



**Iruki & another v Mangaara & 3 others (Civil Application . E025 of 2022) [2023] KECA 137 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 137 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION . E025 OF 2022  
W KARANJA, J MOHAMMED & KI LAIBUTA, JJA  
FEBRUARY 17, 2023**

**BETWEEN**

**NAFTALY MWITI IRUKI ..... 1<sup>ST</sup> APPLICANT**

**JULIUS MWONGERA NKIRITI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**KAIMBA MANGAARA ..... 1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

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

*(Being an application for stay of execution under rule 5(2) (b) against the decree and ruling of the ELC Court at Meru (C. K. Nzili, J.) dated 6th April 2022 in ELC Appeal no. E115 of 2021)*

**RULING**

1. The background to this application is that Kaimba Mangaara, the 1<sup>st</sup> respondent herein, moved the Chief Magistrate's court in Civil Case Number 393 of 2015 by way of a plaint dated December 23, 2021 later amended on the June 24, 2020. He prayed for orders that: the subsequent allotment of plot No Meru Municipality Block 11/697 (the suit property) be declared illegal, null and void in view of the earlier allotment and cancellation of the lease issued to Naftaly Mwititi Iruki (who was the 5<sup>th</sup> defendant, the 1<sup>st</sup> applicant in this motion); a permanent injunction restraining the 5<sup>th</sup> defendant, his agents, assigns, representatives and any other person acting on his behalf from occupying, developing and or user of plot No Meru Municipality Block 11/697 and, in the alternative, he be compensated at the current market value.



2. The 2<sup>nd</sup> to 4<sup>th</sup> respondents filed their statements of defence on June 29, 2016 whereas the 1<sup>st</sup> applicant herein and Julius Mwangera Nkiriti filed their amended statement on July 1, 2020.
3. The matter proceeded by way of viva voce evidence and, upon considering the pleadings, evidence on record and written submissions by the parties, the court in its judgment allowed the prayers sought, and further ordered that the applicant herein to demolish within 45 days, structures he had set up on the suit property.
4. Naftaly Mwiti Iruki and Julius Mwangera Nkiriti sought stay of execution of the decree issued by the lower court pending hearing and determination of an appeal filed before the Environment and Land Court (ELC). The application was supported by an affidavit sworn by Naftaly Mwiti, and on the grounds that he had constructed permanent structures on the suit property for purposes of his business and, if stay was not granted, then the suit property could be disposed off rendering the appeal nugatory.
5. The application was opposed by the 1<sup>st</sup> respondent herein, who averred that he had been found to be the genuine allottee of the suit property, which he had been deprived of for many years, and that the grant of stay would prolong the deprivation of enjoyment of the fruits of the judgment which was granted in his favour.
6. The application was canvassed by way of written submissions and, in its ruling, the ELC held that the applicant herein had not demonstrated that he would suffer any loss if the orders sought were not granted, but he had been given time to remove his structures. The Court held that, in the event the appeal was successful, then the reversal of the transfer of land was possible, and the application was dismissed.
7. Aggrieved by that decision, the applicant lodged a Notice of appeal dated 1 April 2, 2022 under rule 75 of this Court's Rules, 2010 and a draft memorandum of appeal raising 9 grounds of appeal. Meanwhile, the applicant filed a Notice of motion dated April 12, 2022, before this Court under, inter alia, Article 159(2) (d) of the *Constitution*, section 1A,1B,3A &3B of the *Appellate Jurisdiction Act*, Rule 5(2) (b), 41 and 42 seeking orders that:
  - a. There be stay of execution of the judgment and decree of Hon LN Juma (SRM) delivered on October 14, 2021 in Meru CMCC No 393 of 2015 Kiamba Mangaara v The District Land Registrar & 4 others pending the hearing and determination of the intended appeal.
  - b. There be stay of execution of the judgment and decree of Hon LN Juma(SRM) delivered on October 14, 2021 in Meru CMCC No 393 of 2015 Kaimba Mangaara v The District Land Registrar & 4 others pending the hearing and determination of Meru ELC Appeal No 115 of 2021, Naftaly Mwiti Iruki & anor v Kaimba Mangaara & 4 others.
  - c. The Honorable court be pleased to set aside the ruling delivered on April 6, 2022 by Justice CK Nzili in Meru ELC appeal no 115 of 2021, Naftaly Mwiti Iruki & anor v Kaimba Mangaara & 4 others dismissing the application dated October 25, 2021.
8. The motion is premised on the grounds set out on its face and supported by the affidavit of Betty Kiyuki, an advocate for the applicant, who avers that the applicants are aggrieved by the entire judgment delivered at the trial court; that an application for stay of execution was also dismissed; that the applicants had developed residential houses, which are a source of income to the 1<sup>st</sup> applicant who stands to suffer irreparable loss if stay is not granted since demolition may start at any time; that the loss cannot be adequately compensated by way of costs in these difficult economic times; that the applicants



are willing to furnish such security as the court may deem sufficient; and that it is in the interest of justice that the application be allowed.

