



REPUBLIC OF KENYA



KENYA LAW
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**Asher v Kuria & 6 others (Civil Application Nai E057 of 2023)
[2023] KECA 528 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 528 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION NAI E057 OF 2023
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
MAY 12, 2023**

BETWEEN

JAYANT GOVINDJI ASHER APPLICANT

AND

MARTIN WAINAINA KURIA 1ST RESPONDENT

CAROLINE WARUGURU WANGOMBE 2ND RESPONDENT

SURYASINGH PURUSHOTTAM NEGANDHI 3RD RESPONDENT

JITENDRA TRIKAMDAS SWALY 4TH RESPONDENT

SAMUEL MURIGI MWANIKI 5TH RESPONDENT

**JOEL KINYUA KATHUMBI & CHRISPIN WAINAINA T/A KINYUA
MWANIKI & WAINAINA ADVOCATES 6TH RESPONDENT**

JOSEPH GAKAHU GITHI 7TH RESPONDENT

(Being an application brought under section 3 of the Appellate Jurisdiction Act, and rule 5 (2)(b), 42, 43 (1) and 47 of the Court of Appeal Rules (2010), seeking stay of execution of the Ruling and Decree of the Environment and Land Court of Kenya at Machakos (C. Ochieng, J.) dated and delivered on 8th February 2023 in ELC Appeal No. E020 of 2022.)

RULING

1. Before this court is a notice of motion dated February 21, 2023, which is brought by the applicants under the provisions of section 3 of the [Appellate Jurisdiction Act](#), rules 5 (2)(b), 42, 43(1) and 47 of the [Court of Appeal Rules](#). The applicant seeks stay of execution of the ruling and order of the Environment and Land Court at Machakos (C Ochieng, J) delivered on February 8, 2023 in ELC Appeal No E020 of 2022.



2. The dispute between the parties revolves around a transaction for sale of land, to wit parcel of land known as LR No 12715/1409 (hereinafter referred to as (“the suit property”) located in Syokimau and said to measure about 0.264 acres.
3. The 1st and 2nd respondents (as the 1st and 2nd plaintiffs respectively) brought suit, to wit, MC ELC No 76 of 2019 against the applicant and the 3rd and 4th respondents at the Magistrates’ Court in Machakos. The 1st and 2nd respondents contended that, on December 18, 2013, they purchased the suit property from the applicant, the 3rd and 4th respondents, who were the registered owners thereof at a consideration of Kshs 4,650,000/=.
4. They stated that, after receiving the purchase price, the applicant, the 3rd and 4th respondents, reported to the Ministry of Lands that the original title for the suit property had been lost and began the process of obtaining a provisional certificate of title. According to the 1st and 2nd respondents, the applicant, the 3rd and 4th respondents were all along aware that the original title together with other necessary documents had been released to their (1st and 2nd respondent’s) advocate for purposes of transfer of the suit property. When their advocate presented the original title and transfer for registration, the title was impounded, and the transfer was rejected as the registrar believed that the title had been obtained through dubious circumstances. This was in view of the pending application for issuance of a provisional certificate of title.
5. The provisional certificate of title was issued and the applicant, the 3rd and 4th respondents proceeded to sell the suit property to a third party thereby necessitating the filing of suit by the 1st and 2nd respondents seeking refund of the purchase price as well as damages. The suit against the 3rd respondent was withdrawn by dint of his demise.
6. The trial magistrate, vide a judgment dated May 26, 2022, entered judgment for the 1st and 2nd respondents against the applicant and the 4th respondent as follows: “Aggravated damages - Kshs1,350,000/=; Special damages - Kshs 306,905/=; and refund of purchase price - Kshs 4,650,000/=; all amounting to a Total - Kshs 6,306,950/=.” They were also awarded interest on the special damages and on the refund amount at the rate of 14% pa The suit against the 5th, 6th, and 7th respondents herein (then 5th, 6th and 7th Third Parties respectively) was dismissed with costs.
7. Dissatisfied with the decision of the trial court, the applicant filed an appeal at the Environment and Land Court at Machakos, to wit, ELC Appeal No E020 of 2022. He also filed an application seeking stay of execution of the judgment and decree of the trial court.
8. The Environment and Land Court (C Ochieng, J), vide a ruling delivered on February 8, 2023 issued a conditional order of stay of execution directing the applicant and the other judgment debtor to pay half the decretal sum (Kshs 6,211,805/=) to the 1st and 2nd respondents within 30 days (ie, by March 8, 2023) and the balance thereof to be deposited in a joint interest earning account at KCB Machakos branch in the joint names of the applicants and the 1st and 2nd respondents’ counsel within 30 days, failing which the application for stay would be deemed to have been dismissed with costs to the respondents.
9. The applicant was dissatisfied with the ruling of the Environment and Land Court and intends to lodge an appeal before this court. He contends in his application, supporting affidavit and further affidavit sworn on February 21, 2023 and March 7, 2023 respectively that the intended appeal is arguable. In his draft memorandum of appeal, the applicant faults the learned judge for, inter alia., attempting to interrogate the correctness of the judgment of the lower court while determining the application for stay and, in the process, inevitably preempted and or second guessed the outcome of Machakos ELC Appeal No E020 of 2022, which is yet to be heard; failing to appreciate that the merits or otherwise



