



**Bett v Olamroi & 2 others (Civil Appeal (Application) E428 of 2022)  
[2023] KECA 169 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 169 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E428 OF 2022  
DK MUSINGA, JM MATIVO & WK KORIR, JJA  
FEBRUARY 17, 2023**

**BETWEEN**

**ANNE KAREGI BETT ..... APPLICANT**

**AND**

**MERIO OLAMROI ..... 1<sup>ST</sup> RESPONDENT**

**HASSAN TAJEU ALIAS MZUNGU ..... 2<sup>ND</sup> RESPONDENT**

**EMILY SOPHILAL MARASUA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for stay of execution of the Judgment and decree of the Environment and Land Court at Kajiado (Gicheru, J.) dated 7th November, 2022 in ELC No. 370 of 2017)*

**RULING**

1. This ruling determines the applicant's notice of motion dated November 17, 2022. The application is brought under the provisions of sections 3A and 3B of the *Appellate Jurisdiction Act* and rule 5(2) (b) of the *Court of Appeal Rules*. The applicant prays for an order of stay of execution of the judgement and decree issued by the Environment and Land Court on November 7, 2022 (Gicheru, J) in ELC No 370 of 2017: Anne Karegi Bett v Merio Olamroi and 2 Others pending the hearing and determination of the applicant's appeal against the said judgment. The applicant also prays that this court issues any consequential orders that it deems necessary. Lastly, the applicant prays that the costs of and/or incidental to this application do abide the outcome of the appeal.
2. Briefly, the background to the application is that vide a plaint dated December 29, 2014 the applicant as the registered proprietor of Kajiado/Lornigusua/1299 (hereinafter "the suit property") moved the Environment and Land Court seeking a permanent injunction compelling the respondents to vacate the suit property and to have the structures built thereon by the respondents demolished since they had trespassed on the suit property sometimes in or around 2014. In response, the respondents vide their amended statement of defence and counterclaim dated September 27, 2017 stated that the applicant



- and her husband were registered as proprietors of the suit property when there was a court order in Nairobi HCC 561 of 2000 forbidding any such registration, and that Sarinke Lempisai who purported to sell the suit property to the applicant swore a false affidavit alleging the death of the 1<sup>st</sup> respondent which led to the deletion of the 1<sup>st</sup> respondent's name from the list of the members of the 11partimaru Group Ranch.
3. On November 7, 2022 the learned judge of the Environment and Land Court after considering the arguments by the parties, found that the applicant had failed to discharge the burden of proof placed upon her in the face of fraud having been proved against Sarinke Lempisai, the person who sold the applicant the suit property. Consequently, the applicant's suit was dismissed with costs. In upholding the respondent's counter-claim, the learned trial Judge found that the respondents had a legitimate claim to the suit property as was held by the tribunal and the County Land Management Board that the suit property belonged to the 1<sup>st</sup> respondent (deceased) who bequeathed it to the 2<sup>nd</sup> respondent who is his own grandson.
  4. Aggrieved by the judgment delivered on November 7, 2022, the applicant lodged the notice of appeal dated November 8, 2022 and a letter requesting for the typed proceedings dated November 9, 2022. To demonstrate that her appeal is arguable, the applicant relied on her draft memorandum of appeal dated November 11, 2022 wherein she stated that the question to be answered in the appeal is who between the 1<sup>st</sup> respondent and herself together with her husband owns the property and whether the Environment and Land Court erred in declaring the 1<sup>st</sup> respondent as the lawful owner. The applicant also maintained that if a stay of execution to preserve the suit property is not granted then the appeal would be rendered nugatory since the respondent would be allowed to enforce the decree thus cancelling her title and evicting her from her property.
  5. The respondents opposed the application through the replying affidavit sworn by the 2<sup>nd</sup> respondent dated November 25, 2022. The salient averments are that the intended appeal does not raise triable issues; that the learned Judge took into consideration all the evidence presented before him; that the applicant did not rebut the respondents' evidence that they were in occupation of the suit property and that the 1<sup>st</sup> respondent was allocated the land being a member of 11partimaru Group Ranch. The 2<sup>nd</sup> respondent also averred that applicant has not demonstrated that the appeal will be rendered nugatory if the orders sought were not granted. Further, the applicant has never resided on the property, so, there is no risk of eviction, thus, the applicant has not satisfied the principles under rule 5(2) (b) of the [Court of Appeal Rules, 2022](#) to merit the stay sought.
  6. In his submissions, the applicant's counsel argued that the grounds cited in the memorandum of appeal are not only triable, but also the appeal is likely to succeed. Counsel submitted that it is sufficient if a single bona fide arguable ground is raised and relied on *Damji Pragji Mandavia v Sara Lee Household & Body Care (Kl Ltd*, Civil Application No NAI 345 of 2004 cited in [Stanley Kang'etbe Kinyanjui v TonyKeter 5 Others](#) [2013] eKLR.
  7. On whether the appeal would be rendered nugatory if stay is refused, counsel submitted that since the respondents have never occupied the property unlike the applicant, they stand to suffer no prejudice or loss if the stay is granted. Counsel argued that if stay is denied, the applicant will be placed in a precarious position than the respondents and relied on [Absalom Dova v Tarbo Transporters](#) [2013] eKLR, where this court held that the discretionary relief of stay of execution pending appeal is designed such that no one would be worse off by virtue of an order of the court.
  8. On behalf of the respondents, it was submitted that the draft memorandum of appeal does not raise triable issues and that the learned Judge took into account all the evidence presented to him by both parties and made a right finding. Counsel cited [Governors Baloon Safari Ltd v Skyship Company](#)



