



REPUBLIC OF KENYA



KENYA LAW
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**Mwinyi v Bhai & another (Civil Application E049 of 2021)
[2023] KECA 12 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KECA 12 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E049 OF 2021
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
JANUARY 20, 2023**

BETWEEN

ZAINAB MWINYI APPLICANT

AND

SAIFUDEEN ABDULLA BHAI 1ST RESPONDENT

HUSSEIN ABDULLA BHAI 2ND RESPONDENT

*(An application for stay of execution pending appeal from the judgement
of the Environment and Land Court at Mombasa (C.K. Yano J.)
delivered on 17th January 2019 in Mombasa ELC Case 424 of 1996)*

RULING

1. A judgment was delivered by the Environment and Land Court (ELC) at Mombasa (Yano J.) on January 17, 2019 in Mombasa ELC Case 424 of 1996 in favour of Saifudeen Abdulla Bhai and Hussein Abdulla Bhai, the Respondents herein. The learned trial Judge granted the said Respondents declarations that the interest purchased by Zainab Mwinyi (the Applicant herein) by way of an agreement of November 26, 1991, was a house without land which was built on a portion of land of Plot No. Mombasa/XVI/27 belonging to the Respondents; that the Applicant required the consent and authority of the Respondents as the land owners and landlords to demolish the said house; and that having failed to do so, the Applicant upon demolition became a trespasser and any structure or structures put up on the land thereafter were illegal.
2. The learned Judge in addition granted orders of injunctions restraining the Applicant from continuing construction of the illegal structures on the said Plot No. 27/XVI/mombasa (hereinafter the suit property”), requiring her to demolish and remove all of the structures erected thereon and deliver vacant possession of the suit premises, and in default the Respondents were to undertake the demolitions at the cost and expenses of the Applicant. The Respondents were also awarded Kshs.



- 500,000/= as general damages for trespass, and Kshs. 3,000/= per month as mesne profits from 26th November 1991 until the giving of vacant possession by the Applicant. Lastly, the learned Judge dismissed the Applicant's counter-claim with costs.
3. Being dissatisfied with the decision rendered by the ELC, the Applicant filed a Notice of Appeal on January 21, 2019 and subsequently filed an application in this Court by way of a Notice of Motion dated June 23, 2021, in which she sought orders of stay of execution of the judgment of January 17, 2019, pending the hearing and determination of the appeal. The said application which is the subject of this ruling, was supported by two affidavits sworn by the Applicant on June 23, 2021 and on August 13, 2021. The grounds of the application are that after the Applicant's application for stay of execution was dismissed by the ELC on February 4, 2021, the Respondents initiated an unlawful and unprocedural execution process, and served the Applicant with warrants of eviction on 2nd June 2021 which were alleged to have been issued in March 2021; were executed by the police instead of the court bailiff in the absence of court orders to that effect; and without a notice to show cause as required by Order 22 Rule 18(1) of the *Civil Procedure Rules*. Further, that the execution will result in demolition of her house and render the Applicant destitute and affect her ability to prosecute the appeal, which shall also be rendered nugatory.
 4. The application is opposed by the Respondents in a replying affidavit sworn on July 23, 2021 by the 1st Respondent, who explained that before the Applicant made her application for stay of execution in the ELC, the Respondents had made an application to the same Court dated February 20, 2019, seeking to enforce the order for eviction and for the police to provide security during the exercise, which application was considered and a ruling thereon delivered on February 4, 2020. Therefore, that the execution process is not unlawful or unprocedural as alleged, as the warrant to give vacant possession was issued to the Court Bailiff and the police were only enlisted for purposes of providing security. Further, that while executing the warrants, the Court Bailiff was threatened by the Applicant's advocate who went to the suit premises and illegally stopped the execution process. Lastly, that the house on the suit property was partially demolished during the eviction exercise and the application has therefore been overtaken by events. The Respondents annexed copies of the ruling by the ELC dated February 4, 2020, the warrant to the Court Bailiff, and an affidavit by the Court Bailiff explaining the execution process.
 5. We heard the application on the Court's virtual platform on November 9, 2022, and learned counsel Mr. Shiundu was present holding brief for Mr. Khatib, learned counsel for the Applicant, while learned counsel Mr. Mwakireti appeared for the Respondents. Both counsel relied on their respective written submissions filed in Court, dated November 3, 2022 and November 8, 2022.
 6. The principles applicable in the exercise of the Court's unfettered discretion under Rule 5(2) (b) to grant an order of stay are well settled. An applicant has to satisfy two requirements. Firstly, that he or she has an arguable appeal. Secondly, that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR. In addition, this court exercises original jurisdiction under Rule 5(2)(b) as held in *Ruben & 9 others v Nderitu & another* [1989] KLR 459.
 7. On the first limb of arguability, the Applicant's counsel reiterated the averments made in the application as to the reasons why the execution was unlawful, and submitted that the Applicant's grounds of appeal are that the trial Judge erred in ordering vacant possession of the property and declaring the Respondent the rightful owner to the property. It was also argued that the nugatory test had been met because the Applicant's house on the suit property has not been valued and in case it is demolished, the current value will not be ascertainable hence the Applicant cannot be adequately



