



**Njau v Chief Land Registrar & 6 others (Civil Application
E379 of 2022) [2023] KECA 96 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 96 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E379 OF 2022
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 3, 2023**

BETWEEN

MOSES MWAGIRU NJAU APPLICANT

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

DIRECTOR OF SURVEYS 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

ROSE MUTHONI MATHENGE 5TH RESPONDENT

JOSEPH MURIUKI MATHENGE 6TH RESPONDENT

**AGNES NKATHA MUTUNGI (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF HENRY KITHIA MWITARI (DECEASED) 7TH RESPONDENT**

(Being an application for stay of execution, injunction and leave to adduce additional evidence against the Ruling and Orders of the Environment and Land Court of Kenya at Nairobi (E. Obaga, J.) delivered on 29th June 2022 in Petition No. 8 of 2017)

RULING

1. The applicant, Moses Mwagiru Njau, is the biological son of George Njau Mwagiru (Deceased), who died sometime in 1994 and who, according to the applicant, had agreed to buy the suit property (LR No. 27/34) from one Donald Victor Kidman in trust for him (the applicant) under and by virtue of an Indenture of Conveyance dated 20th June 1968. However, the agreed sale collapsed and, consequently, the Indenture of Conveyance was never registered. Subsequently, Donald Victor Kidman surrendered



- the Grant in respect of the suit property, which was later allotted to the 7th respondent, Henry Kithia Mwitari (Deceased).
2. The applicant sued the respondents jointly and severally in Nairobi ELC Petition No. 8 of 2017 praying for 16 orders, including an order directing the 1st respondent to cancel and annul the surrender to the Government of the suit property by Donald Victor Kidman, register the Indenture of Conveyance of the suit property in his (the applicant's) name, and prohibitory orders of injunction restraining the respondents or any of them from dealing with the suit property. He also sought vacant possession and the eviction of the 5th 6th and 7th respondents, compensation by the 1st 2nd 3rd and 4th respondents at the rate of KShs. 200,000,000 per Acre for alienation of the suit property, general damages for trespass, aggravated and exemplary damages, mesne profits, costs and interest.
 3. In addition to the foregoing, the applicant prayed that the order of stay of the consent judgment issued on 19th December 1969 by the Hon. Justice Gerald Harris in HCCC No. 1580 of 1968 be vacated; and that an order do issue to quash and nullify the proceedings, judgment and decree issued in ELC No. 1758 of 1995.
 4. The applicant's petition was anchored on the factual background narrated in detail on the face thereof. It was also supported by his affidavit sworn on 19th July 2017 in which he essentially set out the basis of his claim to the suit property, to wit, the Indenture of Conveyance aforesaid.
 5. By a Notice of Preliminary Objection dated 18th December 2020, the 7th respondent, Agnes Nkatha Mutungi (suing as personal representative of the estate of Henry Kithia Mwitari), objected to the applicant's petition on the grounds, inter alia, that the applicant lacked locus standi to bring the suit in view of the fact that he had not taken out letters of administration to the estate of George Njau Mwangi (Deceased) through whom he claimed; that the suit was in violation of sections 7 and 9 of the *Limitation of Actions Act*; that the suit offended section 7 of the *Civil Procedure Act*; that the same was bad in law; and that the application was incompetent as it was brought against a deceased person (Henry Kithia Mwitari) in his name.
 6. In response to the preliminary objection, the applicant filed a replying affidavit sworn on 26th May 2021 contending that the preliminary objection did not meet the threshold set in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Ltd [1969] EA p.696*; that, as the preliminary objection raised both points of law and fact, it required witness testimony and documentary evidence; that the applicant was the equitable owner of the suit property under and by virtue of the Indenture of Conveyance and the consent judgment entered in HCCC No. 1580 of 1968; that he had locus standi to file the petition; that Articles 22 and 258(1) of *the Constitution* enlarged locus standi to file judicial proceedings where constitutional violations were alleged; that, having filed a constitutional petition, it was not necessary for him to take out letters of administration to enforce the alleged trust; that the suit against the deceased 7th respondent was a mere procedural irregularity that did not go into the jurisdiction of the court or otherwise prejudice the 7th respondent, or, otherwise, go to the root of the dispute; that the procedural irregularity was curable under Article 159(2) (d) of *the Constitution*; that an action to recover property was commenced in HCCC No. 1580 of 1968 and that, accordingly, his cause of action had not expired; and that his suit was not res judicata.
 7. In his Ruling dated 29th June 2022, E. O. Obaga, J. upheld the 7th respondent's preliminary objection. In his ruling, the learned Judge observed: that the applicant, having admitted not having taken out letters of administration in respect of his deceased father's estate, lacked locus standi to bring the suit; that the mere fact of the aborted sale which his father was pursuing was for the land to be held in trust for him did not allow him thereafter to pursue his father's case under a trust; that the suit property had been surrendered to the Government and an instrument of surrender duly registered; that the 7th



