellants’ averments, their fears were live as Ms. Godad had made certain moves in a bid not only to execute the impugned judgment but also frustrate the appellants’ continued occupation and use of the land. We also note that there is an unrebutted averment by the appellants that they have used the suit land since 1997.
19. In the circumstances of this case, we are therefore satisfied that the appeal may be rendered nugatory if the stay order sought by the appellants is not granted. Additionally, it is our view that it is in the interest of justice to maintain the status quo as existed prior to the issuance of the judgment. In any event, Ms. Godad can always be compensated by way of damages should the appeal fail.
20. We, therefore, find that the application dated 23rd May 2024 has satisfied the dual limbs for granting orders of stay. It should be allowed.
21. In conclusion, we find Ms. Godad’s notice of motion dated 12th June 2024 to be without merit and we hereby dismiss it. On the other hand, the appellants’ notice motion dated 23rd May 2024 has merit and is hereby allowed.
22. The applications having been heard together, the appropriate order on costs is to direct the parties to meet their own costs in respect to both applications, which we hereby do.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER 2024.

S. GATEMBU KAIRU, FCI Arb.

JUDGE OF APPEAL

A. O. MUCHELULE

JUDGE OF APPEAL

W. KORIR

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR

