



Karanja v Michael Ndichu Wangaruro t/a Ndichu & Associates & 4 others (Civil Application E584 of 2022) [2023] KECA 266 (KLR) (17 March 2023) (Ruling)

Neutral citation: [2023] KECA 266 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E584 OF 2022
DK MUSINGA, F SICHALE & PM GACHOKA, JJA
MARCH 17, 2023**

BETWEEN

MARY WANJIRU KARANJA APPELLANT

AND

**MICHAEL NDICHU WANGARURO T/A NDICHU &
ASSOCIATES 1ST RESPONDENT**

CHARLES KIHAGI THUAH 2ND RESPONDENT

TITUS MBUGUA KABERI 3RD RESPONDENT

THOMAS THUKU NGÁNGÁTA 4TH RESPONDENT

SAMUEL K. MUKANDIA 5TH RESPONDENT

*(An appeal against the judgment of the ELC court at Nairobi
(Komingoi, J.) dated 30th June, 2022 IN ELC CAUSE NO. 447 OF 2015)*

RULING

1. The applicant, Mary Wanjiku Karanja, filed the Notice of Motion dated September 9, 2022. Her principal prayer was that there be stay of execution of the Judgment delivered by Komingoi, J on June 30, 2022. The motion was supported by her affidavit sworn on September 9, 2022 in which she deposes that, by an order of specific performance, she was ordered to transfer certain parcels of land to the 1st and 3rd respondents within 90 days of the date of judgment; that the said judgment is unenforceable as the subject properties are part of the estate of her late husband and were adjudicated upon in HC Succession Cause No 2361 of 2014; that the 1st and 3rd respondents have embarked on demarcation of the land; that the 1st respondent was her late husband's surveyor and he was paid all his dues whilst the 3rd respondent was the deceased's lawyer.



2. The motion was resisted *vide* an affidavit sworn by Michael Ndichu Wangaruro, the 1st respondent herein, sworn on September 25, 2022. He deponed that the applicant's suit was dismissed on October 28, 2021 for want of prosecution; that the applicant was enjoined from dealing with the suit property and that the contention that he is intent on executing the decree is not well founded.
3. In a further replying affidavit dated October 13, 2022, the applicant deponed that no injunctive orders had been issued against her. Further, in demonstration that the 1st respondent is intent on executing the impugned judgment, the applicant deponed that the respondents have moved unto the suit premises and have started construction of illegal structures.

On November 28, 2022, the motion came up before us for plenary hearing. Learned counsel Mr Kiarie appeared for the applicant whilst learned

3. counsel, Jimmy Maina, appeared for the 1st respondent. There was no appearance on behalf of the 2nd, 3rd 4th and 5th respondents inspite of service of a hearing notice via email on November 15, 2022 at 3.04 p.m.
4. Mr Kiarie in urging the motion placed reliance on the appellant's submissions dated October 14, 2022. It was submitted, inter alia, that the E & L C had no jurisdiction to entertain the respondent's counter-claim where there is still an on-going succession case. Further, that the judgment was unenforceable as the parcels of land, the subject of the dispute, had since been transferred to the deceased's beneficiaries.
5. Mr Maina on his part relied on the replying affidavit of the 1st respondent, his skeleton submissions and a case digest of authorities.
6. We have considered the motion, the supporting affidavit, the replying affidavit, the applicant's further affidavit, the rival oral and written submissions of the applicant and the 1st respondent, the authorities cited and the law. The application before us is premised under Rule 5(2)(b) of this Court's Rules. In an application such as the one before us, an applicant has to show that he/she has an arguable appeal. Secondly, an applicant has to demonstrate that absent stay, the intended appeal is likely to be rendered nugatory. In *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR*, 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 impecuniosity, the onus shifts to the latter to rebut by evidence the claim”. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.
7. As has been previously held, an arguable appeal is not necessarily one that will succeed.
 8. In the motion herein, the applicant contends that she has an arguable appeal. One of the issues she raises is whether the learned judge erred in making orders in favour of the 1st and 3rd respondents in respect of property owned by the applicant's deceased husband. She has also raised the issue that the said properties are beyond her reach, having been distributed in the succession cause. We think the applicant has satisfied the first limb on arguability.
 9. The second limb, in our view has also been satisfied. The subject of the dispute matter is land. If the said land is alienated in one way or the other, it is likely to change its character and ownership, way beyond the reach of the applicant and hence our conclusions that the 2nd limb has equally been satisfied.
 10. The upshot of the above is that the Notice of Motion dated September 9, 2022 is hereby allowed with no order as to costs.

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

D K MUSINGA, (P)

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JUDGE OF APPEAL

F SICHALE

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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

