



M'ikiara (Sued as Administratrix of the Estate of Justus Muriungi) & another v M'murithi (Suing as Legal Representative of the Estate of Muriithi Kirigia, Deceased) (Civil Application E030 of 2024) [2024] KECA 1381 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KECA 1381 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E030 OF 2024
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
OCTOBER 11, 2024**

BETWEEN

VERONICA GACHIUKI M'IKIARA (SUED AS ADMINISTRATRIX OF THE ESTATE OF JUSTUS MURIUNGI) 1ST APPLICANT

CHARLES KINYUA 2ND APPLICANT

AND

SOLOMON MWONGERA M'MURITHI (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF MURIITHI KIRIGIA, DECEASED) RESPONDENT

(An application for stay of execution of the Orders of the Environment and Land Court of Kenya at Meru (Yano, J.) dated 14th March, 2024 in E.L.C.A. No. E054 of 2022 Pending the hearing and determination of an intended appeal therefrom)

RULING

1. The 2nd applicant moved this Court in a notice of motion made under Rule 5 (2) (b) of the Court of Appeal Rules, 2022 seeking orders that there be stay of the execution of the judgment and decree issued in Meru ELCA No. E054 of 2022 pending the hearing and determination of the intended appeal. The grounds in support of the application are stated on the face of the application and the annexed affidavit of Charles Kinyua.
2. The 2nd applicant states that he was aggrieved by the decision rendered by the Environment and Land Court in the above first appeal and wishes to mount a second appeal to this Court. The 2nd applicant contends that his appeal raises arguable grounds that have a reasonable chance of success. He pleaded with the Court to grant the order craved for so that the intended appeal is not rendered nugatory. He urged the Court to allow the application.



3. The application is opposed. Solomon Mwongera M’Murithi, the respondent filed a replying affidavit in opposition to the application. He asserted that the order issued by the first appellate court was that of dismissal and therefore, legally, it was not amenable to being stayed. He deponed that the intended appeal did not raise any arguable issues, and in his view, the same was an abuse of the due process of the court. He swore that the 2nd applicant’s sole aim in filing the application was to enable his continued trespass on the suit parcel of land. The respondent pointed out that both courts below had reached a concurrent finding that the applicants had fraudulently transferred the suit property and registered it in his name. He urged the Court to disallow the application.
4. Both parties filed their respective written submissions in support of their opposing positions. During the plenary hearing, learned counsel Mr. Akwalu for the 2nd applicant and Mr. Kaburu for the respondent respectively informed the Court that they would be relying wholly on the written submissions that are on record.
5. Both parties appreciated the principles to be considered by this Court in determining the application before it. In *Trust Bank Ltd. & Another v Investech Bank Ltd. & 3 Others* [2000] eKLR this Court held thus:

“The jurisdiction of this Court under rule 5 (2) (b) aforestated, 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, or put another way, it is not frivolous; secondly, that unless he is granted a stay the appeal or intended appeal, if successful, will be rendered nugatory. Those are the guiding principles but these principles must be considered against facts and circumstances of each case....”
6. In the present application, the 2nd applicant seeks to invoke the jurisdiction of this Court under Rule 5 (2) (b) of the Court of Appeal Rules, 2022 to stay and the judgment of the Environment and Land Court, which dismissed his first appeal to that court with costs. It is instructive that in his application before this Court, and the 2nd applicant only prayed for the court to grant him an order staying execution pending the hearing and determination of the intended appeal but did not seek an alternative prayer that he be granted an order of injunction to prevent his eviction from the suit parcel of land pending the hearing and determination of the intended appeal.
7. This Court has held severally that, where an applicant invokes the jurisdiction of the Court under Rule 5 (2) (b) of this Court Rules, and where the order that is sought to be stayed is an order of dismissal, this Court lacks jurisdiction to entertain such applications since there is, in essence, nothing to stay, other than the issue of costs, when a suit is dismissed by the superior court. The only caveat, of course, is when the applicant seeks an order of injunction to restrain the interference with the substratum of the subject of the appeal pending the hearing and determination of the intended appeal.
8. In *Devani & 4 Others v Joseph Ngindari* [2004] eKLR the Court held thus:

“By dismissing the judicial review application, the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is not granted, it will have the indirect effect of reviving the dismissed application. This Court cannot at this stage undo what the superior court has done.”



9. In *Western College & Arts and Applied Sciences v Oranga & Others* [1976] KLR 63, the predecessor of this Court held thus:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. An execution can only be in respect of costs... The High Court has not ordered any of the parties to do anything, or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an application for stay to enforce or to restrain by injunction.”

10. In the present application, it is clear to this Court that the order of dismissal of the 2nd applicant’s first appeal to the Environment and Land Court is incapable of being stayed. Indeed, as correctly observed by the respondent, there is nothing to stay because there is no positive order requiring the applicants, and specifically the 2nd applicant to do or to refrain from doing.

11. The application herein therefore lacks a substratum upon which this Court can invoke the jurisdiction under Rule 5 (2) (b) of the Court of Appeal Rules, 2022.

12. The application lacks merit and it is hereby dismissed with costs.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF OCTOBER, 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

