



REPUBLIC OF KENYA



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**Abdulkadir v Ali & 4 others (Civil Application E007 of 2021)
[2023] KECA 472 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KECA 472 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E007 OF 2021
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
APRIL 28, 2023**

BETWEEN

HAMID MOHAMED ABDULKADIR APPLICANT

AND

**SHEIKH MOHAMED ALI (ALIAS SHUKHA MOHAMED
ALI) 1ST RESPONDENT**
AHMED MOHAMED ALI 2ND RESPONDENT
ABDULATIF MOHAMED ALI 3RD RESPONDENT
ALI MOHAMED ALI 4TH RESPONDENT
ZAINAB MOHAMED ALI 5TH RESPONDENT

*(An application for Stay of Execution of the ruling by the Environment
and Land Court at Mombasa (Yano J.) delivered on 11th May
2017 and 16th December 2020 in Mombasa ELC No. 86 of 2016)*

RULING

1. This ruling is on an application dated January 20, 2021, lodged by Hamid Mohamed Abdulkadir (the Applicant), in which he seeks an order of stay of execution of the judgment delivered on May 11, 2017 and the ruling delivered on December 16, 2020 in Mombasa ELC Case No 86 of 2016 together with all other consequential orders pending the hearing of this appeal. The Environment and Land Court (Yano J.) entered judgment for the Respondents herein in the judgment delivered on May 11, 2017, and ordered the Applicant to give vacant possession or be evicted from the parcel of land known as Sub division Number 619 Section 1 Mainland Northland (Optional Number 50/2) (the suit property), and to pay rent arrears of Kshs 1,209,500/-, mesne profits at the rate of Kshs 6,500/- per month from June 1, 2015 until vacant possession is given, and costs. In the ruling delivered on



- December 16, 2020, the Yano J. dismissed the Applicant's application dated February 25, 2020 that had sought a stay of execution; and a review, varying or setting aside of the judgment delivered on May 11, 2017.
2. The matter was virtually heard on November 29, 2022, when learned counsel Mr. J. Asige appeared for the Applicant. The respondent did not file a response to the application, neither did they file written submissions, and their advocates on record were not present at the hearing, despite being duly served with the hearing notice. Mr. Asige relied on the pleadings filed and his written submissions dated November 23, 2022.
 3. The principles applicable in the exercise of the court's unfettered discretion under Rule 5(2) (b) to grant an order of stay are well settled. Firstly, an Applicant has to satisfy that he or she has an arguable appeal. Secondly, an Applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
 4. The application is supported by the affidavit sworn on January 20, 2021 by the Applicant to which he annexed copies of the impugned judgment and ruling, a Notice of Appeal against the said judgement and ruling dated December 16, 2020 and lodged in the court on December 24, 2020, and copies of the title of the suit property. The Applicant's case is that the impugned judgment and ruling were entered in respect of Plot Subdivision No. 619 Mainland North (Original Number 50/2) that ceased to exist upon its subdivision in 2003 when it was subdivided into 3 plots namely Plot No 12102/1/MN, Plot No 12103/1/MN and Plot No 12104/1/MN, which were further subdivided into 26 subplots, 29 subplots and 58 subplots respectively. Therefore, that the trial Court had no jurisdiction to entertain a suit in respect of a non-existing title, consequently, the proceedings were invalid and void ab initio and the decree and warrants directing vacant possession or eviction from the said land was incapable of enforcement against him.
 5. Further, that the Applicant had continuously and without interruption occupied plots in 12103/1/MN namely Plot No. MN/1/17312, 17313, 17314, 17315 and 17316, and not Plot No 619 section 1 Mainland North which ceased to exist upon subdivision in 2003. Additionally, the Applicant deposed that since 1986, when he took possession of Plot No 619 section 1 Mainland North now known as plot no 12103/1/MN namely Plot No. MN/1/17312, 17313, 17314, 17315 and 17316, he had developed a family home and residence where he lived with his wife and children. The applicant urged that he stood to suffer substantial loss if stay of execution pending appeal was not granted because, together with his family, they would be evicted from the said plots rendering them homeless and destitute. The applicant accordingly contended that the intended appeal had a high chance of success and the appeal would be rendered nugatory and otiose unless the stay of execution was granted to conserve and protect the subject matter pending the hearing and determination thereof.
 6. Mr. Asige reiterated the above averments in his written submissions, and urged that the intended appeal was prima facie arguable, the Notice of Appeal had been duly filed, and the trial Court could not lawfully entertain what the respondents had not pleaded in the Plaintiff. With regards to the nugatory limb, the applicant submitted that the basis of the decree and warrants directing vacant possession or eviction from Plot no 619/1/MN had been issued and enforcement had been threatened to be effected by evicting the applicant from Plot No. MN/1/17312, 17313, 17314, 17315 and 17316 which were not the subject matter pleaded in the trial Court. Therefore, that the Applicant stood to suffer in compensable loss if evicted.
 7. We need to point out at the outset that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous and merits to be argued fully. Further that it is sufficient if the appeal



raises only one triable issue. This court in this regard held as follows in *Somak Travels Ltd v Gladys Aganyo* [2016] eKLR

“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”

8. The applicant did not annex a draft proposed memorandum of appeal, which is not fatal, as the applicant set out his grievance with the decision appealed against the face of the application, namely that the trial Judge failed to appreciate that the suit property ceased to exist when it was subdivided to various plots and had no jurisdiction to entertain the suit in respect of a non-existing title, and failed to consider and analyze the applicants pleadings and evidence of possession of the suit property. It is our view that these are not frivolous grounds, and that the applicant has therefore established the existence of the first limb.
9. On the second limb, it was held in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [*supra*] that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or injunctioned, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. It is not contested that the Applicant resides on a portion of the suit property, and to this extent, we are of the view that if stay of execution is not granted, the substratum of the appeal will be destroyed and it will be rendered nugatory.
10. We need to clarify that the above limbs have been satisfied only in relation to the judgment delivered by the trial Court on May 11, 2017, and not the ruling delivered on dated December 16, 2020, since there were no positive orders granted in the ruling that are capable of being stayed. In addition, we note that the Notice of Appeal dated December 16, 2020 and lodged in the court on December 24, 2020 was also purported to be against the judgment delivered on May 11, 2017. However, since the issue of the validity of the said Notice of Appeal is not before us, we shall say no more on the matter, save to acknowledge that there is a Notice of Appeal filed against the impugned judgment.
11. Lastly, we are also mindful that the respondents are the registered owners of the suit property, and that the Notice of Appeal and instant application were lodged almost four years after delivery of the judgment sought to be stayed. We are therefore of the view that even if the required threshold for orders of stay of execution has been met with respect to the impugned judgment, a conditional stay is justified in the circumstances in the interests of justice to both parties.
12. The Notice of Motion application dated January 20, 2021 is accordingly allowed on the following terms and conditions:
 - a. There shall be a stay of execution of the judgment delivered in Mombasa ELC Case No 86 of 2016 by the Environment and Land Court on May 11, 2017 pending the hearing and determination of the appeal herein, only on condition that the Applicant files and serve the memorandum and record of appeal within 30 days from the date of delivery of this ruling.
 - b. The appeal shall thereafter be fixed for case management before the Deputy Registrar for directions on filing of submissions, and shall thereafter fixed for hearing by the Registry on the basis of priority.



- c. Upon default by the Applicant in filing and serving the memorandum and record of appeal within 30 days of delivery of this ruling, the orders of stay granted herein will automatically lapse and shall stand discharged.
- d. There shall be no order as regards the costs of the application.

13. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

