



Koinange Investments and Development Co Ltd v Ngethe & 3 others (Sued as the personal representatives of the Estate of Robert Nelson Ngethe (Deceased)) (Civil Application E380 of 2022) [2023] KECA 104 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 104 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E380 OF 2022
HM OKWENGU, MA WARSAME & JM MATIVO, JJA
FEBRUARY 3, 2023

BETWEEN

KOINANGE INVESTMENTS AND DEVELOPMENT CO LTD APPLICANT

AND

IAN KAHIU NGETHE 1ST RESPONDENT

NICHOLAS NGETHE 2ND RESPONDENT

EDDAH NGETHE 3RD RESPONDENT

RAPHAEL KAMAU NGETHE 4TH RESPONDENT

**SUED AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF ROBERT
NELSON NGETHE (DECEASED)**

(An application for stay of execution of the Ruling of the High Court of Kenya at Nairobi (Mwita, J.) dated 23rd September, 2022) in Civil Case No. 3164 of 1995)

RULING

1. For a better perspective of the issues raised for and against the applicant's application dated October 21, 2022 the subject of this ruling, it is imperative to rehash, albeit briefly, the history of this 35 years old dispute which has traversed the High Court, the Court of Appeal and the Supreme Court. This history, as we discern it from the Judgment and the plethora of Rulings rendered in HCCC No 3164 of 1995, the Court of Appeal and the Supreme Court is essentially uncontroverted or common ground. This is the fourth time this same dispute has found its way into this Court. It has been before the Supreme Court twice.
2. The foundation of this litigation can be traced to an agreement dated December 5, 1988 entered into between one Robert Nelson Ngethe (deceased) as the purchaser, represented in these proceedings



by his legal representatives, namely Ian Kahiu Ngethe, Nicholas Ngethe and Eddah Ngethe (the respondents) and Koinange Investments and Development Co Ltd (the applicant). For the sake of brevity, the applicant before us was the vendor in the said agreement while the deceased was the purchaser. Under the said agreement, the applicant granted the deceased the option to purchase a portion of land measuring approximately 0.2642 ha or thereabouts which was to be excised from LR No 209/9099 at an agreed price of Kshs 50,000,000/=. It was a term of the said agreement that the option to purchase was exercisable by the purchaser on notice in writing either before the expiry of 30 days from the date of the agreement, or before expiry of 30 days from the date the vendor completes sub-division process and the deed plan is available and evidence of such compliance is furnished to the purchaser whichever occurs last.

3. By a letter dated December 2, 1988 the vendor applied to the Director of the City Planning and Architect Department for approval of the sub division of LR No 209/9099. On the May 3, 1989 the vendor notified the deceased in writing that the sub-division had been approved subject to the following conditions:
 - a. Application of water supply to each sub-plot to be made to the General Manager (Water and Sewage Department and his condition for such supply to be met;
 - b. 225mm diameter sewer to be extended to serve all sub-plots. Plan to be submitted to the City Commission for approval.
 - c. Vehicular access to sub plots A & 8 to be from Taifa Road and to be sited and confirmed to the satisfaction of the City Engineer.
 - d. All the outstanding rates to be paid to the City Commission on formal completion or subdivision proposals and the sale of sub- divided portion and within 90 days of the issuance of the said sub-divisional approvals.
4. On May 15, 1989 the applicant wrote to the deceased and informed him that the City Commission had approved the sub- division scheme and requested the deceased to exercise the option granted in the aforesaid agreement within 7 days. By a letter dated August 16, 1995 the deceased exercised his option in accordance with clause 3 of the deed and deposited Kshs 5,000,000/=. However, by a letter dated September 12, 1995 the applicant's advocate rejected the deposit and stated that the plaintiff had no rights under the agreement. It is this rejection which compelled the deceased to sue the applicant in HCCC No 3164 of 1995 seeking a raft of reliefs. Despite being served, the applicant did not attend court, so the hearing proceeded undefended. In a judgement dated October 14, 2002 the High Court (Osiero, J) allowed the deceased's claim and passed judgment against the applicant and ordered as follows:
 - a. A declaration that the deed of December 5, 1998 is valid;
 - b. A declaration that the plaintiff has validly exercised his option thereunder;
 - c. An order that the defendant do within 30 days complete the sub-division of the plot sold to the plaintiff and in default the plaintiff be at liberty to carry out the exercise of sub-division;
 - d. An order that the defendant do transfer the sub- division to the plaintiff and in default the Deputy Registrar may execute any necessary documents to necessitate the transfer.
5. The applicant's application under Order 9B Rule 8 of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act* to set aside the said judgment was dismissed by Osiero, J on November 28, 2002. The applicant appealed to this Court against the said ruling in Civil Appeal No 108 of 2003; Koinange Investment and Development Limited v Robert Nelson Ngethe. In the intervening period,