9. In response to the application, Kaimba Mangaara has filed a replying affidavit stating that the applicants are in illegal occupation of the suit property and, that he had waited for 6 years to have the matter concluded. The rental income was quantifiable and the applicants could easily be compensated by payment of damages. Further that the application is a delay tactic and he continues to suffer pain and loss since he cannot benefit from his investments. Lastly, that it is in the interest of justice that the application be dismissed with costs.
10. The application was heard by way of written submissions and minimal oral highlighting conducted on the June 29, 2022. Miss Kiyuki was present for the applicants, Miss Wanjala held brief for Mr Kaburu for the 1<sup>st</sup> respondent, and Mr Wachira Nguyo was present for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.
11. Miss Kiyuki argued that though the ELC dismissed its application for stay, being a negative order, this Court does have original jurisdiction to grant stay. However, it could still grant an order for stay of execution for purposes of preserving the substratum of the appeal. In addition, the applicants in their written submissions submitted that they have satisfied the two limbs for grant of stay of execution; and that they have an arguable appeal with high chances of success. The Court was referred to the decision in *Githunguri v Jimba Credit Corporation Ltd.* [1988] KLR 838 where the Court held that arguability itself did not mean that an appeal or intended appeal must succeed but, rather, it means that one that raises a bona fide issue that would merit or call upon the Court to consider and determine it, and that in the absence of stay, the substratum of the appeal shall be rendered nugatory in the event the appeal succeeds.
12. On her part, Miss Wanjala for the 1<sup>st</sup> respondent urged the Court to refer to the written submissions and that rule 5(2) (b) of the rules is limited to staying the decisions of the High Court, and an appeal before this Court which is not the case in the present case. The applicants want the Court to stay the decision of the lower court before the appeal at the ELC is heard and determined.
13. Further that this Court could not interfere with the discretion of another court unless it was exercised ultra vires. The appeal is also not arguable since the applicants were not the first allottees, and they had not proved the contrary. She also posited that the applicants could be adequately compensated by way of damages, and that failure to indicate how much rental income was received was fatal.
14. In addition to the above, the applicants had not offered any form of security or willingness to furnish security for the due performance of the decree and, therefore, the decree holder should not be denied the fruits of the judgment.
15. On whether the decision of the High Court should be overturned, the 1<sup>st</sup> respondent submits that this Court should not interfere if the discretion was exercised judiciously. The applicants had not established that the findings of the ELC were based on any misdirection of law, misapprehension of facts or consideration of irrelevant facts. She urged the Court to dismiss the application with costs.
16. Mr Wachira for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents urged the Court that they do not oppose the application and that they had not filed their written submissions.
17. We have considered the application, the grounds in support thereof, the rival affidavits, the submissions and the authorities cited and the law. The jurisdiction under rule 5(2) (b) of this Court's rules is discretionary and guided by the interests of justice. The law in regard to applications under Rule 5(2) (b) such as the one before us is well settled and, for purposes of this application, we deem it unnecessary to delve into details of the same.



18. We may nonetheless restate that, for an applicant to succeed in an application such as this one, the Court must be satisfied on the twin principles, which are, the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory. The applicants have duly filed a Notice of appeal which grants this court jurisdiction to entertain the application. See *Safaricom Ltd v Ocean Beach Hotel Ltd & 2 others* (2010) eKLR
19. A cursory look at the application before us tells us that we have no jurisdiction whatsoever to consider prayers (a) and (b) of the application. We say so because this Court’s constitutional and statutory mandate as pronounced in Article 164(3) of the *Constitution* is to hear appeals from the High Court and other courts or tribunals as prescribed by statute. We do not have jurisdiction to interfere with proceedings before the subordinate courts. We cannot therefor interfere with the orders issued by the Chief Magistrate in this case. Indeed, we note that the Appeal before the ELC against those orders is yet to be heard.
20. On prayer (c), the applicant entreats the Court to set aside the Ruling of the ELC dismissing his application for stay orders. For purposes of clarity, Rule 5(2) (b) provides as hereunder.
5. Suspension of sentence, injunction and stay of execution and stay of further proceedings:
- (1) ...
- (2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—
- a. ...
- b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

From the above, it is crystal clear that we cannot at this stage set aside any decision that is the subject of an appeal before the appeal is heard and determined. Those are orders that are available at the conclusion of the appeal itself. To that extent, those prayers are misconceived.

21. In any event, even assuming that the stay orders sought were in respect of the decision of the ELC, what is before this Court from the ELC are negative orders incapable of execution and, as such, there is no enforceable order made which can be the subject matter of the application for stay of execution. This Court has held innumerable times that negative orders are not capable of being stayed. For instance, in *William W Wabome & The Registrar of Trade Unions v Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers* [2006] eKLR, the Court held that there was no judgment in favour of the respondents which was capable of enforcement by execution save for costs since the respondents had not been granted any reliefs. In the time-honoured decision of the predecessor of this Court in *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR, the court expressed itself as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.



22. However, one looks at this application, it is plainly obvious that the applicants have failed to prove the requirements of rule 5(2) (b) and the application is for dismissal.

Accordingly, the Notice of motion dated April 12, 2022 is hereby dismissed with costs to the 1<sup>st</sup> respondent.

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

**W. KARANJA**

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**JUDGE OF APPEAL**

**J.MOHAMMED**

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**JUDGE OF APPEAL**

**DR. K. I LAIBUTA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

