



**Theophile v Chemfest Limited (Civil Application E210 of 2022)  
[2023] KECA 189 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 189 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E210 OF 2022  
HM OKWENGU, A ALI-ARONI & JM MATIVO, JJA  
FEBRUARY 3, 2023**

**BETWEEN**

**KAHOZI NYEMBO THEOPHILE ..... APPLICANT**

**AND**

**CHEMFEST LIMITED ..... RESPONDENT**

*(Being an application for stay of judgement and decree pending appeal arising from the judgement of the Environment and Land Court at Nairobi (Mogeni J) delivered on 11th May 2022) in ELC. Case No. 232 of 2013)*

**RULING**

1. The applicant Kahozzi Nyembo Theophile moved this court by way of a notice of motion dated June 17, 2022 pursuant to rule 5 (2) (b) of the Court of Appeal rules seeking; -
  1. That this Honourable Court be pleased to issue an order of stay of execution of the Judgment and Decree of the Environment & Land Court at Nairobi (The Hon. Lady Justice Mogeni) delivered on May 11, 2022 in ELC. Case No. 232 of 2013 pending the lodging, hearing and final determination of the Intended Appeal against the said Judgment and Decree.
  2. And for costs to be provided for.
2. The application was based on grounds that the applicant has an arguable appeal with a high chance of success and unless the orders sought are granted the respondent is likely to execute the decree of the trial court, proceed to have the applicant's certificate of lease cancelled, the respondent registered as the legal owner of the property and be at liberty to deal with the property as it deems fit including disposing of the same.
3. The application was further supported by the affidavit of the applicant of even date wherein he deposed that he had entered into an agreement for sale with the previous owner of the suit property



one Nzeyimana Noe Aveque (now deceased) for purchase of the same being Land Reference No. Kikuyu/Kikuyu Block 1/903 for a consideration of US\$ 70,000/- ,and that it was an express term of the agreement that the property would be charged to Middle East Bank to finance the balance of the purchase prize. And since the said previous owner had relocated from Kenya, he had financed his travel to Nairobi by sending him Kshs 193,000, however on arrival the said previous owner indicated to him that the original title was lost and told him he could transfer the property through the Kiambu Land Office which he did. Thereafter his advocate got in touch with the said seller to seek where the balance of the purchase price was to be banked,when they learnt that the said property had been sold to the respondent who was later to sue him in the Environment and Land Court Case No. 232 of 2013, where he was the 1<sup>st</sup> respondent.

4. The applicant further stated that the trial court erred by entering judgement in favour of the respondent in the following terms; -
  - a. A permanent Injunction be and is hereby issued restraining the 1<sup>st</sup> defendant, his agents, servants or any person acting on his instructions from entering into, locking, trespassing, wasting, alienating and or in any manner interfering with the Plaintiffs quiet possession and enjoyment and or dealing with the property known as Kikuyu/Kikuyu Block 1/903.
  - b. A declaration be and is hereby issued that the 1<sup>st</sup> defendant's title to the suit property Kikuyu/ Kikuyu Block 1 /903 and the gazette notice no. 493 of 20<sup>th</sup> January 2012 is null and void and the same to be cancelled forthwith and the 2<sup>nd</sup> defendant to immediately effect the cancellation of the Certificate of Lease issued to the 1<sup>st</sup> defendant.
  - c. An order be and is hereby issued directing the 1<sup>st</sup> defendant to surrender the duplicate certificate of lease for cancellation within 10 days from the date of the judgment and in default the same to be cancelled and the 2<sup>nd</sup> defendant, that is the district land registrar Kiambu does register the 1<sup>st</sup> Plaintiff as the beneficial and legal owner of all that property known as Kikuyu/ Kikuyu Block 1/903 forthwith and the Deputy Registrar of this Honourable Court does sign all the requisite transfer documents to facilitate the said registration.
5. The applicant being aggrieved by the said judgement and orders of the trial court lodged an appeal in this court which informs this application. Urges that he has an arguable appeal and unless an order of stay is issued the respondent is likely to execute the order of the trial court, his title maybe cancelled and the respondent is likely to deal with the property in any manner including disposing of the same which will in turn render the appeal nugatory.
6. On its part the respondent objected to the application by filing a replying affidavit dated June 23, 2022 and sworn by Dr. Martin Mbugua Njogu who described himself as a director of the respondent company and duly authorized to swear the affidavit on its behalf.
7. He deposed that the facts and circumstances described by the applicant in his affidavit in support of the application are not correct. Further that the applicant frustrated the sale agreement between him and the previous owner as he failed to fulfil the terms of the agreement between them and at which point the property was sold to the respondent. Further that in the trial court the applicant failed to demonstrate that he paid part of the sale price. Further the applicant does not have an arguable appeal to challenge the trial court's judgement.
8. At the hearing of the application learned counsel Mr. Kangata appearing for the applicant relied on his written submission dated June 28, 2022 and urged that the applicant alleged serious fraud on the part of the respondent however the trial court made a finding that no fraud was proved when deciding in favour of the respondent. He urged further the applicant has an arguable appeal and if stay is not



granted the applicant will deal with the subject property in a manner it deems fit including disposing of the same.

9. Learned counsel Mr. Ongegu appearing for the respondent equally relied on his written submissions dated June 29, 2022, and on his part urged that the applicant's appeal does not raise any arguable issues, it is frivolous and devoid of any merit. Further that the trial court found that fraud was never proved and that the applicant had misrepresented facts before it. In support of his arguments counsel relied on [\*Stanley Kang'ethe Kinyanjui Versus Tony Keter & 5 others\*](#) (2013) eKLR & *David Mogambi Mang'are Versus A.G & 3 Others* Civil Application No. Nai 265 of 2011(UR 175/2011).
10. The application is based on rule 5 (2) (b) of this courts Rules which provide that;

- “(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.”

11. Both counsel allude and rightly so to the twin principles to be considered in an application such as the one before us. Firstly, the applicant is required to satisfy the court that he has an arguable appeal, one that is not frivolous but not necessarily that the appeal will succeed. Secondly, the applicant has to demonstrate that in the event stay is not granted the appeal will be rendered nugatory.

12. The twin principles referred to by counsel are well captured in the authorities cited herein below; -

[\*Stanley Kangethe Kinyanjui vs. Tony Ketter & Others\*](#) [2103] eKLR where this court stated;

“That in dealing with rule 5(2)(b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court. The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

In [\*Multimedia University & Another vs. Professor Gitile N. Naituli\*](#) (2014) eKLR it was stated:

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underling those decisions was summarized in the case of [\*Stanley Kangethe Kinyanjui vs. Tony Ketter & Others\*](#) [2103] eKLR”



And in *Kenya Industrial Estate & another versus Matilda Tenge Machia* Civil Application No.211 of 2020 as regards the nugatory aspect this court stated; -

“On the nugatory aspect, 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.

13. We have carefully considered the application, the supporting affidavit, and submissions by both the applicant and the respondent’s counsel together with annexures and the authorities cited and without saying much so as not to appear to delve into the main appeal bearing in mind that the intended appeal need not necessarily succeed in the ultimate, we find that the appeal maybe be arguable.
14. However, it is our considered view that lack of a stay in this matter will not render the intended appeal nugatory. After all the pleadings show that the respondent has equally been having a title to the property for a while now and has been in possession of the property subject matter of the intended appeal. Secondly the respondent has indicated that it has no intention of disposing of the property.
15. In the end we decline to grant the application. It is accordingly dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2023**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**ALI-ARONI**

.....

**JUDGE OF APPEAL**

**J. MATIVO**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

