



**Chucha v Wamaitha (Suing as the Legal Representative ad litem of the Estate of Esther Wamaitha Mbugua - Deceased) & 2 others (Civil Application 219 of 2022) [2023] KECA 290 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 290 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 219 OF 2022  
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA  
MARCH 17, 2023**

**BETWEEN**

**JOHNSON NG'ANG'A CHUCHA ..... APPELLANT**

**AND**

**CATHERINE WANJERI WAMAITHA (SUING AS THE LEGAL REPRESENTATIVE AD LITEM OF THE ESTATE OF ESTHER WAMAITHA MBUGUA - DECEASED) ..... 1<sup>ST</sup> RESPONDENT  
LAND REGISTRAR KIAMBU ..... 2<sup>ND</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for stay of execution from the Judgment and Decree of the Environment and Land Court of Kenya at Nairobi (Mogeni, J.) delivered on 25th May 2022 in Environment and Land Court Case No. 537 of 2008)*

**RULING**

1. Before us is a Notice of Motion dated June 20, 2022 and made under rules 5(2) and 47(1) of the Court of Appeal Rules seeking the following orders:
  - a. Spent
  - b. That there be issued a stay of execution of the judgment & decree issued Mogeni J dated May 25, 2022 in ELC No 537 of 2008 and all other subsequent orders barring the 1<sup>st</sup> respondent by herself and/or her servants from commencing and/or concluding any attempts to evict Johnson Ng'ang'a Chutha from the land registered as L.R Githunguri/kanjai/993, or to cancel his title



to the land registered as L.R Githunguri/kanjai/993 pending hearing and determination of this application.

- c. That there be issued a stay of execution of the judgment & decree issued by Mogeni, J. dated 25<sup>th</sup> May 2022 in ELC No 537 of 2008 and all other subsequent orders barring the 1<sup>st</sup> respondent by herself and/or her servants from commencing and/or concluding any attempts to evict Johnson Ng'ang'a Chutha from the land registered as L.R Githunguri/kanjai/993, or to cancel his title to the land Registered as L.R Githunguir/kanjai/993(the suit property) pending the filing, hearing and conclusive determination of the intended appeal.
2. By way of background, the respondent sued the applicant in Civil Suit No ELC 537 of 2008 in the Environment and Land Court, Nairobi, seeking a declaration that the Estate of Esther Wamaitha Mbugua (deceased) was the lawful owner of the suit property. She also sought an order directing the Land Registrar, Kiambu, who was sued as the 2<sup>nd</sup> defendant, to cancel all the entries in the proprietorship section of the title in which the applicant was registered as the proprietor. Finally, the respondent sought an order of eviction of the applicant from the suit property and a permanent injunction to restrain him from entering the suit property.
3. The 1<sup>st</sup> respondent's claim was that she had bought the suit property from Kenya Commercial Bank in the year 1988 in the course of the Bank's exercise of its statutory power of sale.
4. On his part, the applicant opposed the suit. He claimed that he bought the suit property from Family Bank in a public auction that was conducted by Jumweka Auctioneers in the year 2004. The land was subsequently registered in his name, and he took possession. The applicant denied that he was a trespasser and maintained that he was a lawful owner of the suit property.
5. Upon hearing the parties, the learned Judge (J. Mogeni, J.) held that the 1<sup>st</sup> respondent was the lawful owner of the suit property and issued various declaratory orders, including an order for eviction of the applicant. The relevant part of the judgment reads as follows:
  - (63) I am inclined to agree with the Plaintiff's deceased mother that the entries made in the title to the suit property especially on 7/04/1995 seem deceitful. Kenya Commercial Bank had a right as a lien holder to exercise their statutory power of sale to recover the money that James Njuguna Mira (deceased) owed. The sale through the public auction was final. The suit property was not available for any other transaction unless Esther Wamaitha Mbugua (deceased) purported to sell the same. It is not lost to Court that the Court Order that led to Gazette Notice No 1893 being published was not produced in Court. Therefore, I find that the third party could not have sold what it did not have. It follows that the Third party did not have a good title. A fraudulent title cannot be allowed to stand. See Court of Appeal in *Arthi Highway Developers Limited v West End Butchery Limited and 6 Others* Civil Appeal No 246 of 2013 (2015) eKLR.
  64. The maxim of equity which stipulates that; "when two equities are equal, the first in time shall prevail" applies in this case, - See the case of *Gitwany Investment Ltd vs Tajmal Ltd & 3 Others*, as well as Nairobi HCC No1114 of 2002, & *African Inland Church – Kenya (Registered Trustees) v Catherine Nduku & 12 others* [2017] eKLR.
  65. In this case, the plaintiff's title was issued in 1990, fifteen years before the issuance of title to the 1<sup>st</sup> Defendant. The land Registrar is the custodian of Land records and any enquiry as to the validity or ownership of any land reference is usually approved by the Land Registrar and or his representatives. The 2<sup>nd</sup> Defendant is also responsible for the issuance of the invalid title to the 1<sup>st</sup> Defendant."



