



REPUBLIC OF KENYA



KENYA LAW
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**Langat v Langat (Civil Application E051 of 2022)
[2023] KECA 214 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KECA 214 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E051 OF 2022
F SICHALE, FA OCHIENG & WK KORIR, JJA
MARCH 3, 2023**

BETWEEN

JOSEPHINE CHEPNGETICH LANGAT APPLICANT

AND

LEAH CHEBII LANGAT RESPONDENT

(An application for stay of the orders of the High Court pending the hearing and determination of this Appeal from the Ruling and orders of the High Court of Kenya at Kericho (A.N. Ongeru, J.) dated 6th May, 2022 In SUCCESSION CASE No 100 OF 2012)

RULING

1. The applicant's (Josephine Chepngetich Langat's) notice of motion dated August 24, 2022 seeks the following orders:
 1. Spent
 2. That this court be pleased to stay execution of the ruling and order of the High Court of Kenya at Kericho that was granted by Justice AN Ongeru on May 6, 2022 in Kericho High Court Succession Case No 100 of 2012.
 3. That the costs of this application be provided for."
2. In the motion, Leah Chebii Langat is named as the respondent.
3. In the supporting affidavit, the applicant deposed that she filed a notice of appeal on July 8, 2021 expressing her desire to appeal against the ruling delivered by Dulu, J on March 12, 2020 in respect of Kericho Succession Cause No 100 of 2012; that subsequently, the respondent filed a notice of motion dated February 3, 2022 whose outcome was delivered on May 6, 2022; that in the said ruling, Ongeru, J distributed the deceased's land namely, Kericho/Kapsuser/4192 (the suit land) by giving the



applicant and the respondent each equal shares of 4.028 acres. The applicant has sought to stay this ruling pending appeal.

4. In her replying affidavit dated September 12, 2022, the respondent contended that the order sought by the applicant was overtaken by events.
5. On November 7, 2022, the motion came up before us for virtual hearing. Mr Waweru, learned counsel for the applicant was present. There was however no appearance on behalf of the respondent in spite of service of the hearing notice on October 18, 2022 upon the firm of Weldon Ngetich & Co Advocates who are on record for the respondent.
6. In urging the motion, the applicant briefly highlighted the appellant's written submissions dated September 23, 2022. He contended that the applicant has been on the land since the year 1983, and that on the other hand, the respondent has never lived on the suit land.
7. In her written submissions dated September 12, 2022, the respondent reiterated the gist of her replying affidavit of the same date, to the effect that the order sought is overtaken by events.
8. We have considered the motion, the applicant's written and oral submissions as well as the respondent's replying affidavit, (containing what would on the face of it, be submissions), as well as her submissions. We have also considered our mandate in light of rule 5(2)(b) of this *Court's Rules*.
9. For a start, an application under rule 5(2)(b) is predicated on a notice of appeal intent on challenging a ruling and /or judgment which is sought to be stayed. It is the said notice that vests this court with jurisdiction. Indeed, rule 5(2)(b) was aptly summarized in the case of *Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others* [2013] eKLR 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. (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 (1990) KLR 365 (emphasis added).
 - 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, 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. 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 [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” [1990] KLR 403.
10. The notice of appeal upon which the applicant’s motion is predicated upon is dated March 31, 2020. In the said notice, the applicant intends to challenge the decision of Dulu, J delivered on March 12, 2020. The motion before us seeks to stay the orders of Ongeru, J delivered on May 6, 2022 wherein she allowed the respondent’s motion of January 24, 2022, seeking, *inter alia*, an order that security be provided and the surveyor for purposes of demarcation and sub-division of the suit land as per the certificate of confirmation of grant issued on February 4, 2014. Indeed, in the applicant’s supporting affidavit dated August 22, 2020, she deposed that she was aggrieved by the ruling of March 12, 2020 and that she filed a notice of appeal dated July 8, 2021 “... making clear to them of our intention to appeal”. There is no notice of appeal in respect of the ruling of Ongeru, J delivered on May 6, 2022. During the virtual hearing, Mr Waweru for the applicant confirmed that he had not filed a notice of appeal in respect of the ruling of May 6, 2022. The effect of filing a notice of appeal was amplified in the decision of *Equity Bank Limited vs West Link MBO Limited*, [2013] eKLR wherein Githinji, JA stated:
- “ That the true nature of an application under rule 5(2)(b) is an interlocutory application in an appeal pending before this court; and that rule 5 (2) (b) is a procedural innovation designed to empower this court to entertain interlocutory applications for preservation of the subject matter of the pending appeal in order to ensure the just and effective determination of appeal. That as soon as a notice of appeal is lawfully filed, an appeal is deemed to be in existence and a litigant can move this court for grant of an order of stay under rule 5 (2) (b) of this Court's *Rules*.”
11. Similarly, in *Nguruman Limited vs Shompole Group Ranch & Another*, Civil Application NAI 90 OF 2013, Musinga, JA recently held in the lead ruling:
- “ The power of this court under rule 5 (2) (b) to order a stay of execution, an injunction or a stay of further proceedings is only exercisable where a notice of appeal has been lodged in accordance with rule 75 of this Court's *rules*.”
12. In the absence of a notice of appeal against the ruling of Ongeru, J of May 6, 2022, it is our view that we do not have jurisdiction to consider the applicant’s motion. It is hereby dismissed with costs.

Dated & delivered at Nakuru this 3rd day of March, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG



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JUDGE OF APPEAL
W. KORIR

.....
JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

