



**Koech v Kamoing; Koitaba (Interested Party) (Civil Application E049 of 2021) [2023] KECA 24 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KECA 24 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E049 OF 2021  
FA OCHIENG, LA ACHODE & WK KORIR, JJA  
JANUARY 26, 2023**

**BETWEEN**

**JOEL KIBET KOECH ..... APPLICANT**

**AND**

**AARON KIPLAGAT KAMOING ..... RESPONDENT**

**AND**

**WILSON KOITABA ..... INTERESTED PARTY**

*(Application for stay of execution of the judgment and decree of the Environment and Land Court at Nakuru (M Njoroge, J.) dated 27th January, 2022 in ELC Case No. 452 of 2016 (O.S))*

**RULING**

1. Before this Court is a notice of motion dated August 1, 2022 and brought pursuant to rules 5(2)(b) and 20 of the Court of Appeal Rules, 2022. Joel Kibet Koech, the applicant, seeks to stay the execution of the orders and decree emanating from the judgment of the Environment and Land Court at Nakuru in ELC Case No 452 of 2016 pending the hearing and determination of his intended appeal to this Court. The application is accompanied by the affidavit sworn by the applicant, which is dated August 5, 2022.
2. The application is anchored on the grounds set out on its face as well as in the supporting affidavit of the applicant. On the face of the notice of motion, the application is premised on two major grounds, namely, that his appeal stands a risk of being rendered nugatory if the orders for stay are not granted, and that he has an arguable appeal. On the appeal being rendered nugatory, it is the applicant's case that he has lived on the property alongside his family for over 17 years hence execution of the orders of the trial court will lead to him losing his home. He also avers that he has subdivided the suit property (Olenguruone/Keringet Block 1/20) into 11 plots which he has sold to third parties thereby he stands at risk of facing numerous law suits emanating from the third parties. He further avers that he has been



condemned to pay costs and that other than losing his only known home for the past 17 years, he also stands a risk of losing Kshs 4,000,000/- being the purchase price he paid for the land in the year 2005. The applicant urges this Court to maintain the status quo until his appeal is heard and determined.

3. The application was opposed through the replying affidavit of the respondent dated September 29, 2022. The respondent avers that the application is frivolous and is only meant to deprive him the fruits of the judgment issued in his favour. He also avers that the application does not meet the threshold set under the law. The respondent further avers that the grounds of appeal as contained in the memorandum of appeal by the applicant raises new issues which were either not canvassed during trial or had been raised by the interested party and were subsequently preliminarily dismissed. The respondent also reiterates that the applicant is not bound to suffer any substantial loss and that the alleged loss of Kshs 4,000,000/- is recoverable from the interested party as contained in an agreement for sale between the applicant and the interested party dated June 6, 2005. Finally, the respondent avers that he is a person of means and is capable to offer monetary compensation to the applicant if the appeal is successful.
4. When this matter came before us in plenary on October 3, 2022, Mr F. A. Midikira appeared for the applicant and also held brief for Mr. P.W. Wena for the interested party. Mr Sumba appeared for the respondent. Both counsel indicated that they had filed written submissions. Mr Sumba's submissions had, reportedly been filed on Friday, September 30, 2022 although they were not yet in the court file. Counsel also sought to highlight their submissions orally before us. Up to the time of writing this judgment, we were yet to receive the written submissions by Mr Sumba and calls from our Court Assistants to Mr Sumba have remained unanswered, leaving us with no option but to proceed and render ourselves based on the documents on record.
5. The appellant filed submissions in which two issues for determination were identified and addressed and we summarize them as follows. The first issue the appellant addressed is that he had an arguable appeal. The appellant submitted that his memorandum of appeal serialized as COACA/E084/2022 and attached to his supporting affidavit demonstrates that the Learned Judge of the superior court erred in finding that applicant's purchase of the suit property was fraudulent. He is of the view that this issue requires consideration in light of the fact that the Respondent did not specifically plead the same in his pleadings nor was any evidence adduced towards the same. He further submits that the learned Judge of ELC erred in failing to find that the applicant was an innocent purchaser for value of the suit property and his title cannot therefore be defeated. He noted that the judgment and decree of the ELC is positive in nature and seeks to cancel the applicant's title to the suit property and transfer the same to the Respondent.
6. The second issue addressed by the appellant is that the appeal will be rendered nugatory in the event this application is not allowed. To support this line of submission, the applicant reiterates that he has settled on the suit property for more than seventeen (17) years and therefore in the event the respondent executes the judgment and decree of the ELC, this appeal will be rendered nugatory. He submits that he is apprehensive of the impending eviction from the suit property, by the respondent, which will render him homeless as the suit property has been his home. He also submits that during his period of stay in the suit property, he has sub- divided the property and disposed of a portion to third parties who are in occupation: And that in the event the respondent executes the judgment and decree of the ELC, his titles will be canceled leading to the appeal being rendered nugatory. On the other hand, the appellant believes that the respondent will not be prejudiced in any way if execution of the judgment and decree appealed against is stayed pending the hearing and determination of this appeal. In the end, the applicant urged the Court to align itself with the decisions in *Attorney General vs. Okhiya*



