



**Njeri & 2 others v Mbutti & another (Civil Application
E089 of 2022) [2023] KECA 225 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KECA 225 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E089 OF 2022
MSA MAKHANDIA, F SICHALE & HA OMONDI, JJA
MARCH 3, 2023**

BETWEEN

**FELISTA NJERI 1ST APPLICANT
NELLIUS WANGUI 2ND APPLICANT
JANE GACU 3RD APPLICANT**

AND

**MOSES KAMAU MBUTTI 1ST RESPONDENT
DAVID KURIA MBUTTI 2ND RESPONDENT**

(Under section 3 (2), 3A, 3B of the Appellate Jurisdiction Act and Rule 1(2) 5(2)(b), 41, 42(1), 43(1) of the Court of Appeal Rules, 2010 and all the enabling provisions of the Law)

RULING

1. The applicants Felista Njeri, Nelliuss Wangui & Jane Gacu filed a notice of motion application predicated on rule 5(2)(b) of this court's *rules*. In the main, they sought an order of injunction restraining the respondents, Moses Kamau Mbutti and David Kuria Mbutti from evicting them from Dagoretti/Riruta/5443 (the suit property).
2. The motion was supported by the affidavit of Felista Njeri (the 1st applicant) sworn on March 9, 2022. She deponed that on March 3, 2022, the Environment and Land Court (ELC) rendered a judgment in favour of the respondents who had sought to have the applicants evicted from the suit property; that the suit property is part of their ancestral as well as matrimonial land.
3. The motion was opposed vide a replying affidavit sworn by Moses Kamau Mbutti on behalf of himself and on behalf of the 2nd respondent. He refuted the applicants' contention that they have an arguable appeal which will be rendered nugatory, absent stay.



4. On July 25, 2022, the motion came up for plenary hearing before us. Learned counsel Mr Gakaria for the applicants and learned counsel Mr Nyakundi for the respondents, each wholly relied on their written submissions. The applicants' submissions were filed on March 28, 2022 whilst the respondents' submissions were dated May 6, 2022.
5. In their submissions, the applicants contended that they have an arguable appeal as the impugned judgment failed to address the fact of a boundary dispute which did not warrant an order of eviction.
6. On the nugatory aspect, they contended that they stand evicted on land they have occupied for over 40 years, unless stay of execution is granted.
7. In their submissions, the respondents contend that the applicants failed to establish that they had been on the suit property for over 40 years; that the intended demolition of the illegal structures thereon is not an act of extra judicial as contended by the applicants.
8. We have considered the motion, the supporting affidavit, the replying affidavit, the rival written submissions and the law.
9. The order sought by the applicant is premised on rule 5(2)(b) of this court's *rules*. In order for us to grant such an order, we have to be satisfied that the intended appeal is arguable and will be rendered nugatory, absent stay. In this court's decision of [*Stanley Kangethe Kinyanjui v Tony Keter & Others* \[2013\] eKLR](#), it was held 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.
- v. The discretion of this court under rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
- vi. The court becomes seized of the matter only after the notice of appeal has been filed under rule 75.
- vii. In considering whether the appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.
- viii. An applicant must satisfy the court on both the twin principles.
- ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
- x. 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.
- xi. 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.
- xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.



xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

10. The applicants contend that the learned judge erred in ordering them to vacate the suit property without determining the extent of encroachment. We are satisfied that the applicants have demonstrated that they have an arguable appeal. On the nugatory aspect, the applicants are facing the risk of eviction from a parcel of land. We think that the 2nd limb for our consideration has also been satisfied.
11. The upshot of the above is that we grant the 2nd and 3rd prayers as sought in the motion of March 9, 2022.

It is so ordered.

DATED AND DELIVERED IN NAIROBI THIS 3RD DAY OF MARCH, 2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F SICHALE

.....

JUDGE OF APPEAL

H A OMONDI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

