



**Mireri v Oyuko (Civil Application E110 of 2024)
[2024] KECA 1449 (KLR) (18 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1449 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E110 OF 2024
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
OCTOBER 18, 2024**

BETWEEN

DAVID OBONYO MIRERI APPELLANT

AND

SUSAN ATIENO OYUKO RESPONDENT

(Being an application for stay of execution pending hearing and determination of the intended appeal from the judgment of the Environment and Land Court in Homabay (G.M.A. On'gondo, J.) dated 8th April 2024 in Case No. 34 of 2022)

RULING

1. The application before this Court for consideration is the Notice of Motion Application dated April 26, 2024, brought pursuant rules 5(2)(b), 42, 47 of *Court of Appeal Rules 2010*, seeking orders to grant stay of execution of the judgment in Homabay Environment and Land Court (ELC) Appeal No. E304 of 2022 pending the hearing and determination of the intended appeal. The application is supported by the affidavit of even date sworn by David Obonyo Mireri, the applicant.
2. The background to this matter is that, Susan Atieno Oyuko (the respondent herein), claimed she was the registered proprietor of land parcel No. Kanyada/Kotieno/Katuma/B/653 measuring 0.003 acres which had an access road to it. Later, the applicant purchased a neighbouring parcel, and erected a structure on the access road, thus denying her reach of her property. She, thus, filed a suit against the applicant in the magistrates court at Homa Bay seeking an adoption of the report dated June 23, 2021 by the Homa Bay County Land Registrar, and a declaration that the applicant had blocked the access road serving the respondent's suit land; an order for removal of the applicant's mabati structure from the access road; an order of injunction stopping the applicant, his servants and/or agents from blocking the access road in any manner; damages at the rate of 12% from the date of judgment; and costs of the suit with interest at 14% from the date of filing the suit.



3. On August 3, 2022, the lower court dismissed the respondent's case finding that she did not prove her case on a balance of probabilities. The respondent dissatisfied, appealed to the Homa Bay ELC Court Land Appeal No. 34 of 2022 against the lower court judgment. The judgment in the ELC court was delivered on April 8, 2024 in favor of the respondent reversing the finding of the trial court and holding that the respondent was entitled to adoption of the Registrar's report, an order of removal of the erected mabati structure from the access road and costs together with interest at 14% from the date of filing the suit.
4. The applicant now seeks stay of execution of the impugned judgment as the respondent has made an application for extraction of the decree and intends to proceed with execution which will render the appeal nugatory; that the intended appeal has high chances of success.
5. The respondent has neither filed a response nor submission to the application now before this Court.
6. In an application such as the one before us, the applicant is required to satisfy the Court that there exists an arguable appeal, one which is not frivolous, but not necessarily that the appeal will succeed in the end. Secondly, the applicant has to demonstrate that in the event stay is not granted the appeal will be rendered nugatory. The twin principles have been well articulated in the following cases; -

Stanley Kangethe Kinyanjui v Tony Ketter & Others [2103] eKLR where this Court stated:

“That in dealing with Rule 5(2)(b), the Court exercises original and discretionary jurisdiction; and that exercise does not constitute an appeal from the judge's discretion to this Court. The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

7. In *Multimedia University & Another v Professor Gitile N. Naituli* (2014) eKLR it was stated:

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2)(b), the common vein running through them and the jurisprudence underling those decisions was summarized in the case of Stanley Kangethe Kinyanjui v Tony Ketter & Others [2103] eKLR.”
8. In addition, the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 Others*, Sup. Court App 16/2015 [205] eKLR:

“(23) It is clear to us that Rule 5(2)(b) is essentially a tool for preservation. It safeguards the substratum of the Appeal in consonance with principles developed over the years...

(27) Rule 5(2)(b) of the *Court of Appeal Rules* is derived from Article 164(3) of the *Constitution*. It illuminated the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of the Appeal/intended Appeal.”



9. Is the Appeal arguable? In the case of *Wasike v Swala* [1984] 591 KLR this Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court. Further, in the case of *Attorney General v Okiya Omtata & Anor* [2019] eKLR this Court held:

“the principles for our consideration in exercise of our unfettered discretion under Rule 5(2) (b) to grant an order of stay is well settled. Firstly, the applicant must satisfy that it has an arguable appeal. However, this is not to say that the appeal will necessarily succeed but suffice it that the appeal is not idle or frivolous.”

10. Indeed, at this stage the court is not expected to inquire into the merits of the case and whether or not the appeal will succeed. It is sufficient that the applicant has met the threshold, as existence of a single bona fide issue is sufficient. We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our view an arguable issue which has been raised is whether the Court erred in finding that the respondent had proved her case on balance of probability notwithstanding the fact that the map of the area was not produced at the lower court stage. 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 intended appeal is arguable.

11. Will the appeal be rendered nugatory should the order not be granted? This Court has held in the case of *Reliance Bank Limited v Norlake Investment Limited* [2002]1 EA 227, that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides. (see also *Oraro & Rachier Advocates v Co-operative Bank of Kenya* [1999] LLR 1118

12. In the case of *African Safari Club Limited v Safe Rentals Limited*, Nai. Civ. App. No 53 of 2010 this Court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

13. The issue we must consider is whether the appeal, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds. The ELC court reversed the finding of the lower court, the upshot of which was that the respondent had proved her case on a balance of probabilities thus placing her in a position to evict the appellant; and adversely deal with the property. The subject matter is land, it is not disputed that the applicant has erected a structure nor is it disputed that execution proceedings have commenced. In our view, therefore, should we not grant the relief sought, this will pave way for the respondent to execute the judgement and decree in the respondent’s favour, which is likely to lead to an irreversible consequence and likely to be prejudicial to the applicants in the event of a successful appeal.

14. To fortify this position, we refer to the case of *Re Estate of Harish Chandra Hindocha (Deceased)* [2021] eKLR, where this Court stated inter alia:

“Turning to the second prerequisite, the position in law is that, an appeal would be rendered nugatory if the consequential effects for the failure to grant the relief sought would be either irreversible or highly prejudicial so as to render of no consequence the intended appeal



or appeal if ultimately successful. Herein, what is sought to be forestalled is basically the execution of the exparte judgment and decree...”

15. We thus hold that the applicant has satisfied the requirements under rule 5(2)(b) of this Court’s Rules. Accordingly, the notice of motion dated April 26, 2024 is hereby allowed. Costs shall be in the cause.

DATED AND DELIVERED AT KISUMU THIS 18TH DAY OF OCTOBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

