



REPUBLIC OF KENYA



**Guhad & another v Amoni & 20 others (Civil Appeal (Application)
E052 of 2023) [2023] KECA 546 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 546 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E052 OF 2023
K M'INOTI, HA OMONDI & KI LAIBUTA, JJA
MAY 12, 2023**

BETWEEN

SAID MOHAMED GUHAD 1ST APPLICANT

HARRISON KABIRU MUGO 2ND APPLICANT

AND

SYLVANUS MUKATSA AMONI 1ST RESPONDENT

GEORGE JUMA ODONGO 2ND RESPONDENT

JOHN OKELLO WAKA 3RD RESPONDENT

JAMES GITAU MBUGUA 4TH RESPONDENT

EDWARD KAMAU GITAU 5TH RESPONDENT

JOSEPH KANYINGI NDIRANGU 6TH RESPONDENT

JOSEPH GACHERU MAINA 7TH RESPONDENT

FRANCIS MAINA NJUGUNA 8TH RESPONDENT

DENNIS OWINO WAKA 9TH RESPONDENT

STEPHEN NJUGUNA WAIGAN 10TH RESPONDENT

CHARLES KARANJA 11TH RESPONDENT

GEORGE OJUNGA JUMA 12TH RESPONDENT

TONY THUO MWANGA 13TH RESPONDENT

STEPHEN KAMAU MWANGI 14TH RESPONDENT

FINNY OUMA ODONGO 15TH RESPONDENT

JACKTON AMUNGA JACQUE 16TH RESPONDENT



WILLIAM NGARE MWANGI	17 TH RESPONDENT
EVANS OCYAMA NYABOLA	18 TH RESPONDENT
ANTHONY KAMAU	19 TH RESPONDENT
JULIUS MWASYA	20 TH RESPONDENT
NOAH OMWAKA AGUYO	21 ST RESPONDENT

(An Application for stay of execution pending the hearing and determination of an appeal from the whole Judgment and Decree of the Environment and Land Court at Nairobi (L. Mbugua, J.) dated on 26th January 2023 in ELC Suit No. 1357 of 2014)

RULING

1. By a Notice of Motion dated 20th February 2023 supported by the affidavit of Said Mohamed Guhad of even date; and made pursuant to rule 5(2) (b) of the *Court of Appeal Rules*, 2010 the applicants pray that, pending the hearing and determination of the appeal, there be stay of execution of the orders made by Mbugua J. on 26th January 2023 in Nairobi ELC Suit No. 1357 of 2014; and that costs be in the cause.
2. The respondents had sued the applicants by way of an originating summons in ELC No. 1357 of 2014 claiming that they had become entitled to plot No. 36/11/151 situated in Eastleigh Section 3, Nairobi (the suit property) which they claimed to have adversely possessed from 1972. The 1st applicant opposed the claim, stating that he was the legally registered owner of the parcel which he had purchased from the 2nd applicant in May 2012. The 2nd applicant did not file any defence, but testified as a defence witness.
3. The trial court found that the respondents had enjoyed uninterrupted occupation and possession of the suit property for over 12 years, to the exclusion of the registered owner or anyone else; and that they were entitled to the same. The learned Judge also ordered for the cancellation of the 1st applicant's title, and directed that the respondents, their heirs or legally appointed representatives be registered as the owners.
4. Aggrieved by this outcome, the applicant filed an appeal on grounds, inter alia: that there were inconsistencies in the evidence regarding possession; and that the trial court failed to consider; the rights of an innocent 3rd party purchaser for value without notice; the legal position that sanctity of title is protected under the Land Act; and the doctrine of laches in relation to adverse possession. In support of the instant application, the applicants submit that these grounds are arguable and that the 1st applicant, being a registered owner, nothing in law can take away his right to the suit property, not even the doctrine of adverse possession.
5. The applicants also argue that the appeal will be rendered nugatory because, the 1st applicant, as an innocent purchaser for value, will lose property which is registered in his name; that one who holds title can do as he pleases, and hence the risk of the respondents alienating the suit property by disposing of it to third parties; that he occupied the premises on invitation of the original owner who executed the transfer, and that the property remains in his possession.
6. Opposing the application, the respondents vide the replying affidavit dated 3rd March 2023, and sworn by Joseph Gacheru Maina (the 7th respondent) on behalf of his co-respondents deposes that the appeal