- the deceased's application to execute the High Court decree was allowed vide a ruling delivered on November 19, 2003. Specifically, the applicant was ordered to avail to the deceased the title document to the suit property to enable the deceased to undertake the sub-division. Further, the Deputy Registrar of the High Court was authorized to execute the transfer instrument and all necessary documents to complete the transfer.
6. The applicant applied for stay of execution of the said orders pending the hearing and determination of Civil Appeal No 108 of 2003 - Koinange Investment and Development Limited v Robert Nelson Ngethe. Vide a ruling delivered on June 7, 2006 Mutungi, J allowed the said stay sought. The appeal against the ruling delivered on November 19, 2003 was heard and dismissed with costs by the Court of Appeal vide a judgment delivered on March 23, 2012.
 7. The applicant moved to the Supreme Court vide Civil Application No 1 of 2012 seeking leave to challenge the aforesaid Judgment of the Court of Appeal. By a ruling delivered on January 30, 2013, the Supreme Court dismissed the application and directed the applicant to first seek leave from this Court.
 8. The applicant filed Civil Application No 15 of 2012 in this Court seeking leave to challenge the Judgment of this Court delivered on March 23, 2012 in the Supreme Court. The Court of Appeal heard and dismissed the said application on March 8, 2013. Again, the applicant filed yet another application in the Supreme Court being Supreme Court Application Number 4 of 2013 seeking to review the decision of the Court of Appeal delivered on March 8, 2013 in which this Court declined to certify his application to be heard by the Supreme Court. The Supreme Court dismissed the application on March 13, 2014.
 9. The applicant then instituted HCCC No 278 of 2015 (OS) – Koinange Investments and Development Company Limited v Jan Kahi Ngethe & 3 Others, seeking, *inter alia*, orders that:
 - a. The Judgment delivered on October 14, 2002 in HCCC No 3164 of 1995 was no longer capable of being executed as the limitation period of 12 years under the [Limitation of Actions Act](#) has lapsed.
 - b. A permanent stay do issue on all actions of the plaintiffs in respect of the Judgment and the same be declared null and void.
 - c. The defendant be declared the legitimate and sole owner of LR No 209/9099 by virtue of adverse position.
 10. By a Judgment dated November 5, 2015, Kariuki, J dismissed the above suit. Subsequently, the applicant filed three other applications in Hccc No 278 of 2015 (OS) seeking to stay proceedings in Hccc No 3164 of 1995 pending appeal to the Court of Appeal. The deceased filed an application seeking *inter alia* the reconstruction of the deed file for the suit property and for the Court to dispense with the production of the original title so as to effect the transfer. Vide a ruling dated May 5, 2016 delivered by Sewe J on behalf of Kariuki, J the applicant's application was dismissed and the deceased's application was allowed.
 11. Aggrieved and undeterred by the said ruling, the applicant filed Civil Appeal Number 177 of 2016 – Koinange Investments & Development Limited v Ian Kahi Ngethe & Others which was heard and dismissed by this Court of Appeal on December 20, 2019.
 12. The applicant filed three other applications in HCCC No 3164 of 1995, which were heard by Tuiyott, J (as he then was), namely, applications dated June 9, 2004, July 7, 2004 and July 8, 2004. The said



applications were determined vide a ruling dated October 14, 2021 delivered by Mabeya, J on behalf of Tuiyot, J In nutshell, Tuiyot, J stated:

“In the end, what endears this Court as a just way of resolving this old matter is by ordering the estate of the deceased to pay Koinange Investments the sum of Kshs 50,000,000/= (without any interest thereon) less costs that may be due to the estate emanating from the various proceedings related to the suit property which may be unpaid. Parties to agree on what is due and when it is to be paid.

An agreement in this regard to be reached within 14 days failing which any party shall be at liberty to apply. The Court shall then make final orders in regard of all the three applications before it.”