compensated by damages. In any case, that if the house is demolished, the Applicant shall have difficulties in prosecuting her appeal as she will be rendered homeless and destitute.

8. The Respondents' counsel contested the arguability of the appeal, and submitted that the Applicant has only stated that she has an arguable appeal, but has failed to annex a draft memorandum of appeal for the court to satisfy itself of this requirement. Further, the Applicant has not sufficiently set out her grievances with the impugned judgment, or highlighted any weighty issues arising therefrom on the face of the application for consideration by this Court. Reliance was placed on the decisions by this Court to this effect in *Priscilla Wambui Mathenge v Mary Wairimu Mathenge & another* [2020] eKLR and *Moraa Ndege vs Moenga Moenga* [2012] eKLR. In addition, that the Applicant is not serious in prosecuting the intended appeal and the application is a delay tactic to deny the Respondents' the fruits of the judgment delivered in their favour, as the Applicant has not filed a record of appeal or taken steps to prosecute the appeal since the filing of the Notice of Appeal.
9. The Respondent's counsel further submitted that the intended appeal will not be rendered nugatory if the order of stay of execution is not granted because the Applicant's house on the suit property which was incomplete, was partially demolished during the eviction process that was undertaken, and as such the application has been overtaken by events. In addition, that the Respondents being the owners of the suit property have means of repaying the Applicant damages, and that the structures standing on the Respondents' land can be valued and compensated by way of damages in the unlikely event the appeal succeeds.
10. We need to point out at the outset that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous and merits to be argued fully. Further that it is sufficient if the appeal raises only one triable issue. This Court in this regard held as follows in *Somak Travels Ltd v Gladys Aganyo* [2016] eKLR

“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this Court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”
11. The omission to annex a draft proposed memorandum of appeal to an application for stay of execution is therefore not fatal, and is curable if the Applicant sufficiently sets out her grievance with the decision appealed against on the face of the application. In the instant application, it was correctly pointed out by the Respondents that the application and its supporting affidavits do not indicate the grievances that the Applicant has with the judgment rendered by the ELC and appears to have focused on the illegality of the execution process carried out by the Respondents. It was however contended in the Applicant's submissions that the Applicant is aggrieved by the findings of the ELC that the Respondents were the rightful owners of the suit property, including the house thereon, which in our view is not a frivolous ground. The Applicant has therefore established the existence of the first limb.
12. On the second limb, it was held in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [supra] that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or injuncted, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. During the hearing of the application, both Mr. Mr. Shiundu and Mr Mwakireti confirmed that the Applicant is still living on the partly demolished house



on the suit property. To this extent, we are of the view that if stay of execution is not granted, the substratum of the appeal will be destroyed and it will be rendered nugatory.

13. We are however also mindful that the Applicant delayed in bringing the instant application after her application for stay of execution was dismissed by the ELC on February 4, 2021, and did not demonstrate the steps she has taken to prosecute the appeal. We are therefore of the view that even if the required threshold for orders of stay of execution has been met, a conditional stay is justified in the circumstances in the interests of justice to both parties.
14. The Notice of Motion application dated June 23, 2021 is accordingly allowed on the following terms and conditions:
 - a) There shall be a stay of execution of the judgment delivered in Mombasa ELC Case 424 of 1996 by the Environment and Land Court on January 17, 2019 pending the hearing and determination of the appeal herein, only on condition that the Applicant files and serve the memorandum and record of appeal within 30 days from the date of delivery of this ruling.
 - b) The appeal shall thereafter be fixed for case management before the Deputy Registrar for directions on filing of submissions, and shall thereafter fixed for hearing by the Registry on the basis of priority.
 - c) Upon default by the Applicant in filing and serving the memorandum and record of appeal within 30 days of delivery of this ruling, the orders of stay granted herein will automatically lapse and shall stand discharged.
 - d) There shall be no order as regards the costs of the application.
15. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF JANUARY, 2023.

S. GATEMBU KAIRU (FCI Arb)

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