respondent was allotted the suit property in 1995, 22 years before the filing of the applicant's petition in 2017; that the applicant's suit was time barred; that the suit against the deceased 7th respondent was a nullity; and that, even though claims under *the Constitution* had no time limit, the applicant had not explained why it took him so long to bring his suit.

8. In view of the foregoing, the learned Judge proceeded to strike out the deceased 7th respondent's name from the proceedings. He also struck out the applicant's petition with no orders as to costs.
9. Dissatisfied by the ruling of Obaga, J., the applicant moved to this Court on appeal on 27 grounds, which we need not replicate here. Suffice it to observe in summary that he faults the learned Judge for, inter alia: concluding that the 7th respondent died before the applicant filed his petition and that, therefore, his suit against him was a nullity; that, the sale of the suit property having aborted, and the Indenture of Conveyance not having been registered, the alleged trust did not crystallise; that the applicant had no locus standi to bring the petition, having not taken out letters of administration to his father's estate; that the applicant's cause of action had expired, having been brought 22 years after the suit property had been allotted to the 7th respondent; and that his suit was res judicata, having been determined by a consent judgment entered on 19th December 1969 in HCCC No. 1580 of 1968.
10. By a Notice of Motion dated 19th October 2022, the applicant seeks stay of execution of the ruling and orders of Obaga, J. delivered on 29th June 2022, injunctive relief restraining any dealings in the suit property pending hearing and determination of the intended appeal, and leave to adduce further evidence on appeal.
11. The applicant's Motion is anchored on 57 grounds whose recital here would serve no useful purpose, but through which we have sifted and duly considered. The application is also supported by the applicant's annexed affidavit sworn on 19th October 2022 essentially reiterating the factual background of the claim to which his appeal relates, the grounds of appeal and those on which his Motion is founded.
12. In addition, learned counsel for the applicant, M/s. Ngonyo Munyua and Company, filed written submissions dated 1st November 2022. Citing the Supreme Court decision in *Kenya Commercial Bank Ltd vs. Muiru Coffee Estate Ltd and Another* [2016] eKLR, counsel submitted that the learned Judge erred "... when he entertained interlocutory applications and the preliminary objection, yet pending before him was the applicant's application dated 12th July 2017, that sought for the physical court file for the old suit to be brought before the learned Judge." He asked us to allow the application as prayed.
13. In opposition to the applicant's Motion, the 7th respondent filed a replying affidavit sworn on 28th October 2022 denying the applicant's allegations that she was offering the suit property for sale to third parties while she was yet to obtain the title documents. She contended that "... the intended appeal was frivolous with no chances of success as the appellant may not be successful to circumvent the provisions of the law expressly provided relating to failure to take out letters of administration to enable him institute any legal proceedings on behalf of the estate of his late father;" that the intended appeal is frivolous with no chances of success having been brought out of time contrary to statute law; that the intended appeal would not be rendered nugatory since, the subject matter being land, the Court has jurisdiction to make far-reaching orders, including rectification of the land register and nullification of any title obtained by any party to the appeal herein; and that the applicant has not met the principles set out in law for grant of stay of execution under Rule 5(2) (b) of the Court of Appeal Rules.
14. Likewise, learned counsel for the 7th respondent, M/s. Ochieng Opiyo and Co., filed written submissions dated 4th November 2022 citing this Court's decision in *Kenya Industrial Estate Limited and Another vs. Matilda Tenge Mwachia* [2021] eKLR, and drawing our attention to the principles



to be met for the grant of orders under Rule 5(2) of this Court's Rules to which we will shortly return. Counsel urged us to dismiss the applicant's Motion with costs.

