



**Kamundi v Mbare & another (Civil Appeal (Application)  
E003 of 2023) [2024] KECA 1617 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1617 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) E003 OF 2023  
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA  
NOVEMBER 8, 2024**

**BETWEEN**

**ALBAN NJOKA KAMUNDI ..... APPLICANT**

**AND**

**GEORGE MUNENE MBARE ..... 1<sup>ST</sup> RESPONDENT**

**EDWIN MURITHI KINYUA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of execution and injunction against the judgment of the Environment and Land Court of Kenya at Chuka (C. K Yano, J.) dated 9th November, 2022 in Chuka ELC Appeal No. 002 of 2022)*

**RULING**

**Background**

1. Alban Njoka Kamundi (the applicant) has vide a notice of motion dated 19<sup>th</sup> December, 2023 expressed to be brought pursuant to the provisions of Rule 5(2)(b) of the Court of Appeal Rules (this Court's Rules) sought orders in the main:
  - a. That this Court be pleased to issue a stay of execution and an injunction restraining the respondents and or the agents or servants from evicting and or in any manner whatsoever interfering with the applicant's right to ownership, occupation and possession of plot numbers 25 and 26 Kerege Market, Chuka town (Plot Nos. 25 and 26) pending the hearing and determination of the instant application and Nyeri Civil Appeal Number E003 of 2023 against the judgment and decree and order of Justice C.K. Yano delivered on 9<sup>th</sup> November 2022 in Chuka Environment and Land Court (ELC) Appeal No. 002 of 2022;
  - b. That this Court be pleased to issue an order conserving the suit property pending the hearing and determination of this application and Nyeri Civil Appeal Number E003 of 2023 against



the judgment and decree and order of Justice C. K. Yano delivered on 9th November 2022 in Chuka ELC Appeal No. 002 of 2022;

- c. That the costs of this application be borne by the respondents. George Munene Mbare and Edwin Murithi Kinyua are the 1<sup>st</sup> and 2<sup>nd</sup> respondents, respectively.
2. The motion is premised inter alia on the grounds: that the applicant was a defendant in the trial court case Chuka CMELC No 51 of 2019; that the applicant is the lawful allottee and owner of Plot Nos. 25 and 26 having been lawfully allocated and issued with allotment letters by the then Municipal Council of Chuka on 27<sup>th</sup> October, 1997; that prior to the said allocation a notice was issued by the Ministry of Lands and Settlement approving construction of a petrol station on Plot Nos. 25 and 26; that the respondents sued the applicant before the trial court claiming that Plot Nos. 25 and 26 are located on an access road to their plots on Land Reference Number Karingani/Mugirirwa/3573, 3575, 3612 and 3925 (the suit properties); that on 6<sup>th</sup> October, 2021 the case before the trial court was heard when the applicant failed to attend court on the ground that he was sick and the court declined an adjournment sought by his advocate; and that the case was closed and judgment delivered solely based on the respondents' evidence.
3. The applicant's further grounds are: that the judgment of the trial court was delivered on 28<sup>th</sup> January, 2022 in which the applicant was ordered to give vacant possession of Plot Nos. 25 and 26 and to pay Kshs.200,000 as damages; that his appeal at the ELC against the judgment being ELC Appeal No. E002 of 2022 was dismissed on 9<sup>th</sup> November, 2022 for lack of merit which provoked the instant appeal; that the applicant also filed an application for stay in the Chuka ELC Appeal No. E002 of 2022 which was granted on 26<sup>th</sup> July, 2023 on condition that he deposits Kshs.200,000 in a joint interest earning account of the advocates for the applicant and the respondents within 30 days; that the said condition was beyond his capabilities and exposed him to eminent eviction in execution of the decree; that the trial Court in Chuka in CMELC 51 of 2019 issued eviction orders against the applicant despite the pendency of the stay orders granted by the ELC; that the current status is that the applicant is in possession of Plot Nos. 25 and 26 and has heavily invested in their development by putting up a filling station, shops, bar and restaurant all of which have been approved by the County Government of Tharaka Nithi; that the applicant stands to suffer loss in the event that he is evicted from Plot Nos. 25 and 26 in execution of the decree dated 28<sup>th</sup> January, 2022 in Chuka CMELC 51 of 2019 yet the case was never heard on merit; that the appeal is arguable and not frivolous as the ELC failed to appreciate that the applicant was denied a hearing by the trial court in violation of his right to a fair hearing; and that unless the orders sought are granted, the appeal will be rendered nugatory as the eviction orders in respect of Plot Nos. 25 and 26 issued by the trial court were of permanent nature.
4. The motion is supported by the affidavit sworn by the applicant reiterating the grounds on the face of the motion and annexing documentary evidence in support of the prayers sought. The documents include the allotment letters in respect of Plot Nos. 25 and 26, letter approving development, development plans, rates payment receipts, the plaint and defence filed before the trial court, and the applicant's medical records. The documents also included the judgment of the trial court, memorandum of appeal before the ELC, the ELC appeal judgment dated 9<sup>th</sup> November, 2022, request for proceedings and notice of appeal dated 10<sup>th</sup> November, 2022, memorandum of appeal before this Court, application for stay orders and ruling of the ELC and ruling on eviction orders issued by the trial court.
5. The motion was opposed vide a replying affidavit by the 1<sup>st</sup> respondent who deponed inter alia that the application is ill-advised, an abuse of the court process and brought with unclean hands and it is an attempt to circumvent and subvert the due process and to frustrate and defeat the ends of justice.