6. Aggrieved by the judgment, the applicant lodged a notice of appeal on May 30, 2022 and annexed a memorandum of appeal raising 7 grounds. We need not recite the grounds in full, but take the liberty to summarize them as follows: that the respondent’s case, especially the allegations of fraud, were not proved to the required standard; that the applicant’s evidence was not considered; and that the judgment was not supported by the evidence on record.
7. When the matter was called out for hearing, counsel for the applicant adopted his written submissions dated June 21, 2022. The applicant submitted that he has an arguable appeal which will be rendered nugatory unless the order for stay is granted. On her part, the 1<sup>st</sup> respondent relied on her written submissions dated July 14, 2022 and submitted that the applicant has no arguable appeal, and that, in any event, the appeal will not be rendered nugatory if the order for stay is not granted.
8. The principles applicable to an application brought under rule 5(2) (b) of this Court’s Rules are now well settled. Firstly, the applicant must demonstrate that they have an arguable appeal, and it is sufficient if a single bonafide arguable ground is raised (see [University of Nairobi v Ricatti Business of East Africa](#) [2020] eKLR where the Court held:
 

“We remind ourselves that on whether the appeal is arguable, the applicant need not establish a multiplicity of grounds and it is sufficient if a single bona fide arguable ground of appeal is raised.”
9. Further, the arguable appeal is not one which must necessarily succeed, but one which ought to be fully argued before the Court (see [Joseph Gitabi Gachau & Another v Pioneer Holdings \(A\) Limited & 2 Others](#) [2009] eKLR and [Nicholas Ombija v Kenya Commercial Bank](#) [2009] eKLR.
10. The second limb is that the appeal, if successful, will be rendered nugatory unless the order for stay is granted. The term “nugatory” does not only mean worthless, futile or invalid, it also means trifling (See [George Otieno Gache & another v Judith Akinyi Bonyo & 5 others](#) [2017] eKLR where the Court held:
 

“[20] Thus in determining whether an appeal will be rendered nugatory or not, the Court must consider what is sought to be stayed and whether if allowed to happen the situation is reversible; or if it is not reversible whether damages will reasonably compensate the aggrieved party.”
11. In determining whether an appeal will be rendered nugatory unless an order for stay is granted, the Court has to consider the conflicting claims of both parties. In [Mbembe v Kamere](#) [2021] KECA 266 (KLR) (3 December 2021) (Ruling), the Court expressed itself as follows:
 

“On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in [Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others](#) (supra) this Court stated that: “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. 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”.
16. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits.”



12. To succeed, an applicant must satisfy the two principles as enunciated in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR where the Court held:

“This Court, in accordance with precedent, has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be nugatory if these interim orders were denied. From the long line of decided cases (although none was cited by counsel, perhaps due to their notoriety) on Rule 5(2) (b) aforesaid, the common vein running through them and the jurisprudence underlying these decisions can today be summarized as follows:

- 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 bonafide 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. *Damji Pragji* (supra).
- 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.”

13. The question we need to answer now is whether the applicant has satisfied the two principles. On the arguability of the appeal, we note that the grounds raised are whether the respondent discharged the burden of proof, and whether the learned Judge considered the evidence adduced by the applicant. The



grounds are general in nature, but all we can say now is that the grounds cannot be termed frivolous. The merits or otherwise of those grounds will be determined by the bench that will hear and determine the appeal. Therefore, we hold that the applicant has satisfied the first limb of the twin principles.

14. On the question whether the appeal will be rendered nugatory, we note that there is an order for cancellation of the applicant's title and eviction from the parcel of land. It is our view that if the entries in the land register are cancelled and the applicant is evicted, the appeal, if successful, will be rendered nugatory. Therefore, we find that this is a proper case where the status quo on the ground should be maintained pending the hearing and determination of the appeal.
15. Accordingly, it is our finding that the applicant has satisfied the twin principles and allow the application as prayed, save that the costs of the application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.**

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

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**JUDGE OF APPEAL DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