13. The applicant filed another application dated December 2, 2021 seeking to vary the above orders of October 14, 2021. Mwita, J delivered a ruling on September 23, 2022 which triggered the instant application. In the said ruling, the learned Judge issued the following orders:
 - a. The plaintiffs do pay the balance of the purchase price being Kshs 47,182,697.50 to Koinange Investment Development Ltd within ninety (90) days from the date hereof.
 - b. In default of (i) above, Koinange Investment Development Ltd shall be at liberty to execute.
 - c. The applications dated June 9, 2014, July 7, 2014 and July 8, 2014 are declined and dismissed with no order as to costs.
14. Aggrieved by the above application, the applicant desires to appeal to this Court. In the meantime, it filed the application dated October 21, 2022 the subject of this ruling in which it prays for an injunction to restrain the respondents by themselves, or through their employees, servants and/or agents from transferring to themselves or to other persons or in any way alienating or disposing any portion of the suit property, that is LR No 209/9099, Nairobi pending the hearing and determination of its intended appeal. The applicant also prays for stay of execution of the above ruling/orders pending the hearing and final determination of its intended appeal to this Court. Further, the applicant prays for such other orders as this Court may deem fit to serve the ends of justice in the circumstances of this case. Lastly, it prays for costs of this application to abide the result of the intended appeal.
15. The applicant argues that its intended appeal raises arguable grounds namely, the learned Judge erred by:
 - a. determining its three applications without hearing the parties nor did the parties consent the determination of the applications;
 - b. ordering specific performance of an option to purchase contract executed in 1988 which contract is not enforceable as a condition precedent to its performance has never been fulfilled;
 - c. ordering that the respondent pay Kshs 47 million as a balance of the purchase price, without interest thereon, which amount was due in the year 1988;
 - d. failing to appreciate that the said amount is inordinately low and amounts to a gross undervaluing of the suit property whose current value is approximately Kshs 500 million;
 - e. dismissing the applicant's application seeking review of the judgement by Osiemo, J delivered on the October 14, 2002 despite there being material antecedent and/or subsequent facts that only became apparent after the delivery of the said judgement;



- f. dismissing the applicant's application seeking leave to amend its Statement of defence and counter-claim which had not been heard and determined, essentially denying the applicant its constitutional right to be heard and have the Counterclaim heard and determined on its merits;
 - g. the Judgement was obtained through falsehoods and the undated transfer instrument was drawn and executed by one D W Nyambu, the Deputy Registrar of the High Court and Robert Nelson Ngeth'e-deceased may be presented for registration in which event the applicant will suffer irremediable loss and damage and its appeal will be rendered nugatory; and,
 - h. the respondent will suffer no prejudice.
16. The application is opposed vide the replying affidavit of Ian Kahiu Ngethe, the 1st respondent dated October 28, 2022. The key grounds cited are:
- a. the dispute was determined by Osiemo J in the judgment delivered on October 14, 2002 and the applicant never appealed against the said Judgment ;
 - b. the applicant's application to set aside the judgment was dismissed on November 28, 2002 and the ruling was upheld by the Court of Appeal in Civil Appeal 108 of 2003 on March 23, 2012;
 - c. the appeal is not arguable;
 - d. the intended appeal is a collateral attack against the previous decisions which have determined the dispute with finality;
 - e. the intended appeal will not be rendered nugatory because the applicant will be paid the balance of the purchase price.
17. Both parties filed written submissions which they highlighted orally in court. In a nutshell, the applicant's counsel's submissions were: (a) the applicant has an arguable appeal with a high probability of success; (b) if stay of execution is refused, the intended appeal will be rendered nugatory; and, (c) the applicant will suffer irreparable and irreversible damage.
18. Counsel relied on *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd & 2 Others*, Civil Application No 124 of 2008 which held 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 and it is sufficient if a single bona fide arguable ground of appeal is raised. He submitted that under the agreement, the deceased had the option of purchasing the property subject to the terms stipulated in the agreement, but he failed to exercise the option within the agreed period. Further, the property has never been sub-divided nor have deed plans been issued by the applicant. Counsel argued that the deceased had no rights under the agreement because the option to purchase was not exercised in accordance with the agreement nor is it capable of being exercised having been terminated by the conduct of the parties and/or extinguished by effluxion of time.
19. Further, the applicant's counsel argued that the impugned ruling requires the respondent to pay the applicant about Kshs 50 million (less costs, without interest thereon) which has been due since 1988, that the ruling allows the respondent to transfer the suit property to themselves, yet no consideration has been paid to date. Counsel argued that Kshs 50 million, less costs, without interest is inordinately low and amounts to a gross undervaluing of the property whose current value is approximately Kshs 500 million, so, it is unconscionable for the respondents to insist on the sub-division and transfer of a portion of the suit property in exchange for a consideration that is not reflective of the current value of the property.



