



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njogo & another v Kagunda & another (Civil Application  
E031 of 2024) [2024] KECA 1870 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1870 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E031 OF 2024  
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA  
DECEMBER 19, 2024**

**BETWEEN**

**STANLEY KAGUNDA NJOGO ..... 1<sup>ST</sup> APPLICANT**

**ELIUD MAINA KAGUNDA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PRISCILA NYAKIEGA KAGUNDA ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR MURANGA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Application for stay of execution pending appeal from the  
Judgment of the Environment and Land Court at Muranga (L. N. Gacheru,  
J.) delivered on 25th January, 2024 in E.L.C. Suit Case No. E038 of 2021)*

**RULING**

1. The applicants Stanley Kagunda Njogo and Eliud Maina Kagunda have moved the Court by Motion on notice said to be brought under Order 42 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of law praying in the main that we be pleased to stay execution of the judgment delivered on 25<sup>th</sup> January, 2024 pending hearing and determination of Nyeri Civil Appeal No. E035 of 2024 to preserve the subject matter of the dispute Loc.19/Gacharageini/4664, 4665 and 4666 “so that the right of the appellant who is exercising the undoubted right of appeal are safeguard (sic) and the appeal if successful is not rendered nugatory.” The application is supported by grounds on its face and the affidavit of the 1<sup>st</sup> applicant Stanley Kagunda Njogo. The grounds in support are to the effect that the applicants are dissatisfied with the judgment of Gacheru, J. delivered on 25<sup>th</sup> January, 2024 in Muranga ELC No. E038 of 2021 and have filed an appeal to this Court; that the application has been brought without delay. The 1<sup>st</sup> applicant states further in the affidavit that the respondents are threatening to execute the judgment of ELC; that he is apprehensive that if the stay of execution is not granted the appeal will be rendered nugatory.



2. Attached to the Motion is the judgment of ELC where the court found in favour of the respondents (plaintiffs). There is also a Memorandum of Appeal where 12 grounds of appeal are set out and a Notice of Appeal which challenges the whole of the said decision.
3. There is a replying affidavit of the 1<sup>st</sup> respondent Priscila Nyakiega Kagunda who depones amongst other things that the 1<sup>st</sup> applicant is her husband; the 2<sup>nd</sup> applicant is her son currently in remand as an accused facing a murder trial in Muranga High Court Criminal Case No.E006 of 2024 for the alleged murder of his sister Margaret Wangari Kimarua; that the murder occurred after the court judgment where it was directed that transfer of the suit land (Loc.19 Gacharageini/414) be cancelled and the same reverts to the 1<sup>st</sup> applicant with her (the respondent) obtaining a spousal interest to the suit land; that judgment was entered in her favour by ELC; that the application is brought with unreasonable delay. She states at paragraphs 6 and 7 of replying affidavit:
  6. That in response to paragraph 8 of the Supporting Affidavit, judgment of the court was executed upon the lapse of stay orders as follows;
    - a. the transfer of Land Parcel No. LOC.19/Gacharageinl/414 from the 1<sup>st</sup> Applicant to the 2<sup>nd</sup> Applicant was cancelled and the land has since reverted to its original status in the 1<sup>st</sup> Applicant's name (Annexed is a copy of search marked PNK 1).
    - b. the subdivision of land parcel number LOC.19/Gacharageinl/1284 into 3 subsequent title numbers was cancelled and the land reverted to its original status (Annexed is a copy of green card marked PNK 2(a), 2(b) & 2(c) respectively).
    - c) The Applicant's spousal interest LOC.19Gacharageinl/414, LOC.19/Gacharageinl/252, LOC.19/Gacharageinl/1284 & LOC.19/Gacharageinl/1440 was noted in the land registry (Annexed are copies of searches marked PNK 3(a), 3(b), 3(c) & 3(d) respectively).

As such, the application before the honourable court has been overtaken by events.
  7. That in response to paragraph 9 of the Supporting Affidavit, the appellant's appeal is an abuse of the court process, frivolous and vexatious. The judgment and subsequent decree of the trial court was effected as execution sought to be stayed took place as from 22<sup>nd</sup> March, 2024 or thereabout. The application has thus been overtaken by events and, further, the land records show the 1<sup>st</sup> Applicant as the registered owner of the suit properties and I cannot thereof get rid of the properties given that they are registered in the name of the 1<sup>st</sup> applicant, so the stay orders sought are otiose as the properties are not going anywhere.”
4. The respondent states further in the affidavit that no substantial loss will be occasioned to the applicants as ELC issued declaratory orders of her rights to the matrimonial property by virtue of her being the 1<sup>st</sup> applicant's wife; that the properties are registered in her husband's name. She has attached a copy of Certificate of Official Search in respect of the suit property which shows the 1<sup>st</sup> applicant as the registered proprietor “... for himself and hold in trust of Priscilla Nyakiega Kagunda ...”
5. When the application was called out for hearing before us on 14<sup>th</sup> October, 2024 there was no appearance for the applicants who we noted had been served with a hearing notice on 18<sup>th</sup> September, 2024 at 8.00 a.m. through ≥Thomas Njoroge≥njorogethomas92@gmail.com≥. Learned counsel Miss Gachango appeared for the 1st respondent. Both sides had filed written submissions. The applicants urge in those submissions that the appeal has high chances of success; that the 1<sup>st</sup> respondent has not demonstrated whether she will be able to compensate the applicants if the appeal is successful. It is



- submitted that the applicants' right to property is about to be infringed if stay of execution is not granted.
6. It is submitted by the respondent that judgment of ELC has already been executed and the application has been overtaken by events. Various case law is cited including this Court's decision in Civil Application No. E010 of 2021 John Karanja Muchoki vs. Grace Wambui Muchoki & Others (UR) in support of the proposition that there should not be an order for stay of execution where execution has taken place. It is also submitted that the applicants have not demonstrated what loss they are to suffer if the orders prayed for are not granted.
  7. We have considered the record of the Motion, the oral affidavits, submissions and the law.
  8. The principles that apply in an application for stay of execution pending appeal are well known. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay- see the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR.
  9. The applicants list 12 grounds of appeal in the Memorandum of Appeal. It is proposed to be argued on appeal, for instance, that the trial Judge erred in fact and in law in ordering cancellation of title to the suit land without interrogating circumstance that led to the applicant to transfer the suit land to his son. It is proposed to also be argued on appeal, apart from other grounds that the Judge erred in law and fact to find the 1<sup>st</sup> respondent held the suit land in trust for the respondent when no such interest was noted in the registry. These we find to be arguable grounds, they are not idle grounds, and as has been held by this Court an arguable point on appeal is not one which will succeed, it is one calling for a full interrogation and determination by the Court - Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd Civil Application No. Nai 345 of 2004.
  10. What about the nugatory aspect which an applicant must also satisfy in order to succeed in an application like this one?
  11. The respondent depones and has demonstrated in various ways including production of a Certificate of Official Search that the judgment and orders of ELC have been executed. Orders in that judgment have been effected. Registration of the suit land has reverted to the 1<sup>st</sup> applicant after cancellation of the transfer to the 2<sup>nd</sup> applicant. The title document is registered in favour of the 1<sup>st</sup> applicant and the 1<sup>st</sup> respondent cannot meddle with the title at all which is registered in her husband's name.
  12. The applicants have not satisfied us that the appeal would be rendered nugatory if we do not grant the orders prayed for. The Motion fails and is dismissed. Let each party meet their own costs; they are family members.

**DATED AND DELIVERED AT NYERI THIS 19<sup>TH</sup> DAY OF DECEMBER, 2024.**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**ALI - ARONI**



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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