15. Notably, the 1st 2nd 3rd 4th 5th and 6th respondents did not file any affidavits in reply or written submissions in response to the applicant's Motion.
16. With regard to the application for stay of execution and injunctive relief, we have perused the applicant's Motion and duly considered the rival submissions of the parties. The issues for our consideration upon which the application turns are: whether the principles that govern the exercise of this Court's discretionary power in granting the reliefs stipulated in rule 5(2) (b) of the Rules of this Court on which the application is predicated have been met. The twin principles require an applicant to show that he has an arguable appeal and, further, that the appeal, if successful, shall be rendered nugatory unless stay is granted.
17. Considering the principles that govern grant of orders under rule 5(2) (b) of the *Court of Appeal Rules*, this Court in *Peter Gathecha Gachiri vs. the Attorney-General and 4 Others* [2014] eKLR had this to say:

“Rule 5(2) (b) of the Rules of this Court on which the application is premised confers on us independent discretionary jurisdiction exercisable in accordance with the twin principles, namely, that the appeal must be shown to be arguable and, in addition, that the appeal, if successful, shall be rendered nugatory if stay is not granted. These principles have been developed by the court as a guide in the exercise of its discretionary power in determining an application premised on Rule 5(2) (b). The rationale in these principles is intended to balance two parallel propositions: first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause; and secondly, that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it in the next higher court (see *Butt v Rent Restriction Tribunal* [1982] KLR 417. See also *Kenya Shell Ltd v. Kibiru & Another* [1986] KLR 410.

It is imperative for an applicant seeking an order under Rule 5(2) (b) to satisfy the Court on both principles. An applicant must show that the appeal is not frivolous, that it is arguable. It is now settled that an applicant need not demonstrate a plethora of arguable points. It is sufficient even if there be a solitary arguable point. An applicant must further show that the appeal, if successful, will be rendered futile if stay is not granted.”

18. It is noteworthy that what is sought to be stayed is an order striking out the applicant's petition on a preliminary objection on several points of law raised by the 7th respondent. An order of this nature is incapable of being stayed. The order did not direct anything to be done, or restrain anything from being done, to the applicant's prejudice. Neither did the learned Judge award the respondents costs of the petition whose recovery may be stayed.
19. To our mind, the only question that falls to be determined with regard to the first limb of the applicant's Motion is whether an order dismissing a suit can be stayed under rule 5(2) (b). If the answer is in the negative, that will dispose of the application subject, however, to our finding on the issue as to whether injunctive relief avails in any event. If the answer is in the affirmative, we will be bound to proceed and consider whether the twin principles regarding the arguability of the intended appeal and the nugatory effect of the appeal if it succeeds, and stay or injunctive relief are not granted, have been satisfied.
20. The issue whether dismissal of a suit gives rise to an order that is capable of being stayed by an order under rule 5(2)(b) was considered by this Court in *Western College of Arts and Applied Sciences vs. Oranga & Others* [1976] KLR 63 where a dispute arose between the parties over and concerning money held in a bank account contributed by members of the public for construction of a college of



technology called WECO. The appellant filed suit in the High Court seeking a declaration that the money belonged to WECO, and that WECO was entitled to operate the bank account. The High Court dismissed the suit with costs whereupon WECO gave notice of appeal and applied for temporary injunction to restrain the respondent from operating the bank account, and for stay of execution until the appeal was determined. At the time, this Court did not have jurisdiction to grant an injunction under the equivalent of rule 5(2) (b), but had jurisdiction to grant stay. The Court, therefore, held that it had no jurisdiction to grant an order for injunction. But with regard to the prayer for stay in respect of which it then, as now, had jurisdiction, the Court held that there was nothing in the order of dismissal of the suit (other than the order for costs) that could be enforced and, accordingly, dismissed the application for stay. In a unanimous decision, the Court 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. 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.”

