



REPUBLIC OF KENYA



**Kimani v Kungu (Civil Application E128 of 2022)  
[2023] KECA 150 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 150 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E128 OF 2022  
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA  
FEBRUARY 17, 2023**

**BETWEEN**

**PETER MUNYUA KIMANI ..... APPLICANT**

**AND**

**SERAH WANJIRU KUNGU ..... RESPONDENT**

*(Being an application for stay of execution pending appeal from the  
Judgment and Decree of the Environment and Land Court of Kenya at  
Thika (L. Gacheru, J.) delivered on 29th July 2021 in E.L.C.A No. 8 of 2020)*

**RULING**

1. The respondent, Serah Wanjiru Kungu, filed suit against the applicant, Peter Munyua Kimani, in the Senior Principal Magistrates' Court at Kikuyu SPMCC No 230 of 2010 seeking: an order of permanent injunction to restrain the applicant from trespassing on LR No Muguga/Kanyariri/1245 (the suit property); eviction of the applicant from the suit property; costs and interest.
2. The respondent's claim was that she was registered as proprietor of the suit property on October 27, 2008, having bought it in a public auction on June 4, 2008; that the applicant had forcibly occupied the suit property without her consent or any lawful cause; and that the applicant's conduct amounted to trespass.
3. In his defence, the applicant denied the respondent's claim and contended that Equity Bank Limited had fraudulently conspired with the respondent to defraud him of the suit property by purporting to sell to the respondent to recover a non-existent loan; that he had been in occupation of the suit property as the owner; and that the allegations of trespass were unfounded.
4. In its judgment dated December 20, 2018, the trial court struck out the respondent's case with no orders as to costs. According to the learned magistrate, the court could not go to the merits or demerits of the case in light of the fact that a dispute had arisen as to how the respondent acquired the property,



- which was central to the determination of the ownership of the property, but which could not be determined without Equity Bank being joined in the suit.
5. Dissatisfied by the decision of the trial court, the respondent appealed to the Environment and Land Court at Thika in ELC Appeal No 8 of 2020. The ELC (L Gacheru, J) allowed the respondent's appeal with costs. In her judgment dated July 29, 2021, the learned Judge held that none of the parties had sought any redress against Equity Bank and that, therefore, Equity Bank was not a necessary party to the proceedings at the trial court; and that failure to sue Equity Bank was not fatal to the respondent's suit.
  6. Accordingly, the learned Judge proceeded to determine the competing claims on their merits and found that, in the absence of any witness statements or documents, the allegations made by the applicant in his defence remained mere allegations; that the averments made by the respondent were uncontroverted; that the respondent held a title deed dated October 27, 2008 confirming that she was the registered owner of the suit property; that the respondent produced a certificate and a memorandum of sale both dated June 4, 2008 confirming that she was the successful bidder at the public auction; that there was a transfer by the chargee (Equity Bank Limited) in exercise of its statutory power of sale, a letter by the bank dated August 21, 2008, being a release transfer by charge, and an advertisement for public auction; that the foregoing documents showed the respondent's root of her title, which had not been controverted by the applicant; that the applicant did not adduce any evidence of the alleged fraud, or any evidence that he had challenged the sale; that, in the circumstances, the respondent's title to the suit property remained absolute and indefeasible in terms of section 26 of the [Land Registration Act](#); and that, being the indefeasible owner, the respondent was entitled to all the rights and privileges that appertained to the suit property, including the right to quiet use and possession of the property, and that the same could only be achieved by eviction of the applicant and a permanent injunction issued to restrain him from trespassing onto the property.
  7. Aggrieved by the judgment of Gacheru, J, the applicant moved to this court on appeal on 13 grounds set out on the face of his memorandum of appeal dated January 26, 2022. In summary, the applicant faults the learned Judge for: holding that Equity Bank was not a necessary party to the suit in the trial court; failing to consider the applicant's submission that the respondent's suit was misconceived and an abuse of the court process; holding that the respondent had properly acquired the title to the suit property, and that she was the absolute and indefeasible owner thereof; failing to find that the trial magistrate had properly determined and exercised her discretion judiciously in striking out the respondent's suit; misconceiving and misapprehending and misapplying the law and facts; failing to find that the respondent and Equity Bank had conspired to defraud him of his parcel of land, and by purporting to sell the suit property to recover a non-existent loan; making a determination on factual issues not addressed in the trial court thereby curtailing the role and jurisdiction of the lower court to make its own independent findings of fact; and for failing to remit the case to the lower court if any findings of fact were necessary before making a finding on live issues on which the trial court had reserved making any findings.
  8. Pending hearing and determination of his appeal, the applicant moved this court *vide* his notice of motion dated March 24, 2022 pursuant to rule 5(2) (b) of the [Court of Appeal Rules](#) seeking stay of execution of the entire judgment and orders issued by the Hon Lady Justice L Gacheru on July 29, 2021 in the ELC appeal aforesaid together with costs of his application.
  9. The applicant's motion is supported by his annexed affidavit sworn on March 24, 2022, and is anchored on 4 grounds, namely: that the appeal raises triable issues; that the appeal would be rendered nugatory if stay is not granted; that the respondent has made threats to evict the applicant; that the respondent is in the process of executing the judgment and consequential orders issued on July 29, 2021; and that the temporary stay of 90 days ordered on November 18, 2021 have lapsed.



