



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bironga v Ndungu & 2 others (Civil Application E033 of 2022)  
[2023] KECA 613 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 613 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E033 OF 2022  
DK MUSINGA, K M'INOTI & KI LAIBUTA, JJA  
MAY 26, 2023**

**BETWEEN**

**SOPHIA MORAA BIRONGA ..... APPLICANT**

**AND**

**DAVID WAWERU NDUNGU ..... 1<sup>ST</sup> RESPONDENT**

**GLADYS NJERI MAINA ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES .... 3<sup>RD</sup>  
RESPONDENT**

*(Being an application for stay of execution of the Judgment and Decree of the Environment and Land Court at Nairobi (K. Bor, J.) delivered on 1st October 2020 in E.L.C Appeal No. 73 of 2019)*

**RULING**

1. The applicant's Notice of Motion dated February 7, 2022 seeks stay of execution of the judgment delivered on October 1, 2020 in Civil Appeal No. 73 of 2019. The applicant also seeks to restrain the respondents, their agents and/or servants, from transferring, disposing of or in any way dealing with the parcels of land known as L.R No. Nairobi/Block 21190/D/28 and L.R No. Nairobi/Block 21190/D/25 ('the suit properties') pending hearing and determination of an intended appeal.
2. The background to the application is set out in the applicant's affidavit in support of the application. The applicant states that she purchased the suit properties from Kwa Ndege Self - Help Group ('Kwa Ndege') on June 29, 2002, and was issued with a certificate of registration and continued to pay subscription to Kwa Ndege as a member and shareholder; that, subsequently, the National Social Security Fund Board of Trustees ('NSSF'), the 3<sup>rd</sup> respondent, being the registered owner of the suit properties, took over the entire block of land, claiming that Kwa Ndege had unlawfully encroached on its property; that NSSF obtained a court order to forcefully evict all the occupants of the suit properties,



but the area member of Parliament brokered a deal that would enable the occupants purchase from NSSF the plots they were unlawfully occupying.

3. The applicant further states that she submitted to NSSF an application form for purchase of the suit properties; provided all the documents that had been issued to her by Kwa Ndege; made partial payments of the agreed purchase price; and thereafter proceeded to erect four concrete pillars, with intention of developing the suit properties. However, while she waited for NSSF to process her application, she discovered that, sometime in December 2007, the 1<sup>st</sup> and 2<sup>nd</sup> respondents had encroached into the suit properties. When the applicant approached NSSF about the issue, she realised that the suit properties had been sold to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents allegedly because the applicant did not submit a letter from Kwa Ndege to certify that she was the one who had been allocated the suit properties.
4. The applicant filed suit (CMCC No. 6182 of 2010) against the respondents and obtained a temporary injunction that restrained the respondents from evicting her from the suit properties pending hearing and determination of the suit. But, upon hearing of the suit, the Magistrates' Court found in favour of the respondents. The applicant preferred an appeal against the trial court's judgment vide ELC Appeal No. 73 of 2019 (K. Bor, J.).
5. In its judgment that dismissed the appeal, the first appellate court held, inter alia, that the applicant ought to have joined Kwa Ndege as a respondent; that the applicant had paid to NSSF Kshs.90,000/= only and not the full purchase price; that NSSF had lawfully transferred the suit properties to the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that there was no proof of any fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondents; and that the applicant could only seek to recover the Kshs.90,000/= paid to NSSF.
6. Being aggrieved by the said judgment, the applicant filed a notice of appeal on which she has founded her application. The applicant states that she has an arguable appeal; and that the appeal, if successful, will be rendered nugatory unless this court grants the orders sought.
7. Opposing the application, the 1<sup>st</sup> respondent stated in his written submissions that the 2<sup>nd</sup> respondent died on October 1, 2021; that the suit properties initially belonged to NSSF; that NSSF agreed to sell them to persons who were lawfully in occupation thereof, on condition that the persons obtained and availed to NSSF a letter of introduction from Kwa Ndege; that the applicant did not comply with that condition; that the respondents rightfully acquired the suit properties from NSSF; that the intended appeal is not arguable; and that the order sought to be stayed is a negative one.
8. On its part, the 3<sup>rd</sup> respondent, (NSSF), stated in its brief written submissions that the suit properties were properly and regularly transferred to the 1<sup>st</sup> and 2<sup>nd</sup> respondents in 2008; that the applicant's application had long been overtaken by events; and that the application was unmeritorious. Those submissions are in accord with a replying affidavit filed by the 3<sup>rd</sup> respondent's Legal Officer, Lilian Kemunto Mugo, who stated, *inter alia*, that one David Goligol Nteere ('Nteere') was the one who had been introduced by Kwa Ndege, and who entered into a sale agreement with NSSF; that Nteere sold the suit properties to the 1<sup>st</sup> and 2<sup>nd</sup> respondents; and that Nteere requested NSSF to transfer the suit properties to the two respondents, which it did.
9. On February 2, 2023, the advocates for all the parties entered into a consent to the effect that the Notice of Motion dated February 7, 2022 be determined on the basis of their written submissions.
10. We have perused the application, the affidavits sworn by the parties and their respective written submissions. In an application for stay of execution, stay of proceedings or injunction pending appeal, the applicant must demonstrate the existence of an arguable appeal, and that the appeal, if successful,



shall be rendered nugatory unless the orders sought are granted. See [Stanley Kinyanjui Kangethe v Tony Ketter & others](#) [2013] eKLR.

11. In our view, the applicant's intended appeal is not arguable. The applicant did not fully comply with the requirements set by NSSF for sale of the suit properties. She did not get an introduction letter from Kwa Ndege. Nteere was introduced to NSSF by Kwa Ndege as the beneficial owner of the suit properties. NSSF as the registered owner of the suit properties lawfully entered into a sale agreement with Nteere, and, at his request, transferred the same to the 1<sup>st</sup> and 2<sup>nd</sup> respondents way back in 2008.
12. The Magistrates' Court as well as the first appellate court found no merit in the applicant's suit. The orders sought to be stayed are negative ones, as the first appellate court simply dismissed the appellant's appeal. A negative order cannot be executed, and therefore, there can be no lawful basis of seeking to stay execution of such an order.

See *Western College of Arts and Applied Sciences v Oranga & others* [1976-80] 1KLR 63; and *Kanwal Sarjit Singh Dhiman v Keshavji Shah* [2008] eKLR.

13. We find this application unmeritorious and hereby dismiss it with costs to the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

**DATED AND DELIVERED AT NAIROBI THIS 26TH DAY MAY, 2023.**

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

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