- of the decision and/or finding of the trial magistrate that the applicant and the 4th respondent received the purchase price are the subject of the appeal filed by the applicant, which is yet to be determined; failing to appreciate that the decretal sum to be paid to the 1st and 2nd respondents is colossal, and that they may not be in a position to refund it in the event that the intended appeal is successful; and in failing to apportion the decretal sum equally among the applicant and the other judgment debtor.
10. On the nugatory aspect, the applicant is apprehensive that the 1st, 2nd, 5th and 6th respondents will commence execution process of the judgment and decree of the trial court any time after the lapse of the 30 days' period granted to the applicant by the Environment and Land Court to comply with the conditions of stay orders issued on February 8, 2023. He contends that the execution process will occasion him great prejudice and irreparable loss, and that, unless the orders sought are granted, the intended appeal, if successful, shall be rendered nugatory.
 11. The application is opposed by the 1st and 2nd respondents through a replying affidavit sworn by the 1st respondent on March 3, 2023. He avers that the learned judge correctly applied the law in granting the orders of conditional stay and that the learned judge's discretion was limited by order 42 rule 6(2) of the *Civil Procedure Rules*. It is further contended that the applicant has not demonstrated that the learned judge proceeded on wrong principles in granting the conditional orders of stay so as to render the intended appeal arguable. On the nugatory aspect, it is contended that this being a money decree, it is not possible for the applicant to suffer irreparable loss and that in any case, liability was joint and several, and that execution can proceed against any of the judgment debtors or both.
 12. At the hearing of this application, learned counsel Mr Kimani appeared alongside Mr Oguye for the applicant, while Mr Muoka, learned counsel, appeared for the 4th respondent. There was no appearance on behalf of the 1st, 2nd, 5th, 6th and 7th respondents. The 5th to 7th respondents did not file written submissions.
 13. Highlighting the applicant's written submissions dated March 7, 2023, counsel reiterated that the applicant had demonstrated that the intended appeal is arguable, and that the twin test set out in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR had been met. Counsel contended that the respondents had not demonstrated their ability to repay the decretal sum, which stood at around Kshs 13,000,000/= in the event the intended appeal succeeds. He submitted that the onus was on the respondents to demonstrate their ability to repay the decretal sum in full.
 14. Mr Muoka for the 4th respondent indicated his client's support for the application. He relied on his written submissions dated March 13, 2023 and urged us to find that the application has satisfied the test on arguability and the nugatory aspect.
 15. The 1st and 2nd respondent had, on their part, filed written submissions dated March 8, 2023. They contend through their submissions that the intended appeal is neither arguable nor will it be rendered nugatory if the orders sought are not granted.
 16. 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 vs Tony Ketter & 5 others (supra)*. 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.
 17. 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 that must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. See the case of *Joseph Gitahi Gachau & Another vs Pioneer Holdings (A) Ltd & 2*



others, Civil Application No 124 of 2008. A single *bona fide* arguable ground of appeal is sufficient to satisfy this requirement. See the case of *Damji Pragji Mandavia vs Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004.

18. The applicant argues, *inter alia*, that the learned judge while determining the application for stay of execution made findings on the issue of the purchase price which she appeared to indicate had been paid by the 1st and 2nd respondents to the applicant and the 4th respondent. According to the applicant, this is one of the issues for determination in the appeal before the 1st appellate court. The argument by the applicant is that the learned judge preempted the outcome of the appeal pending for hearing and determination before her. This argument is, in our view, not an idle one. On this basis, we are satisfied that the applicant has demonstrated that its intended appeal is arguable. We need not say much on arguability at this stage, lest we embarrass the bench that shall eventually hear the appeal.
19. Turning to the nugatory aspect, the applicant states that the order directing payment of half the decretal sum directly to the 1st and 2nd respondent will greatly prejudice him owing to the colossal nature of the amount, and that, in any event, the 1st and 2nd respondents did not demonstrate their ability to repay the entire decretal sum in the event the intended appeal is successful. This court in *University of Nairobi vs Ricatti Business of East Africa* [2020] eKLR stated thus:

“Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecuniosity, the onus shifts to the latter to rebut that allegation by evidence. See *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”
20. The 1st and 2nd respondent did not provide any proof on their ability to repay the monies to be paid to them in satisfaction of the conditional order of stay issued by the Environment and Land Court. They have, therefore, not discharged their obligation. We are of the view that if we do not grant orders of stay as prayed by the applicant, the intended appeal shall be rendered nugatory, and the applicant may never be able to recover the monies paid to the respondents in the event the intended appeal is successful. The applicant has, in our view, satisfied the second limb required for grant of orders of stay under rule 5 (2)(b) of this court’s rules.
21. For the foregoing reasons, we are satisfied that the applicant has established both limbs to deserve orders as prayed. Accordingly, we allow the notice of motion dated February 21, 2023 with costs in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

D. K. MUSINGA, (P).

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

