



**Hanspal & 2 others (2nd and 3rd Applicants suing as the executors of the Estate and personal representatives of Davinder Singh Hanspal - Deceased) v Hanspal (Sued as the son and administrator ad litem of the Estate of Inderjit Singh Hanspal) (Civil Appeal (Application) E199 of 2022) [2023] KECA 197 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 197 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E199 OF 2022  
MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA  
FEBRUARY 17, 2023**

**BETWEEN**

**PARAMJEET KAUR HANSPAL ..... 1<sup>ST</sup> APPLICANT**

**JASPRIYA KAUR HANSPAL ..... 2<sup>ND</sup> APPLICANT**

**SACHNA KAUR HANSPAL ..... 3<sup>RD</sup> APPLICANT**

**2ND AND 3RD APPLICANTS SUING AS THE EXECUTORS OF THE ESTATE  
AND PERSONAL REPRESENTATIVES OF DAVINDER SINGH HANSPAL -  
DECEASED**

**AND**

**VIJAY HANSPAL (SUED AS THE SON AND ADMINISTRATOR AD LITEM OF  
THE ESTATE OF INDERJIT SINGH HANSPAL) ..... RESPONDENT**

*(Being an application for stay of execution of the judgment and decree  
of (Komingoi, J.) dated 12th May, 2022 in ELC No 1218 of 2013)*

**RULING**

1. Before us is a notice of motion dated 8<sup>th</sup> June, 2022 in which Paramjeet Kaur Hanspal, Jaspriya Kaur Hanspal & Sachna Kaur Hanspal (the applicants suing as the executors and personal representatives of Davinder Singh Hanspal (deceased) seek an order of stay of execution pending the hearing of the appeal against the judgment of the Environment and Land Court (ELC) in Nairobi (L. Komingoi, J.) dated 12<sup>th</sup> May, 2022. The application is brought under Rule 5(2)(b) of the Court of Appeal Rules (this Court's Rules). Vijay Hanspal (sued as the son and administrator ad litem of the estate of Inderjit Singh Hanspal) is the respondent herein.



2. The grounds upon which the application is based are inter alia that on 12<sup>th</sup> May, 2022 the ELC delivered a judgment wherein the applicants were directed to vacate L.R. No. 209/7496 (the suit property) situated on Manyani Road, Lavington, Nairobi within Ninety (90) days from the date of judgment and surrender the same to the respondent. The respondent was also granted injunctive relief and awarded mesne profits of Kshs.26,251,915/= being the rent from February, 2013.
3. Aggrieved by the judgment, the applicants lodged an appeal and the instant application supported by the affidavit of the 2<sup>nd</sup> applicant in which he averred inter alia that:- the applicants have a meritorious appeal with a high probability of success as it raises serious and arguable factual, evidentiary and legal issues; the applicants are reasonably apprehensive that unless the orders sought are granted the respondent may proceed to execute the decree and evict the applicants from the suit property before the appeal is heard and determined, rendering the eventual orders of this Court nugatory.
4. The respondent opposed the application and filed a replying affidavit dated 17<sup>th</sup> June, 2022. He averred that his late father, Inderjit Singh Hanspal purchased the suit property through a transfer dated 14<sup>th</sup> May, 1973; that his father developed the suit property after purchase; and that the declaration sought by the applicants that his later father was holding the suit property for Davinder Singh Hanspal (now through the applicants) as beneficial owners of the suit property was unsustainable and not supported by any evidence.
5. The application was heard by way of written submissions with oral highlights. Learned counsel, Mr. Daniel Musyoka appeared for the applicants while learned counsel, Mr. Mituga Omari appeared for the respondent. Counsel for the applicants submitted that the applicants have an arguable appeal with high prospects of success inter alia regarding the ownership of the suit property. Reliance was placed on the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR.
6. On the nugatory aspect, it was submitted that if stay is not granted the respondent will proceed to execute the decree by way of eviction and in that event the intended appeal will be rendered nugatory as the applicants will have been evicted from the suit property which is their only home and has been their residence for over 40 years. As such, there is dire need to ensure that the status quo is maintained until the intended appeal is heard and determined so that the intended appeal is not rendered nugatory.
7. Counsel for the respondent opposed the application and on the arguability aspect it was submitted that the applicants' intended appeal is not arguable as the 12 grounds of appeal do not raise arguable grounds; and that the only arguable ground of appeal if any is on the assessment of damages.
8. Counsel submitted that the Estate of Davinder has claimed 667 shares out of 1000 shares of a company called Alcon Holdings Ltd that has an asset with a market value of Kshs 800,000,000/= ; and that 333 of those shares are not subject of any dispute. It was submitted that the applicants have been unequivocal of their unwillingness to provide those shares as security for now and are seeking to have the court exercise discretion in their favour at the expense of injustice to the respondent should stay be given and the intended appeal is unsuccessful.
9. Counsel further submitted that in the event that this Court exercises its discretion in favour of the applicants, for balance and justice, the Court should make the grant of the orders sought conditional on a security that will cover the judgment sum, the ongoing rent plus interest with a view of ensuring that the respondent does not suffer the injustice of not recovering the judgment sum in the event that the intended appeal is unsuccessful.
10. We have considered the application, the grounds in support thereof, the affidavits, the submissions, the authorities cited and the law. The jurisdiction of this Court under Rule 5(2)(b) of this Court's Rules



is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.

11. The principles for granting a stay of execution, injunction or stay of proceedings under rule 5(2)(b) of this Court's Rules are well settled. This Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

12. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this court, both limbs must be demonstrated to the court's satisfaction.
13. On the first principle, 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. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR where 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.”

14. We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our view the appeal is arguable as the issue of the ownership of the suit property is contested. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
15. On the nugatory aspect, 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 of both parties and each case has to be determined on its merits. We find that in the circumstances of the instant application, even though the applicants can be compensated in damages, the applicants face the risk of being evicted from the suit property which from the record has been their home for over 40 years and thus face undue hardship. In *Housing Finance Company of Kenya Limited*



*v Sharok Kher Mohamed Ali Hirji & Ano.* [2015] eKLR this Court addressed itself as follows on the issue of monetary decrees:

“With time it became necessary to put certain riders to the legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree”.

17. In the circumstances of the instant application, we are persuaded that the applicants have demonstrated an arguable appeal which will be rendered nugatory if the orders sought are not granted since they will have been evicted from the suit property.
18. We are therefore satisfied that the applicants have met the twin principles for the grant of an injunction pending the hearing and determination of the intended appeal in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in the case of Stanley Kange’the Kinyanjui (supra).
19. The upshot is that the application dated 8<sup>th</sup> June, 2022 is allowed. Costs shall abide the outcome of the intended appeal.

**Dated and delivered at Nairobi this 17<sup>th</sup> day of February, 2023**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**HELLEN OMONDI**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

