



**Mwambire (Suing as the Legal Representative of the Estate of Martha Paul Kazungu) v Gede Secondary School & 3 others (Civil Application E085 of 2022) [2023] KECA 6 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KECA 6 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E085 OF 2022  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
JANUARY 20, 2023**

**BETWEEN**

**ANTHONY NDUNDI MWAMBIRE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MARTHA PAUL KAZUNGU) ..... APPLICANT**

**AND**

**GEDE SECONDARY SCHOOL ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KILIFI ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR KILIFI ..... 3<sup>RD</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for a stay of execution of the judgment delivered by Hon M.A. Odeny on 6<sup>th</sup> October 2022 in Malindi ELC Case 112 of 2015)*

**RULING**

1. The applicant, by a notice of motion application dated November 15, 2022 brought pursuant to rule 5 (2) (b) of the [Court of Appeal Rules](#) (hereinafter Rules) and order 42 rule 6 and order 51 rule 1 of the [Civil Procedure Rules](#), seeks the following three substantive orders, the rest of them being moot:
  - i) ....
  - ii) ....
  - iii) ...



- iv). That the Hon court be pleased to issue a stay of execution of the judgment and decree dated and delivered on the October 6, 2022 pending hearing and determination of the intended appeal;
  - v) ...
  - vi. That pending the hearing and determination of this appeal the defendants (sic) and/or their agents be restrained from evicting or causing eviction of persons living on the said subject matter being Kilifi Mbarakachembe 3 and Kilifi Mbarakachembe 1 plot 24159;
  - vii. That pending the hearing and determination of this appeal this Hon court stays the order of the permanent injunction granted in the judgment in ELC 112 of 2015 relating to plot 24159 being the subject matter of the suit.
  - viii. Costs
2. The background of this case is important in order to bring to the fore the nature of the dispute between the parties. The applicant was the plaintiff in the ELC Case No 112 of 2015, which he filed as legal representative of the deceased Martha Paul Kazungu, against the respondents seeking several reliefs among them a declaration that plot No Kilifi/Mbarakachembe 3 and Plot No Kilifi/ Mbarakachembe 1 plot 24159 were the property of his deceased kin, (Martha Paul Kazungu), and an order directing the Land Registrar Kilifi to register and issue title over the suit land to the applicant. The 1<sup>st</sup> respondent in its defence and counterclaim averred that the suit land was allotted to the 1<sup>st</sup> respondent in 1997 and registered in its name as a secondary school under a 99 year lease. The 1<sup>st</sup> respondent's sought injunctive reliefs against the applicant as well as an eviction order against him. The case was heard and the ELC Judge (Hon M Odeny, J) in a judgment delivered on the October 6, 2022, resolved it in favour of the 1<sup>st</sup> respondent and entered judgment in terms of the prayers in the counter claim, dismissing the applicant's case, issuing injunctions against him, including an order to vacate the suit land within 45 days of the date of the judgment.
  3. The applicant was dissatisfied with the decision rendered by the ELC and lodged a notice of appeal dated October 11, 2022. He then filed the instant application. The grounds of the application are that execution of the judgment and decree of the ELC was underway and that unless the orders sought are granted, the applicant will be evicted from or denied entry to the suit land thereby destabilizing the family who are the beneficiaries of the suit land causing him irreparable harm, and consequently will render the intended appeal nugatory.
  4. The affidavit in support of the application reiterated the contents on the face of the notice of motion.
  5. The application is opposed. The 1<sup>st</sup> respondent has filed a replying affidavit through the Principal and Secretary to the Board of Management of the 1<sup>st</sup> respondent, Josiah Mwachanya dated November 15, 2022. The gist of the affidavit is that the 1<sup>st</sup> respondent is the registered owner of the suit land, which is a public institution, that there is public interest involved in the matter which overrides the interest of the applicant, which he also acknowledges. It is also averred that the applicant does not meet the threshold required under rule 5 (2) (b) of this Court's Rules, as he has not demonstrated an arguable appeal.
  6. The application was heard on December 13, 2022. Learned counsel Mr Derrick Odhiambo was present for the applicant, learned State Counsel Mr Martin Munga was present for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent, while learned counsel Ms Mulongo appeared for the 2<sup>nd</sup> respondent.
  7. Mr Odhiambo relied on his written submissions filed on the November 22, 2022. Counsel urged eviction of the applicant and demolition of all his structures on the suit land was imminent as the decree has already been issued. It was urged that the respondents being public entities where the applicant's



