



**Kiarie & 3 others v Thuku (Civil Appeal (Application)
E629 of 2021) [2023] KECA 586 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 586 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E629 OF 2021
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA
MAY 26, 2023**

BETWEEN

**SARAH WANGUI KIARIE 1ST APPLICANT
JANE NDUTA KIARIE 2ND APPLICANT
SAMUEL KARANJA KIARIE 3RD APPLICANT
ANTHONY MBUGUA KIARIE (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF KIARIE THUKU DECEASED) 4TH APPLICANT
AND
JAMES NJENGA THUKU RESPONDENT**

(Being an application brought under rule 4, 5 (2)(b), and 47 of the Court of Appeal Rules (2010), seeking stay of execution of the Judgment and Decree of the Environment and Land Court of Kenya at Thika (Gacheru, J.) dated and delivered on 30th September 2021 in E.L.C suit NO. 19 OF 2019.)

RULING

1. Before this court is an application by way of Notice of Motion dated October 28, 2021, which is brought by the applicants under the provisions of rules 4, 5 (2)(b) and 47 of the *Court of Appeal Rules, 2010*. The applicants seek principally the following orders:
 - i. that the Notice of Appeal dated October 25, 2021 and lodged in the Environment and Land Court at Thika on October 27, 2021 be deemed as duly filed, and to be properly on record;
 - ii. that, in the alternative, this Court be pleased to extend time within which to file a notice of appeal against the judgment of L. Gacheru, J. delivered on September 30, 2021 in Thika Environment and Land Court Case No. 19 of 2019, Serah Wangui Kiarie & 3 others v James Njenga Thuku; and



- iii. that pending the hearing and determination of the applicants' intended appeal, this court do grant a stay of execution of the trial court's judgment delivered on September 30, 2021 in Thika Environment and Land Court Case No. 19 o/2019, Serah Wangui Kiarie & 3 others vs. James Njenga Thuku.
1. The prayers related to the notice of appeal were dispensed with by Kimaru, J.A. vide a ruling delivered on November 9, 2022 through which the applicants were granted leave to file and serve the notice of appeal within fourteen (14) days of the said ruling. The only live prayers for determination in this application are those premised on rule 5 (2) (b) of the *Rules of this Court*.
 2. The dispute before the Environment and Land Court, Thika, revolved around the ownership of two properties known as LR Kiambaa/Thimbigua/927 and LR Kiambaa/Karuri/T.419 (hereinafter referred to as "the suit properties"). The contention by the applicants was that the suit properties, although registered in the name of the respondent, were originally owned by the late Thuku Kiarie, who had two biological sons namely Njenga Thuku, the respondent herein and Kiarie Thuku (deceased), who was the applicants' father. They averred that Kiarie Thuku (deceased) died before land demarcation and registration in 1958, resulting in registration of the suit property in the name of the respondent to hold it in trust for himself and his brother, Kiarie Thuku (deceased). They argued that Kiarie Thuku (deceased), and the respondent herein settled on LR Kiambaa/Karuri/T.419 where they both raised their families and cultivated on LR Kiambaa/Thimbigua/927. They contended that, despite the respondent holding the suit properties in trust for himself and his late brother, he had refused to transfer and effect registration of the applicants as proprietors of their father's share and that, on October 29, 2018, they were served with a notice to vacate from the suit land, and that the respondent had attempted to evict them from the suit properties.
4. The prayers contained in the plaint dated January 25, 2019 were, inter alia, an order of permanent injunction to restrain the respondent by himself, his agents, servants, employees, proxies and/or any person claiming under him from alienating, selling, transferring, trespassing, evicting and/or otherwise howsoever from interfering with the plaintiffs' quiet possession and enjoyment of Land Parcel LR Kiambaa/Karuri/T.419 and LR Kiambaa/Thimbigua/927; an order that Land Parcel LR Kiambaa/Karuri/T.419 and LR Kiambaa/Thimbigua/927 be distributed equally between the applicants' and the respondent in trust for himself and his late brother Kiarie Thuku; in the alternative, a declaration that the applicants have acquired ownership of half the share of Land Parcel LR Kiambaa/Karuri/T.419 and LR Kiambaa/Thimbigua/927 by way of adverse possession; an order directing the respondent to transfer and cause the applicants' to be registered as proprietors of half portion of Land Parcel LR Kiambaa/Karuri/T.419 and LR Kiambaa/Thimbigua/927 and, in default, the Deputy Registrar of the Environment and Land Court to execute all the relevant documents to effect the transfer and registration of the applicants' as proprietors of half portion of Land Parcel LR Kiambaa/Karuri/T.419 and LR Kiambaa/Thimbigua/927; general damages; punitive damages; costs of this suit and interest.
5. In his Defence and Counterclaim, the respondent contended that the applicants' and their parents had never lived on LR Kiambaa/Thimbigua/927, and that he only gave a graveyard to their brother, Njenga Kiarie, in honour of his name. He further contended that he bought the parcels of land bits by bits and the same were amalgamated as LR Kiambaa/Karuri/T.419, and that he has never held the suit land in trust. The respondent prayed that: the applicants', their agents, servants, purchasers and employees and



anyone acting on their behalf be evicted from the parcel of land known to the parties as LR Kiambaa/Karuri/T.419; a permanent injunction be issued against applicants', their agents, servants, purchasers and employees from trespassing, subdividing, disposing, living on, erecting thereon any buildings, transacting any business and or interfering in any manner whatsoever with the parcel of land known to the parties as LR Kiambaa/Karuri/T.419.