7. Orally, Mr F. A. Midikira, counsel for the applicant submitted that in such an application, the applicant does not have to demonstrate that the appeal shall be successful. And that all that is required is a demonstration that the appeal is arguable. To buttress this, counsel submitted that the 11 grounds of appeal contained in the memorandum of appeal demonstrated that this appeal is arguable. Counsel further reiterated that the pending appeal would be rendered nugatory if the application is not allowed. The applicant and his family are resident upon the suit property. In contrast, the respondent has been in court for the last 20 years, without possession and if there is any loss to be suffered by the respondent, it can be compensated by way of damages. He pleaded with the Court to allow the application and let parties ventilate the substantive issues through the main appeal.
8. Similarly, Mr Sumba for the respondent also made oral submissions before us in plenary. Counsel submitted that the respondent should be allowed to enjoy the fruits of judgment and that no compensation in terms of damages was sufficient in the circumstances. He also submitted that the applicant had failed to demonstrate any substantial loss that would be occasioned to him if the application is dismissed. He pointed out that the applicant, in his supporting affidavit, quantified his loss as Kshs 4 million together with interests and therefore no substantial loss was bound to be occasioned. Therefore, in his view the appeal cannot be rendered nugatory. To support this, counsel referred the Court to clause 5 of the sale agreement between the applicant and the Interested Party dated June 6, 2005 in which it was expressly stipulated that the LSK conditions of sale would take effect; hence the applicant would be refunded the purchase price with interest at the rate of 15%. With regards to the issue that the property had been transferred to 3<sup>rd</sup> parties, counsel refuted the claims, submitting that those were never issues raised before the trial court and therefore amounted to new issues being sneaked into this application. Further, counsel submitted that the intended appeal was frivolous for reasons that the applicant did not demonstrate to the ELC that he was an innocent purchaser for value. Counsel urged the Court to dismiss the application on the ground that there would be no substantial loss occasioned, as the applicant had quantified the potential loss, and also indicated how it would be recoverable.
9. This application is premised on rule 5(2)(b) of the Court of Appeal Rules, 2010. In *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR this Court underscored the import of this provision, as follows:

“It is clear from all the provisions of Rule 5 that their basic aim is to provide an interim relief where the superior court has determined a matter and the party against whom the determination is made has either appealed or intends to appeal. If there is no appeal or no intention to appeal, this Court would have no jurisdiction to meddle in a decision made by the superior court.”
10. Even though the jurisdiction of this Court is not contested, we find it prudent to reiterate that this Court only has jurisdiction on applications such as this one once it is seized of the matter either through a notice of appeal or at times, later in the day, when an appeal is filed before it. In the present instance, we note that there is a notice of appeal on record and further, the memorandum of appeal has also been filed. We are therefore satisfied that we are properly seized of this application.
11. For an applicant to succeed in an application for stay under rule 5(2)(b) of the *Court of Appeal Rules*, he or she must satisfy the Court that his or her application meets the threshold of the twin principles, namely, that he or she has an arguable appeal, and that if the order of stay is not granted, the appeal is



bound to be rendered nugatory. In this Court's decision in the case of *Attorney General & Another vs. Eunice Makori & Another* [2021] eKLR it was held as follows;

“Undoubtedly, this Court has unfettered discretion under Rule 5(2) (b) to grant an order of stay. The principles guiding the exercise of such discretion are well settled. Firstly, an applicant has to demonstrate that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. (See: *Multimedia University & Another v. Professor Gitile N. Naituli* (2014) eKLR).”