- minor children also school, it was in the best interest of the applicant's minor children that the orders sought are granted. Counsel cited the case of *Tabro Transporters v Absalom Dova Lumbasi* [2012] eKLR urging that a court in exercise of its discretionary power should not leave a party worse off or introduce any disadvantage but should administer the justice that the case deserves, which in this case, counsel urged, was in grant of the orders sought. Counsel also relied on *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR for the proposition that execution of the decree would create a state of affairs that will negate the essential core of the applicant as a successful party on appeal.
8. Mr Munga on his part relied on his submissions dated November 25, 2022 in opposition to the application. Placing reliance on the case of *Dickson Sinkeet Mapi (Suing as the personal representative of Benjamin Mapi Ole Pritimo- Deceased v Muntukei* [2021] eKLR, counsel pointed out that there is no arguable point that merits consideration by the court; that the applicant's gravamen was dealt with by the High Court when it rendered its decision in Judicial Review Application No 14 of 2009. Counsel urged that the applicant is belatedly raising the issue of adverse possession on appeal and yet the same was not an issue before the ELC Court.
  9. As for the nugatory test, Mr Munga, placing reliance on the case of *County Government of Kakamega & another v Munyao Sila & another* [2021] eKLR urged that the test was not met as there is no loss that the applicant may suffer that cannot be atoned in damages; that the 1<sup>st</sup> respondent is a public institution situate on the suit property and the interests of the public ought to take precedence over that of the applicant. Counsel concluded that the applicant did not meet the threshold for grant of the orders sought.
  10. Ms Mulongo for the 2<sup>nd</sup> respondent relied on their written submissions date December 9, 2022 together with the replying affidavit sworn by Henry Faraji Chipinde, the County Solicitor of the 2<sup>nd</sup> respondent dated December 9, 2022. The contents of the replying affidavit are reiterated in the submissions by counsel and we need not rehash them. Counsel submitted that the applicant did not have an arguable appeal as he had not described the property he claims, further that adverse possession claim was being introduced on appeal and ought not to be entertained. Further that the application for stay is being sought against a negative order which order is incapable of being stayed. To buttress her submissions counsel placed reliance on *George ole Sangui & 12 others v Kedong Ranch Ltd* [2015] eKLR; *Kenya Industrial Estate Ltd v Matilda Tenge Mwachia* [2021] eKLR; and *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR.
  11. We have considered the rival arguments of counsel to the parties in this application together with the cases relied upon, as well as the affidavits sworn for and against the application. Our invitation to intervene in this matter is anchored on rule 5 (2) (b) of the *Rules* of this court, and order 42 rule 6 and order 51 rule 1 of the *Civil Procedure Rules*. We shall regard the invocation of the *Rules* under the *Civil Procedure Act* as a procedural lapse and thus overlook it under article 159 of the *Constitution*. The substantive provision for seeking relief sought is however rule 5(2)(b) of the *Rules*. It is now trite that the court's exercise of its mandate under the said rule, is original, independent and discretionary. See *Githunguri v Jimba Credit Corporation Ltd (No 2)* [1988] KLR 88.
  12. The principles which apply in an application such as the instant one are well settled. The applicant must satisfy the twin principles that first, he has an arguable appeal and secondly, that the appeal will be rendered nugatory if the order sought was not granted and the appeal were to succeed. See *Stanley Kangethe Kinyanjui v Tonny Keter & others* [2013] eKLR
  13. We are aware that 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. See *Joseph Gitabi Gachau & another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008. We have perused the



memorandum of appeal annexed to the supporting affidavit of the applicant. Among the grounds raised are failure by the ELC to consider the issue of adverse possession despite evidence being led in its support. We are satisfied that the appeal is not frivolous. It is arguable. 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.”

14. As to whether the appeal will be rendered nugatory, if the order sought is not granted and the appeal succeeds; Mr Odhiambo for the applicant urged that the applicant stood to suffer irreversible loss as his children living on the land were attending the 1<sup>st</sup> respondent school and were sitting examinations which if disrupted they may never be able to recover, neither would the damage be adequately compensated by an award of damages. Mr Munga’s submission was that appeal would not be rendered nugatory as the government had the resources to compensate the applicant for any loss. Ms Mulongo for the 2<sup>nd</sup> respondent in her submissions contended that this Court has no jurisdiction to grant the orders sought as the order of the ELC intended to be appealed was a negative order.
15. We have considered the rival arguments of the counsel to the parties. With due respect to Ms Mulongo, the order intended to be appealed is not a negative order. The ELC granted orders of mandatory and permanent injunction as against the applicant. As to what nugatory entails, we are guided by the decision in *Stanley Kangethe Kinyanjui v Tonny Keter & others, supra* where the court summarized what should guide the court as follows:
  - xii. “The term ‘nugatory’ has to be given its full meaning. It does only mean worthless, futile or invalid. It also means trifling.
  - xiii. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.
16. We find the nugatory test has been met in that it has been demonstrated that the lives of the applicant and his family will be destabilized including those of the minor children who were schooling and sitting examinations in the 1<sup>st</sup> respondent school. We are in agreement that interruption of learning and of sitting examination can have adverse impact on minor children, and may be irreversible and incapable of being adequately compensated by an award in damages. On the other hand, the suit land is over 9 hectares and the applicant appears to occupy a small portion of it. The 1<sup>st</sup> respondent has not demonstrated that it stands to suffer any prejudice if the order sought is granted. The result is that we allow the application in terms of prayer 6 of the motion dated November 15, 2022 as follows:
  - i. That pending the hearing and determination of the intended appeal an injunction do issue restraining the respondents by themselves or through agents from evicting or causing the eviction the applicant from Kilifi Mbarakachembe 3 and Kilifi Mbarakachembe 1 plot 23159
  - ii. The costs of this application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT MOMBASA THIS 20<sup>TH</sup> DAY OF JANUARY, 2023.**



**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