That the respondents sought orders to compel the applicant to unblock the access road leading to the suit properties as the applicant erected unauthorized structures making it impossible for them to access the suit properties; that the applicant was granted stay orders pending this appeal by the ELC on condition that he deposits security of Kshs.200,000 in a joint interest earning account within the 30 days from the date of the order. That the applicant did not provide the security and the instant application is therefore merely an academic exercise, as the applicant never complies with court orders. The 1<sup>st</sup> respondent annexed a copy of the ruling of the ELC granting stay orders. The 1<sup>st</sup> respondent further deponed that a similar application was also filed in the trial court.

For those reasons, the 1<sup>st</sup> respondent sought for the instant application to be dismissed with costs.

6. A brief background will help place the application in context. The respondents filed suit against the applicant via plaint before the trial court claiming inter alia to be the joint registered proprietors of the suit properties; that as per the Original Registry Index Map (RIM) Mugirirwa Registration Section, road of access leading to the suit properties was clearly defined; that the applicant had illegally constructed and continued to construct illegal structures on the road of access leading to the suit properties despite numerous protestations from the previous owners of the suit properties to desist from further blockage of the road of access leading to the suit properties; that the applicant had further excavated a non- treatable sewerage system on the access road leading to the suit properties which leaks and emits poisonous and harmful gases; that the illegal structures constructed by the applicant have been constructed without the necessary approvals; and that as a consequence of the matters pleaded, they have suffered and continue to suffer damages both general and special and hold the applicant liable for the same.
7. The respondent prayed for judgment against the applicant seeking for an order directing the applicant to remove all the illegal structures standing on the road access leading to the suit properties and an order for compensation for loss and damages arising from the act of omission or commission by the applicant.
8. The applicant filed his defence denying the respondents' claim and averred that the only properties that he had developed were Plot Numbers 25 and 26, Kirege Market which were allotted to him by the defunct Municipal Council of Chuka. Further, that he had been paying rates and rent to the County Government of Tharaka Nithi.
9. The case proceeded ex-parte as the applicant failed to attend court. His application for a 2<sup>nd</sup> adjournment was declined. Judgment was delivered in favour of the respondents on reliance of the Original Registry Index Map (R.I.M) sheet no. 12 Mugirirwa Registration section produced by the respondents indicating that there were no plots fronting the Nairobi-Meru Highway where the applicant's plots lay. The applicant appealed to the ELC but the appeal was dismissed for lack of merit hence the appeal before this Court.
10. In the impugned judgment, the ELC noted that the applicant's main ground of appeal was that he was denied an opportunity to be heard and on perusal of the record, the ELC noted that the applicant's defence hearing before the trial court was slated for 29<sup>th</sup> September, 2021 when his advocates stated that he was unwell although no medical records were produced. The applicant was granted a last adjournment and hearing slated for 6<sup>th</sup> October 2021. From the record, on the said date, the applicant did not appear, no medical records were produced and his advocates could not reach him as his phone was off. It was the finding of the ELC that the applicant was given time to defend his case but chose not to attend court.