12. We note that the grounds of appeal are based on issues concerning the jurisdiction of the trial court, fraud, burden of proof as well as interpretation of certain sections of our statutes. Having considered the 11 grounds of appeal raised in the memorandum of appeal vis-à-vis the judgment of the learned Judge, we are convinced that the pending appeal is arguable. We must however point out that it is a well-grounded norm that the fact that an appeal is arguable should not in any way be construed as indicator of the final outcome of the appeal. To this end, we refer to this Court's decision in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR

where the learned Judges stated:

- “vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004.
- 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. *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008.”

13. The second limb is whether the applicant has satisfied the court that without the orders for stay, the pending appeal will be rendered nugatory. For an appeal to be rendered nugatory, what is sought to be stayed must be irreversible, and so colossal that damages cannot reasonably compensate the applicant in the event that the orders for stay are not granted, see *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* (supra).

14. Elsewhere, this Court in *Permanent Secretary Ministry of Roads & another v Fleur Investments Limited* [2014] eKLR addressed the issue thus:

“In *Reliance Bank Limited v Norlake Investments Ltd* [2002] 1 EA 227, this Court held that:

“..... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

“A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law.”

15. Before us is an application in which the subject matter is land parcel No Olenguruone/Keringet Block 1/20. Both the applicant and the respondent are in agreement that the applicant has been in possession of the said parcel since the year 2005. The applicant further avers that the said parcel forms part of his home, a fact that is not disputed by the respondent. The applicant has also subdivided the said parcel



into 10 other plots which he alleges to have sold to other third parties. There is however no evidence that the same has been sold to third parties as alleged by the applicant as all the title deeds attached are in the names of the applicant.

16. We therefore find the applicant has not demonstrated the possibility of an avalanche of suits from purchasers. However, the fact the suit property has been his home, and being cognisant of the sentimental value that the applicant and his family members must have placed in establishing the home, we find that the disruption of that long-term arrangement may well be irreversible. On the other hand, however, if the appeal is to be dismissed and the respondent is then allowed to execute his judgment, no substantial loss is going to be occasioned to him. The respondent has not been in possession of the suit property and we deem it not only proper but just to let the parties prosecute their appeal while enjoying the prevailing status quo.
17. Being mindful of the fact that the purpose of orders of stay is to grant some reprieve to the aggrieved party, we are also alive to the fact that there is need for this Court to preserve the integrity of the suit property. To this end, we do order that execution shall be stayed until the appeal is heard and determined. However, in order to preserve the integrity of the suit property, the appellant shall not have any dealings with the suit property. For the avoidance of any doubt, but without limiting the generality of the meaning of the words “dealing with the suit property”, we order that the applicant shall not sell, transfer, mortgage or in any other manner whatsoever, encumber the title of the suit property or the titles (if any) that have arisen after sub-division of the said suit property.
18. The only remaining issue is who should bear the cost of this application.  
  
Under Rule 33 of the Court of Appeal Rules, 2022, this court is mandated to make such incidental orders including orders as to costs. Additionally, Section 27 of the *Civil Procedure Act* provides that costs shall follow the event unless the court or judge shall for good reason otherwise order. We see no good reasons advanced by either party herein as to warrant the departure from the position. Be that as it may, we deem it fit to let the appeal be canvassed first and the cost of this application to follow the outcome of the appeal.
19. The upshot of the foregoing is that the application is with merit and is hereby allowed. However, the applicant be restrained from leasing, selling, subletting, mortgaging, transferring, encumbering or gifting the suit property or the subsequent titles arising from land No Olenguruone/Keringet Block 1/20 pending the hearing and determination of this appeal. The cost of this application to abide the final determination of the appeal.
20. It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