Limited & County Council of Transmara, Civil Application No Nai 32 of 2015 where this court found an appeal to be un-arguable because it did not raise a bona fide issue meriting consideration by the court.

9. On whether the appeal will be rendered nugatory if the orders sought are not granted, counsel maintained that the applicant does not live on the suit property and no evidence was produced to show she resides on the property or carries out the small scale farming and animal rearing on the land as alleged. Therefore, counsel argued that the applicant does not risk eviction or having her crops and animals damaged because she does not carry out the said activities on the suit property. Counsel relied on Edwin K Too and Paul Sitienei, Civil Application No 93 of 2020 where the court held that because the applicant was not in possession of the property and there was no evidence that the respondent who was in possession intended to dispose of the said property or take any action that may change the character of the property, the intended appeal will not be rendered nugatory if the orders sought are not granted and the intended appeal succeeds.
10. We have given due consideration to this application, the affidavits, the rival submissions, the authorities cited and the law. The precepts upon which this court exercises its rule 5(2)(b) jurisdiction are well settled. An applicant must show that he has an arguable appeal and that the appeal, if successful, would be rendered nugatory unless the stay of execution or injunction pending appeal is granted. We need only add that, whether the application is for stay of execution, injunction, or stay of further proceedings, or preservation of the subject matter, the considerations and applicable principles are the same.
11. It is incumbent upon an applicant to satisfy the court on both limbs in order to obtain the relief sought which is always at the discretion of the court. (See, Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR).
12. On the first principle, as to whether 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 applicant in order to warrant ventilation before this court. In Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [supra] 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.”
13. On the limb of arguability, the applicant has availed a draft memorandum of appeal citing several grounds of appeal. Our perusal of the draft memorandum of appeal reveals that prima facie there are arguable points to be urged in the intended appeal. For instance, it is arguable whether the learned judge of the Environment and Land Court erred in dismissing the applicant’s suit despite overwhelming evidence that the suit property is owned by the applicant. It is also arguable whether the learned Judge erred in law and in fact by introducing issues that were not pleaded by parties in his Judgment when he declared that the 1<sup>st</sup> respondent is the lawful owner on the basis of a contentious Tribunal and County Land Management Board finding so as to sanitize and/or legitimize what is otherwise a fraudulent and illegal scheme of claims by the respondents over the suit property.
14. The court is minded to avoid going into the merits of the intended appeal as this will be the preserve of the bench that will hear and determine the main appeal. As we have stated on numerous occasions, an arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s



consideration. Therefore, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable. In our view, the draft memorandum of appeal raises arguable issues and the applicant has therefore satisfied the first limb of arguability.

15. Turning to the second principle, whether the appeal, if successful, would be rendered nugatory in the event that stay is not granted, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (supra) this Court stated that:

“ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

16. In determining whether or not an appeal will be rendered nugatory the court has to consider the conflicting claims by both parties and each case has to be considered on its merits. It is evident that the applicant is the registered owner of the suit property and stands at risk of losing the suit property. To our mind, the absence of stay would pave way to execution of the eviction orders, cancellation of the applicant’s title deed and possible destruction of property, an eventuality that would be onerous, if not impossible, to undo. Indeed, that would, in our considered view, render the appeal, if successful, nugatory.

17. In our view, in the absence of stay, if the eviction is undertaken, or the property is disposed, it would be difficult to reverse the situation nor would it be practical to suppose that the aggrieved parties would be compensated by an award of damages. We are therefore satisfied that the applicant has satisfied both limbs for grant of relief under rule 5(2) (b) of the court rules.

18. Accordingly, we allow the application and order as follows:

a. A stay of execution of the Judgement and decree of the Judgment issued by the Environment and Land Court on November 7, 2022 (Gicheru, J) in ELC No 370 of 2017: *Anne Karegi Bett v Merio Olamroi and 2 Others* be and is hereby issued pending the hearing and determination of the applicant’s appeal against the said judgment.

b. Costs of this application shall abide by the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**D. K. MUSINGA, (P)**

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**JUDGE OF APPEAL**

**J. MATIVO**

.....

**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**

