



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Muthee v Muthee (Civil Application E446 of 2020)
[2023] KECA 589 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 589 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E446 OF 2020
DK MUSINGA, K M'INOTI & GWN MACHARIA, JJA
MAY 26, 2023**

BETWEEN

JOSEPH MWENJE MUTHEE APPLICANT

AND

STEPHEN MUTHEE RESPONDENT

(An application for stay of execution pending the hearing and determination of an appeal from the judgment and decree of the Environment and Land Court at Nairobi (E.O. Obaga) dated 31st October, 2019 in ELC Case No. 1453 of 2013)

RULING

1. The application before us is dated November 16, 2020 brought pursuant to rules 4, 7, 41, 42, and 43 of the Court of Appeal Rules, 2010. The application seeks leave to appeal out of time and that if leave is granted, the same do operate as a stay of execution of the judgment and orders of the Environment and Land Court (ELC) dated November 31, 2019. It is premised on the grounds on the face of it as well as the affidavit of the applicant sworn on even date.
2. The Applicant filed a suit in the ELC by way of an Originating Summons dated November 26, 2013 seeking majorly, a declaration that all that land situated in the County of Kiambu measuring 0.09 hectares better known as L R No Ndumberi/Ndumberi/Block T 629 (the suit property) had vested in him by virtue of adverse possession. Evidence adduced during trial in which the applicant was the only witness points to the fact that, though the suit property was in the name of the respondent, he had already sold it to one Joseph Kiarie Mbugua (deceased) in or around 1997; the deceased then put the applicant in possession of the suit property as an employee to take care of it. The respondent signed the transfer bequeathing the suit property to one of the deceased's widows vide High Court Succession Cause No 784 of 2007.



3. In a judgment rendered on October 31, 2019, ELC (Obaga, J) held that the suit property ceased to be that of the respondent upon purchase by the deceased and though the title had not been transferred to the deceased, the beneficial ownership was with the deceased. The applicant could not therefore seek to be registered as an owner of a property which belonged to his employer who was since deceased. That the Plaintiff was only on the suit property with the permission of the deceased until 2006 when the deceased died. If he wanted to lay claim to the property, then he should have started claiming it after the demise of deceased in 2006. The court found the claim misconceived and dismissed it with costs.
4. Aggrieved, the applicant filed the instant application contending that upon judgment being delivered, he immediately requested for certified copies of the proceedings and the same were supplied to his advocate on October 28, 2020; that at that time, the statutory period to file an appeal had run out and the respondent is likely to execute the judgment, and it is in the interest of justice that the application be allowed.
5. The application was opposed vide a replying affidavit dated November 27, 2020, sworn by Njoroge Wachira, the respondent's advocate on record, who averred that the Notice of Appeal was served 6 days out of time, contrary to the mandatory provisions of rule 77 (1) of the Court of Appeal rules; that an application or record of appeal premised on a defective notice of appeal cannot sustain the appeal; and the prayers sought are vague and the applicant has not shown there is danger of execution, hence the appeal is not arguable. Further, that the subject matter of this case in the ELC was the subject matter in another case, Succession Cause No 784 of 2007 and a full determination was made in regard to the ownership of the suit land by the Kimaru, J (as he then was) on June 28, 2010 confirming the property to one Grace Wanjiku Mbugua, a widow of the purchaser; yet, the present suit seeking adverse possession was filed on November 20, 2013.
6. This application was argued on January 25, 2023 in a virtual platform. There was no appearance by the applicant or his counsel while learned counsel, Mr Wachira was present for the respondent. The submissions by the applicant are dated November 24, 2020 while of the respondent are dated November 27, 2020. Mr Wachira wholly adopted the written submissions.
7. At the outset, and before delving into the merits of the application, we wish to highlight that this application had earlier been placed before Makhandia, J A who, sitting as a single judge allowed the prayer for extension of time to file an appeal out of time on June 18, 2021. It would appear that the said application was again placed before Kimaru, J A who, also sitting as a single judge similarly allowed the prayer for extension of time to file appeal out of time on November 7, 2022. What is left pending is the prayer for stay of execution which could not be dealt with by a single judge. In the circumstances, we would find it superfluous to rehash submissions in respect to the spent prayer.
8. On arguability of the appeal, the applicant submitted that the grounds of appeal contained in the draft Memorandum of Appeal dated November 16, 2020 filed together with the Record of Appeal raise weighty issues of law requiring the determination by this Court. He contended that the learned trial judge erred in holding that he was not entitled to the suit land by virtue of adverse possession. On whether the appeal would be rendered nugatory if stay of execution is not granted, it is argued that there was a likelihood of execution of the judgment and decree of ELC, which would cause prejudice to the applicant. And in any event, the respondent is not likely to suffer any harm or prejudice if the application is allowed, as he has not executed the decree since the judgment was issued.
9. On the part of the respondent, it was submitted that the applicant has no arguable appeal with a likelihood of success and that, nothing is likely to be rendered nugatory as he (respondent) has not executed or threatened to execute the decree since judgment. Furthermore, there is nothing to execute