## Submissions by Counsel

11. When the application came up for hearing before us, Messrs M’Njau & Mageto Advocates appeared for the applicant while Messrs Waklaw Advocates represented the respondents. The parties filed written submissions and sought to rely on them.
12. Counsel for the applicant submitted that the applicant is in possession of the Plot Nos. 25 and 26, which were presented as road access by the respondents before the trial court, and the ELC. That the applicant has carried out substantial developments on Plot Nos. 25 and 26 and unless the orders of stay and injunction are granted, the respondent will proceed with execution of the decree and the eviction orders as well as attachment to recover Kshs.200,000 which will render the appeal nugatory.
13. Counsel further submitted that the appeal before this Court is arguable as demonstrated in the draft memorandum of appeal on grounds that the ELC erred: in finding that the applicant was denied a hearing and was locked out of the case during trial; in failing to consider the defence; in quoting a nonexistent consent for fixing the case for hearing before the trial court; in justifying the rush to hear the case on account of transfer of the learned Magistrate from the station; in failing to give the applicant sufficient time to present his defence; and in failing to find that bias had not been sufficiently substantiated. Counsel urged that the respondents stand to suffer no prejudice while the appeal will be rendered nugatory if the orders sought are not granted.
14. In opposing the application, counsel for the respondents submitted that the applicant has not come to court with clean hands. Counsel further submitted that the instant application lacks merit and has failed to satisfy the conditions pre-requisite for the grant of the orders sought. Counsel urged us to dismiss the application with costs.

## Determination

15. 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.
16. 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...”

17. 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 [2013] eKLR 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.”

18. An application for stay entails the exercise of discretion on the part of the Court. The applicant should deserve the exercise of discretion in his favour. The fact that he was granted stay on a condition which he did not satisfy will not help him in his quest for stay.
19. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view it is arguable inter alia whether the ELC erred in law in holding that the trial court accorded the applicant a fair hearing. 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 appeal is arguable.
20. On the nugatory aspect, the position in law is that this depends on whether or not what is sought to be stayed if allowed to happen is irreversible; or if it is not reversible, whether damages will reasonably compensate the aggrieved party. See: Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others (supra).
21. 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 denied that Plot Nos. 25 and 26 are situated on an access road and that they impede access to the suit properties. Counsel for the applicant contended that the application would be rendered nugatory if the orders sought are not granted, as he will suffer irreparable loss in the event that he is evicted from Plot Nos. 25 and 26.
22. From the record, the applicant has not proved that payment of damages will not be an adequate remedy in the event that the appeal succeeds and the orders sought are not granted. It is also notable that the applicant does not suggest, in any event, that the respondents are incapable of paying such damages. The question that we must consider is whether the loss is irreparable to the extent that damages would not be available as compensation, as was stated in *Esso Kenya Limited vs. Mark Makwata Okiya* [1992] eKLR that:

...as it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available.”
23. In the circumstances, we find that damages will be an adequate remedy and the appeal will therefore not be rendered nugatory if the orders sought are not granted and the appeal succeeds. The applicant has therefore failed to establish one limb of Rule 5(2)(b) of this Court’s Rules.
24. 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).
25. In the circumstances, we find that the applicant has failed to meet the threshold set for applications of this nature. The upshot is that the notice of motion dated 19<sup>th</sup> December 2023 is dismissed with costs to the respondents. It is so ordered.

**DATED AND DELIVERED AT NYERI THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**JAMILA MOHAMMED**

.....



**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**

