



REPUBLIC OF KENYA



KENYA LAW
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**Hailu v Kaara & another (Civil Application E432 of 2022)
[2023] KECA 526 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 526 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E432 OF 2022
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
MAY 12, 2023**

BETWEEN

ZEWDI TEFAMICHAEL HAILU APPLICANT

AND

JOSEPH KINYANJUI KAARA 1ST RESPONDENT

J M NJONGORO 2ND RESPONDENT

(Being an application for stay of execution of the Judgment and Decree of the Environment and Land Court of Kenya at Nairobi (L. Komingoi, J.) delivered on 30th September 2022 in E.L.C Case No. 763 of 2012)

RULING

1. The Notice of Motion dated November 18, 2022 seeks stay of execution pending hearing and determination of an intended appeal in respect of the decree and judgment delivered on September 30, 2022 in Nairobi ELC No. 763 of 2012. The dispute relates to a property known as Nairobi /block 110/237 (the suit property).
2. The background to this application is that the 1st respondent filed the aforesaid suit against the applicant and her advocate, the 2nd respondent, claiming to have purchased the suit property and obtained a title deed in respect of the same. The applicant denied the claim and asserted that she never signed the sale agreement and the transfer; and that, at the time of the alleged signing of the said documents, she was in Canada where she resides.
3. On the other hand, the 2nd respondent contended that the applicant appeared before him on June 26, 2012 and executed the transfer, having signed the sale agreement earlier on.
4. The trial court upheld the 1st respondent's claim over the suit property. Being aggrieved by the said decision, the applicant filed a notice of appeal evincing her intent to institute an appeal.



5. In her application before this court, the applicant contends that the intended appeal is arguable and that it will be rendered nugatory unless the order sought is granted. The applicant is apprehensive that the 1st respondent may dispose of the suit property before the intended appeal is heard and determined unless the court grants the order sought.
6. The 1st respondent opposes the application. He contends that the intended appeal is not arguable as he has lawfully acquired the suit property and obtained a title deed. On the nugatory aspect, the 1st respondent told this court that he has no intention of selling the suit property.
7. On his part, the 2nd respondent stated in his replying affidavit that he was lawfully instructed by the applicant to draw the sale agreement and transfer instrument, which she executed, and therefore the trial court's finding that the 1st respondent is the lawful owner of the suit property is unassailable. He further states that the applicant does not stand to suffer any irreparable loss; that the sale proceeds are readily available, but the applicant had failed to provide her bank account details for the remittance of the funds as directed by the trial court. He therefore urged this court to dismiss the application with costs.
8. We have carefully considered the application as well as the written submissions filed by the parties. In an application of this nature, an applicant has to satisfy the court that the appeal or intended appeal is arguable and, secondly, that unless the order sought is granted, the appeal, if successful, shall be rendered nugatory. See *Ruben & 9 others v Nderitu & another* [1989] eKLR 459.
9. An applicant need not establish a multiplicity of arguable grounds, a single bonafide arguable ground would suffice. See *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR.
10. It is not in dispute that, prior to the alleged sale and transfer, the suit property was owned by the applicant. It is also not in dispute that, prior to the alleged sale and transfer, the applicant had entrusted the 2nd respondent with the title deed to the suit property. What was in dispute before the trial court was whether the applicant instructed the 2nd respondent to draw a sale agreement in respect of the same. The 2nd respondent contended that he was duly instructed by the applicant to draw the sale agreement and transfer documents, which he did and were duly signed by the applicant, after which he proceeded to register the transfer and obtained the title deed in favour of the 1st respondent.
11. The 1st respondent argues that he lawfully purchased the suit property at a consideration of Kshs.13,000,000.
12. In our view, these are arguable grounds, and we are therefore satisfied that the application meets the first limb of the mandatory requirements under rule 5(2) (b) of this *Court's Rules*.
13. Turning to the nugatory aspect, the 1st respondent is now the registered owner of the suit property. Nothing prevents him from dealing with the suit property in whichever manner he chooses. If he were to dispose of the suit property before the intended appeal is heard and determined, it will be rendered nugatory in the event that the intended appeal is successful.
14. All in all, we find and hold that the order sought is merited. Consequently, we allow the application and hereby issue an order of stay of execution of the trial court's judgment pending hearing and determination of the intended appeal. The costs of the application shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 12TH 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
G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