10. In addition to the affidavit in support of his motion, the applicant filed a supplementary affidavit sworn on April 22, 2022 in which he deposed further that the respondent had applied to the Senior Principal Magistrates' Court at Kikuyu in SPMCC No 230 of 2010 for orders to have him evicted in enforcement of the orders of the ELC at Thika in ELC Appeal No 8 of 2020 allowing the respondent's appeal; that the motion in the lower court was scheduled for hearing on April 25, 2022; that he stood the risk of losing his only residence if stay was not granted; that he had an arguable appeal; that the respondent would not be prejudiced by grant of stay orders pending appeal.
11. In a second supplementary affidavit sworn on May 4, 2022, the applicant stated that, on April 29, 2022, persons unknown to him descended on the suit property, broke into his home, cut down trees, removed the house roofing, ripped off the ceiling, carted away window, door and gate grills, destroyed property on site and within the house, and threw out all personal effects; that they returned on May 2, 2022 and cut down mature trees within the property, and injured him; and that the respondent masterminded of the foregoing illegalities. He urged the court to intervene.
12. In support of the applicant's motion, learned counsel M/s Wokabi Mathenge and Co filed written submissions dated April 25, 2022 citing the cases of *Attorney-General vs Okiya Omutata Okoiti and Another* [2019] eKLR and *Halai and Another vs Thornton and Turpin (1963) Ltd* [1990] eKLR and drawing the court's attention to the principles for consideration in exercise of its unfettered discretion under rule 5(2) (b) to grant an order of stay. We agree with learned counsel that, first, the applicant has to satisfy the court that he/she has an arguable appeal; and that the appeal would be rendered nugatory if the orders sought were not granted. They urged us to allow the motion as prayed.
13. In reply, the respondent filed an affidavit sworn on May 5, 2022 stating that the applicant's motion was an abuse of the court process; that the applicant's motion had no merit, but was designed to deny her the fruits of her judgment, which she pursued for 11 years; that the present application was the fifth in sequence, the applicant having made four similar applications in the ELC; that the interim orders granted by the ELC were eventually vacated; that, subsequently, execution of the impugned judgment and decree was stayed for 90 days on condition that the applicant pays to the respondent KShs 20,000 per month during the period of stay; that the applicant does not have an arguable appeal, having failed to adduce any evidence at the trial of ownership or fraud on her part in acquisition of the suit property; that he has not demonstrated what loss he is likely to suffer should stay not be granted; and that the applicant is merely buying time after being issued with an eviction notice by an order of the ELC, which he refused to obey, compelling the respondent to file the notice of motion dated April 12, 2022 in SPMCC No 230 of 2010 seeking police assistance to remove the applicant from the suit property.
14. In reply to the applicant's supplementary affidavit sworn on May 4, 2022, the respondent deposed that the suit property is vacant; that the applicant and his family had vacated the property, which is deserted and uninhabited; that she has already taken possession and secured it by engaging guards from Jamesford Security Limited; that she had nothing to do with the matters complained of in the applicant's supplementary affidavit sworn on May 4, 2022; and that the destruction complained of was orchestrated by the applicant to attract sympathy and erode the value of the suit property. According to her, the applicant's motion lacks merit on account of his having vacated the suit property.
15. Learned counsel for the respondent, M/s F Karanja and Company, filed written submissions dated May 6, 2022 urging us to dismiss the applicant's motion. Counsel cited 6 authorities, including the case of *Norman Njue Mesbeck vs Pholisila Ngithi Nthiga* [2021] eKLR highlighting the twin principles for grant of stay of execution pending appeal; *Fatuma Mohamud Mohammed Mire vs Japhet Nteere Mwendwa* [2019] eKLR and *Lucy Nyamu Kimani vs Lawrence Mburu Muthiga* [2006] eKLR contending that the applicant has not proved that he will suffer substantial loss or become a



destitute if the intended eviction is carried out. The remaining 3 relate to matters touching on the merits of the competing claims to which we decline to comment lest we embarrass the bench that is destined to hear and determine the substantive appeal.

16. The principles that apply in applications under Rule 5(2) (b) of this court's Rules for stay of execution pending appeal, or intended appeal, have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings arising from the impugned judgment, decree or order were not stayed. These principles have been enunciated in various judicial pronouncements of this court, including those cited by the parties.
17. On the first limb of this twin principle, this court held in Anne Wanjiku Kibeh vs Clement Kungu Waibara and IEBC [2020] eKLR that, for stay orders to issue in similar cases, the applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.
18. On our reading of the grounds on which the applicant's motion is founded, the draft memorandum of appeal, the affidavit in support thereof, and from the respective written and oral submissions of the learned counsel for the parties, we are persuaded that the applicants have an arguable appeal. Indeed, it is by no means frivolous. Whether the appeal will succeed or not is not for us to judge. That is a matter for determination at the hearing of the appeal. Neither is it material whether the appeal is preferred on only one or more grounds.
19. With regard to the adequacy of the grounds of appeal to warrant a grant of the stay orders sought, this court in Yellow Horse Inns Limited vs A A Kawir Transporters & 4 Others [2014] eKLR observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point will succeed.
20. That brings us to the second limb of the twin principle – whether the appeal, if successful, would be rendered nugatory in the event that stay is not granted. The term “nugatory” was defined in Reliance Bank Ltd Vs Norlake Investments Ltd (2002) 1 EA p.227 at p 232 thus: “it does not only mean worthless, futile or invalid. It also means trifling.” The court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.
21. The circumstances of this case are that execution of the impugned judgment has taken place. Regardless of who did it, the applicant states on oath that the roofing of the house situate in the suit property was removed, the ceiling ripped off, the window, door and gate grills removed and carted away, all personal effects thrown out of the house and taken away, and trees cut down. His statement was confirmed by the respondent, who states that she took possession of the property and secured it by engaging guards from a security company. According to her, the suit property is already in her vacant possession. To our mind, there is nothing to stay. Accordingly, we find that the applicant's notice of motion dated March 24, 2022 fails and is hereby dismissed with costs to the respondent.

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

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

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**



.....

**JUDGE OF APPEAL**

**M. GACHOKA – CI Arb, FCIARB**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

