



Mparo & 5 others v Mathare Investments & Properties Limited (Civil Application E057 of 2021) [2023] KECA 114 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 114 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E057 OF 2021
W KARANJA, DK MUSINGA & F SICHALE, JJA
FEBRUARY 3, 2023**

BETWEEN

**SAMUEL KIMINTAE MPARO 1ST APPELLANT
WANGUI KIMINDAI JOSEPH 2ND APPELLANT
ANNA MBENEK 3RD APPELLANT
ALBERT LEMPARO 4TH APPELLANT
RICHARD TURERE MPARO 5TH APPELLANT
ANDREW SAIBULU KIMINTAE 6TH APPELLANT**

AND

MATHARE INVESTMENTS & PROPERTIES LIMITED RESPONDENT

(Under section 3A and 3B of the Appellate Jurisdiction Act, Rule 5(2)(b) of the Court of Appeal Rules, 2010, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provisions of the Law)

RULING

1. The applicants' Notice of Motion dated February 18, 2021 is predicated on Rules 5(2)(b), Order 40 Rule 1 and Order 51 Rule 1 of this Court's *Rules*. In the main, the applicant is seeking a stay of the judgment of May 15, 2020 and an injunction restraining the respondents from evicting them from land known as Title Number Kajiado/Kaputiei-South/45.
2. A brief background leading to the filing of the motion is that the applicants herein (the then plaintiffs) filed an originating summons (OS) dated October 21, 2009. In the originating summons, the applicants sought for a declaration that they have become entitled to the suit property under the doctrine of adverse possession.



3. In a judgment rendered on May 15, 2020, Angote, J found as follows:

“The plaintiffs in this matter did not prove on the required standards that they had lived on the suit land for twelve (12) years before this suit was filed *nec vi, nec clam, nec precario*”
4. The applicants were dissatisfied with the said outcome and on May 21, 2020 filed a Notice of Appeal under the then Rule 75 of this Court’s Rules.
5. The motion was supported by an affidavit sworn on February 18, 2021 by Andrew Saibulu Kimintae, reiterating that the suit property has been their home

“...since childhood”.
6. The motion was opposed vide an affidavit dated March 15, 2021 sworn by Joseph Njenga Wainaina, wherein he deposed that there was nothing to stay, the applicant’s suit by way of adverse possession having been dismissed.
7. On April 26, 2021, the motion came before us for hearing by way of

“written submissions, with no appearance of counsel”

The applicant placed reliance on the submissions filed by their counsel, Miller & Co Advocates, dated March 16, 2021. It was their position that they had an arguable appeal as they

“... will be mainly faulting the judge’s finding that the appellants/applicants have not fulfilled the legal requirements to acquire the suit premises by way of adverse possession”.
8. On the nugatory aspect, the applicants submitted that unless the order of stay is granted, the respondents may deal with the suit property in a manner that will render the appeal nugatory.
9. In the respondent’s submissions filed by J.N. Mbutia & Co. Advocates, the respondents urged us to find that there was no order capable of being stayed. On the nugatory aspect, the respondent contended that the eviction, if at all, flows from their rights of being *bona fide* registered owners and not from the impugned judgment.
10. We have considered the motion and the supporting affidavit, the affidavit sworn in opposition to the motion, the submissions of both the applicant and the respondent, the authorities cited and the law.
11. For a start, the applicants seek orders of stay of the judgment delivered on May 15, 2020. For the applicants to succeed, they have to demonstrate that they have an arguable appeal. Secondly, they have to demonstrate that the appeal, if successful, will be rendered nugatory, absent stay (See Stanley Kang’ethe Kinyanjui v Tony Keter & 5 others [2013] eKLR) where it was held:
 - i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge’s discretion to this court. See Ruben & 9 others v Nderitu & another (1989) KLR 459.
 - ii. The discretion of this court under Rule 5(2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
 - iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.



- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
 - v. An applicant must satisfy the court on both of the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
 - 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. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
 - 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.
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
 - 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.
 - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim”. *International Laboratory for Research on Animal Diseases v. Kinyua*, [1990] KLR 403.”
12. It is common ground that the applicants’ suit in the Environment & Land Court was one of adverse possession.
13. It is also common ground that the applicants’ suit was dismissed. In the case of *Western College of Arts & Applied Sciences v Oranga & others* [1976] KLR 63, the Court whilst dismissing an application for stay of a negative order stated:
- 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. An execution can only be in respect of costs ...” “The High Court had 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 stay to enforce or refrain by injunction”.
14. Similarly, we find nothing in the instant application warranting an order of stay. We dismiss the motion with costs.
15. However, before we pen off, we sincerely apologize to the parties as this matter slipped through our hands and it was after the Presiding Judge, combing through her records, that she realized that ruling in this matter had not been delivered.

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

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