6. Through a judgment delivered on 30th September 2021, the trial court held that the applicants had not proved their case to the required standard and consequently dismissed the applicants' claim in its entirety. The trial court allowed the respondent's counterclaim, granting him an order of eviction of the applicants, their agents, servants, purchasers and employees and anyone acting on their behalf from the parcel of land known to the parties as LR Kiambaa/Karuri/T.419; a permanent injunction against the applicants, their agents, servants, purchasers and employees from trespassing, subdividing, disposing, living on, erecting on buildings whatsoever, transacting any business and or interfering in any manner whatsoever with the parcel of land known to the parties as LR Kiambaa/Karuri/T.419; costs and interest.
7. Being aggrieved and dissatisfied with the judgment of the trial court, the applicants have preferred an appeal to this court, to wit, Civil Appeal No. E852 of 2022.
8. The instant application is supported by the grounds appearing on the face thereof and in the supporting affidavit sworn by the 1st applicant on October 28, 2021 on her own behalf and on behalf of the 2nd, 3rd and 4th applicants.
9. On arguability, it is contended that the learned judge erred in law and in fact in that despite acknowledging that the respondent had admitted in evidence that the applicants had lived on the suit property, and that is where they were born, the youngest having been born in 1976, she erroneously held that the applicants had not led any evidence to allow for the challenge of the respondent's title on account of a customary trust; that despite the uncontroverted evidence that the applicants were born and brought up in the suit property and in consideration of the respondent's concession that the applicants had declined to move out of the suit property, the learned judge did not address herself to the applicants' claim for adverse possession as prayed for; and, lastly, that she erred in affirming the respondent's sale agreements for the purported purchase of the suit properties, which was contested.
10. On nugatory aspect, the applicants are apprehensive that should this Court decline to grant the orders of stay as sought, then they face an imminent risk of eviction from the suit property, which will leave them homeless and, consequently, render their appeal nugatory.
11. The application is opposed by the respondent by way of a replying affidavit sworn on November 30, 2021. The respondent contends that the applicants are arguing the substantive appeal in their application, and that they have not given any reason for the grant of orders of stay by this court. It is further contended that the application is a waste of this court's time and resources and that it is only intended to deny the respondent enjoyment of the fruits of the judgment entered in his favour. In urging the court to dismiss the application with costs, the respondent avers that no reasons have been adduced by the applicants to demonstrate that their appeal is arguable, and neither have they proved how they will be prejudiced if the application is disallowed.
12. At the hearing of this application, learned counsel Mr. Mburu appeared for the applicants while learned counsel Ms. Kerio was present for the respondent. Highlighting the applicants' written submissions dated November 15, 2021, learned counsel Mr. Mburu contended that there existed a customary trust contrary to the finding of the trial court, and that this alone constitutes an arguable issue. Learned counsel also contended that the learned judge failed to address herself to the prayer for adverse possession which had been pleaded by the applicants. On the nugatory aspect, it was submitted



- that the trial court ordered the eviction of the applicants from the suit properties where they have lived all their lives, and which order is likely to be executed at any time. In the event that eviction takes place, and in the absence of orders of stay of execution, the appeal pending for hearing and determination before this court would, according to counsel, be rendered nugatory.
13. Learned counsel Ms. Kerio, on her part, contended that the suit properties are registered in the name of the respondent as the rightful owner, and that the respondent had merely allowed his brother's children to be brought up on the suit properties. On the nugatory aspect, counsel contended that the applicants have not demonstrated how the intended appeal would be rendered nugatory if the orders sought are not granted.
 14. The principles that guide this court in determination of an application under rule 5 (2)(b) of this Court's Rules are well settled and have been set out in a plethora of the court's decisions. They have been well summarised in Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR. The twin test is that an applicant must demonstrate that the appeal or intended appeal is arguable; and that, unless the orders sought are granted the appeal, if successful, shall be rendered nugatory.
 15. We have considered the application, the written and oral submissions by the parties. In determining whether the intended appeal is arguable or not, we are cognizant of the fact that 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. See the case of Joseph Gitabi Gachau & another v Pioneer Holdings (A) Limited & 2 others [2009] eKLR. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See the case of Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.
 16. The applicants contend, *inter alia*, that the learned judge went into error by not holding that the applicants were born and raised on the suit properties, and that a customary trust existed. It is further contended that the learned judge did not address herself to the applicants' prayer for adverse possession. The arguments being advanced by the applicants are, in our view, not idle. They require to be ventilated further on appeal. On this basis, we are satisfied that the applicants have demonstrated to us that their appeal is arguable. We need not say much on arguability at this stage, lest we embarrass the bench that shall eventually hear the appeal.
 17. Turning to the nugatory aspect, the applicants contend that the respondent is likely to execute the decree of the trial court which had ordered their eviction from the suit properties. They contend that they have lived on the suit properties all their lives and that, if eviction was to ensue, they would be rendered homeless. The concerns being raised by the applicants are, in our view, not hollow, and there is every likelihood of the respondent executing the decree issued by the trial court. We are satisfied, therefore, that in the absence of the orders of stay, the applicants and their families are likely to be rendered homeless. Nothing would stop the respondent from alienating, selling, charging, transferring and/or in any way disposing of the suit land in a manner that would irredeemably alter the physical character of the suit properties. The applicants have therefore satisfied the second limb required for grant of orders of stay under rule 5 (2)(b) of this Court's Rules.
 18. For the foregoing reasons, we are satisfied that the applicants have established both limbs to deserve the orders as prayed. Accordingly, we allow the Notice of Motion dated October 28, 2021 with costs in the appeal.

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

D. K. MUSINGA (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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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