is not arguable as there is nothing to dislodge the fact that, at all material times to date, they have been in possession of the suit property; that the doctrine of laches is inapplicable as it was never raised at the trial; that, in any event, the applicants will not suffer irreparable loss, as the 1st applicant has never been in possession of the property, and the appeal cannot be rendered nugatory as the value of the land has been quantified, and that there is nothing to suggest that damages would not reasonably compensate the applicants; and that in any case, the respondents would be able to refund the stated value. In support of these submissions, the respondent draws from the Supreme Court decision in the case of *George Mike Wanjohi v Stephen Kariuki and 2 Others* [2014] eKLR urging us to find that the application is not merited as it has not met the prerequisites for grant of stay, and that it should be disallowed.

7. The principles upon which an application under rule 5(2) (b) of this Court's Rules is granted now have been laid out in various decisions of this Court.

For instance, in *Housing Finance Company of Kenya Limited v Sharock Kher Mohamed Ali Hirji & Anor* [2015] eKLR, this Court stated:

- “ 10. The principles governing the exercise of the court's jurisdiction under rule 5(2)(b) of our Rules are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. We need only restate these principles from *Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd – Civil Appl. No. Nai. 93 of 2002 (UR)*, thus: ‘Hitherto, this Court has consistently maintained that for an application under Rule 5(2) (b) to succeed, the applicant must satisfy the Court on two matters, namely: -
 - a. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal.
 - b. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.’

Invariably, before one can obtain relief under rule 5(2) (b), both limbs must be demonstrated to exist. (See *Republic v. Kenya Anti-Corruption Commission & 2 others* [2009] KLR 31).”

8. The applicants and the respondents have addressed these principles in their submissions. The applicants contend that their application meets the threshold of arguability and the nugatory aspect, whilst the respondents maintain that this threshold has not been met.
9. We have carefully considered the grounds set out in the motion and the memorandum of appeal, and, bearing in mind that an arguable appeal as has been stated severally by this Court is not necessarily one that must succeed, but merely one that is deserving of consideration by this court, we note that there are two competing claims on ownership with the 1st applicant insisting that 2nd respondent who was the original owner had occupied the premises and the respondents were on the property as his mechanics; and that when he executed the transfer documents in favour of the 1st applicant, the respondents remained on the plot as the 1st applicant's tenants. There is also the contested issue as to whether the beneficiaries of the initial occupants are justified to invoke the doctrine of adverse possession in claiming entitlement to the said parcel. We thus find that the applicant has an arguable appeal.



10. The applicant has raised the issue that the appeal will be rendered nugatory because the suit land will be out of reach/sold/disposed off/transferred to third parties.
11. This Court has held in the case of *Reliance Bank Limited v Norlake Investment Limited* [2002]1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing, the Court is bound to consider the conflicting claims of both sides.
12. In the case of *African Safari Club Limited vs Safe Rentals Limited*, [2010] eKLR, this Court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the Court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

In short, the Court is to decide which party’s hardship is greater. In this instance, the respondents are, and have been on the parcel, carrying on their business as mechanics, whilst the 1st applicant has never had possession. So, our understanding is that what we are being urged to stay is the respondents’ registration as owners.

13. We note that, although all the twenty-one respondents are carrying on businesses on the suit property, they are an amorphous group who are simply brought together by the fact of plying their trade on the suit property. Indeed, once they are registered as the owners, nothing would bar them from dealing with the property in any manner that pleases them, including leasing or selling to a third party. This apprehension is justified and, although the respondents depose that they would be able to repay the actual value of the property, there is no tangible demonstration as regards the respondents’ ability to refund the value of the property, which is such a colossal sum.
14. We therefore find that if the orders sought are not granted, and the appeal succeeds, then the applicants risks having a nugatory result due to possible alienation of the property. It is therefore critical that the transfer and cancellation of the title be stayed, pending hearing and determination of the appeal. The applicant has shown that indeed he has an arguable appeal, and that his appeal would be rendered nugatory if the orders sought are not granted, thus satisfying both limbs of the test in a rule 5(2) (b) application. Accordingly, the Notice of Motion dated 20th February 2023 is hereby allowed as prayed.
15. Consequently, the parties shall maintain the status quo and, since the respondents are on the suit property, we hereby order and direct that they remain therein until the appeal is heard and determined.

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

K. M’INOTI

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JUDGE OF APPEAL

H. A. OMONDI

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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