as in his statement of defence, he did not file a counter-claim for eviction of the applicant from the suit land. We were urged to dismiss the application with costs.

10. We have considered the notice of motion, the supporting affidavit, the replying affidavit, submissions of both parties and the law. In our view, this being a rule 5(2)(b) application, the application will turn upon consideration of the issues as established by this Court in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR, being Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. See also *Githunguri vs. Jimba Credit Corporation Ltd.* (No. 2) (1988) KLR 838.
11. A perusal of the ELC judgment rendered on October 31, 2019, which is annexed to the application and comprises part of the Record of Appeal, shows that the Court essentially dismissed the applicant's suit which is in the nature of a negative order incapable of execution; consequently, there is nothing to be stayed.
12. This Court, differently constituted, in its decision in *Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another* [2007] eKLR held as follows: -

“This Court has repeatedly stated in previous decisions, among them, David Thiong’o t/ a Welcome General Stores vs Market Fancy Emporium, Civil Application No. Nai. 47 of 2007... that in an application under Rule 5(2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum, there would be nothing arising out of that decision for this court to enforce or to restrain by injunction... the decision of 9th February, 2007 in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. Accordingly, no order of stay can properly issue relating to it.”
13. Be that as it may, we still would have found that the application was for dismissal for the following reasons. The first is that the appeal is not arguable in the least. Without delving into the merit of the appeal, a crucial issue which this Court on appeal will have to determine is whether the applicant has a claim over the suit property by way of adverse possession. The answer to this question is in black and white that, where an employee is in possession of land or a house by virtue of employment, he cannot seek to have that land or house by way of adverse possession. It has been reiterated numerously by the courts that if a person is an employee of another and by virtue of his employment he is allowed to reside on his employer's property, his entry and occupation thereon is not adverse to his employer's rights because he entered therein with permission of his employer.
14. Further the applicant herein appears to have sued the wrong party. By his own admission, the suit property belonged to the respondent, who sold it to Joseph Kiarie Mbugua (deceased) for Kshs 350,000/- sometime in 1997 and by virtue of being an employee of the deceased, the applicant was brought onto the suit property to look after it. When the deceased died in 2006, the applicant continued being on the suit property by being an employee of one Florence Mbugua, a widow of the deceased; by virtue of a consent order in Succession Cause No 784 of 2017, the widows of the deceased transferred the suit property to one Grace Wanjiku Mbugua, another widow of the deceased. The respondent herein is not the true owner of the suit property and has no title over the suit property that the applicant can claim rights adverse to it.



15. Finally, the applicant cannot have his cake and eat it. He has stabbed himself on the back by admitting that there is no threat of execution of the ELC judgment. Indeed, none has commenced since the judgment. Hence, there is nothing capable of being rendered nugatory if a stay of execution is not granted.
16. We have said enough to demonstrate why the application dated November 16, 2020 is not merited and must fail. The same is hereby dismissed with costs to the respondent.

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

D. K. MUSINGA, (P.)

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