20. On the nugatory aspect, counsel relied on *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR which held that 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 aggrieved party. He argued that if execution proceeds, the intended appeal will be rendered nugatory, and if the respondents transfer the property to themselves, the intended appeal would be rendered absolutely, thereby endangering the applicant's property rights. Lastly, the respondent will not be prejudiced if the stay is allowed.
21. The respondent's counsel submitted that the applicant does not have an arguable appeal because it seeks to re-litigate issues already determined by several courts. He relied on *George Kamau Kimani & 4 Others v The County Government Of Trans-Nzoia & Another* [2016] eKLR, *Accredo AG & 3 Others v Steffano Uccelli & Another* [2019] eKLR and *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR in support of his argument that the issues raised by the applicant are res judicata and it is not open to the applicant to re-litigate the same issues. He urged the Court to find that the intended appeal is not arguable.
22. On the nugatory aspect, counsel relied on *Khairunnisa Mobamedali Harunani & Another v Niranjana Zaverchand Shah Shushila & 2 Others* [2016] eKLR and *Gulf Timber & Hardware Supplies Limited v Ngaruiya & 5 Others* (Civil Appeal E203 of 2021) [2022] KECA 87 (KLR) (4 February 2022) which underscored the need for an applicant to demonstrate that an appeal will be rendered nugatory and the applicable considerations.
23. This being an application for stay of execution and injunction, the applicant is required to satisfy the twin requirements of Rule 5(2) (b) of the *Court of Appeal Rules, 2022*. The guiding principles were re-stated by this Court in *Public Service Commission & 72 Others v Okiya Omtatah & 4 Others* [2021] eKLR that for an application of stay of execution to succeed, an appellant must demonstrate that the intended appeal is arguable and will be rendered nugatory if the stay is not granted. In other words, the intended appeal:
- a. must not be frivolous; and
 - b. must raise at least one *bona fide* (ie genuine) issue that can be argued before the court.
- Whether an appeal will be rendered nugatory if a stay is not granted depends on:
- a. whether what is sought to be stayed is reversible;
 - b. whether any loss to the aggrieved party can be reasonably compensated by damages; or
 - c. if it is in the public interest to grant a stay. (See *Gatirau Peter Munya v Dickson Mwenda Kitthinji & 2 Others* [2014] eKLR).
24. In invoking its jurisdiction under Rule 5 (2) (b), this Court exercises original and discretionary jurisdiction. This position has been affirmed in several decisions of this Court among them *Pauline Yebei & Another v Estate of Kiprotich Letting represented by Andrew Kipkoech Kiprono* [2017] eKLR and *Ishmael Kagunyi Thande v Housing Finance Kenya Ltd*, Civil Application No Nai 157 of 2006 (Unreported) where the court held:
- “The jurisdiction of the Court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed he must not only show that his appeal or intended appeal



is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.”

25. As to whether or not 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. To underscore this point, we make reference to *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR (*supra*) where this Court defined an arguable appeal and set out the limits of this Court in determining applications for stay as follows:
- “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.”
26. In line with the boundaries set out in above excerpt, we are conscious that we are not determining the appeal and therefore we shall avoid making definitive findings of fact and law. We are also alive to the fact that an arguable ground is not necessarily one that must succeed, but merely one that deserves consideration by this Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, it is important to mention that the Judgment delivered against the applicant in favour of the deceased on October 14, 2002 by Osiemo, J has never been appealed against. The appeals to this Court and the Supreme Court mentioned earlier were against rulings in applications made by the applicant. Similarly, the intended appeal is also against a ruling and not the final Judgment which has all along remained unassailed in this Court.
27. On the nugatory aspect, as this Court held in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] I EA 227, the factors which could render an appeal nugatory are to be considered within the circumstances of each particular case and that in doing so, the court is bound to consider the conflicting claims of both sides. The court stated as follows:
- “To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”
28. In the instant case, the applicant has provided a valuation of the subject land. Our view is that should the intended appeal succeed, the transfer can be rescinded and the applicant can be compensated in monetary terms. We also note that the purchase price has since been deposited in court pursuant to a court order. This means that should the respondent win the case, the money will be secure and the applicant will easily access its money. We are guided by the case of *Mukuma v Abuoga* [1988] KLR 645, in which this Court held *inter alia*:
- “The discretion of the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules is at large but the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render it nugatory.”
29. We are satisfied that no substantial loss will be suffered by applicant since it has not persuaded us that the appeal shall be rendered nugatory if we decline to grant the orders sought. We also find that in the event of a successful appeal, an award of damages would be an adequate remedy. The foregoing being



the case, the order that commends itself is that the applicant's application dated December 2, 2021 must fail and is therefore dismissed with costs to the respondents.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023

HANNAH OKWENGU

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