21. Likewise, this Court in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR held that:

“Following that approach of looking at the nature of the orders even before delving into the said principles in a Rule 5(2) (b) application the Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in *Executive Estates Limited v Kenya Posts & Anor.* [2005] 1 E.A. 53 where it was stated that “... the order which dismissed the suit was a negative order which is not capable of execution...”

22. The Court of Appeal in *George Ole Sangui & 12 others v Kedong Ranch Limited* [2015] eKLR held that:

“20. In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”

23. We adopt the same reasoning as in the three applications we have cited above and hold that the learned judge having upheld the preliminary objection and struck out the applicant’s petition, there is nothing that can be executed out of such an order. It follows, therefore, that this Court cannot grant stay of a negative order and hereby dismiss the prayer for stay of execution.



24. With regard to the injunctive relief sought pending hearing and determination of the intended appeal, the applicant must demonstrate that he has an arguable appeal, and that the appeal, if successful, would be rendered nugatory if the relief sought is not granted.
25. From the record as put to us, it is clear that the appellant had not taken out letters of administration to the estate of his deceased father prior to filing his petition; that the contract for sale to his deceased father of the suit property aborted, and that the Indenture of Conveyance on which the applicant claimed under a trust was never registered; that Kidman had long surrendered the suit property to the Government, and that the same was subsequently allotted to the 7th respondent; that the applicant's petition against the respondents was lodged after the 7th respondent's demise; and that a period of 22 years had lapsed before the applicant lodged his petition. Without peering into the merits of the intended appeal, a glimpse of the uncontested factual background leads to the conclusion that the applicant has no arguable appeal. Accordingly, we need not address ourselves to the second limb of the twin principle – whether the appeal would be rendered nugatory in the absence of the injunctive relief sought.
26. With regard to the leave sought to adduce new evidence on appeal, we take to mind the decision In Mohamed Abdi Mohamed vs. Ahmed Abdullahi Mohamed and 3 others [2018] eKLR where the Supreme Court laid out the guidelines on admission of additional evidence. The Court stated as follows:

“Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by Counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- a. The additional evidence must be directly relevant to the matter before the Court and be in the interest of Justice;
- b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was within the knowledge of, or could not have been produced at the time of the suit or Petition by the Party seeking to adduce the additional evidence;
- d. where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has direct bearing on the main issue in the suit;
- e. the evidence must be credible in the sense that it is capable of belief;
- f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- g. whether a Party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- h. whether the additional evidence discloses a strong prima facie case of willful deception of the Court;



- i. the Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence;
- j. the Court must find the further evidence needful;
- k. A Party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the Omissions or patch up the weak points in his/her case.”

- 27 The guiding principle in determining whether to grant leave to adduce new evidence on appeal is the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other. It is also instructive that, even with the application of the foregoing principles, the Court would only allow additional evidence on a case-by-case basis and, even then, sparingly, with abundant caution.
28. The new Evidence sought to be adduced on appeal by the applicant is a court order dated 21st May 2009 in HCCC No. 1580 of 1968 – *Bernard Kiarie Njau (Suing pursuant to legal representative ad litem issued in the estate of George Njau Mwangiru - Deceased) vs. Donald Victor Kidman, Registrar of Titles and the Attorney-General.*
29. There isn’t much to say of the evidence sought to be adduced by the applicant in support of his intended appeal. Suffice it to note that the order is of no relevance to the matters in contention in the intended appeal. Neither has the applicant demonstrated how the evidence satisfies the requirements for leave set out in the afore-cited decision of the Supreme Court in the case of Mohamed Abdi Mahamud vs. ahmed Abdullahi Mohammed and 3 others (ibid).
30. Having carefully considered the applicant’s Motion, the affidavits in support and reply, the written submissions of learned counsel for the applicant and for the 7th respondent, the cited authorities and statute law, we reach the inescapable conclusion that the applicant’s Notice of Motion dated 19th October 2022 fails and is hereby dismissed with costs to the 7th respondent. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD 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

