



**Kortot & another v Gisore (Civil Application E066 of 2022)  
[2023] KECA 475 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 475 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E066 OF 2022  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
MAY 12, 2023**

**BETWEEN**

**NTETIA ENE KORTOT ..... 1<sup>ST</sup> APPLICANT**

**NOONKOKWA ENE KORTOM ..... 2<sup>ND</sup> APPLICANT**

**AND**

**WILLIAMSON ONYANCHA GISORE ..... RESPONDENT**

*(An application for a stay of execution of the judgment and decree of the Environment and Land Court (Washe J) dated 22nd September 2022) IN (Kilgoris ELC Case No. E004 of 2021 (OS))*

**RULING**

1. Before us is a motion dated October 17, 2022, brought under the provisions of rule 5 (2) (b) of the [Court of Appeal Rules 2010](#), in which Ntetia Ene Kortot and Noonkokwa Kortom (the applicants herein), seek stay of execution of the judgment and decree of Washe J dated September 22, 2022, pending the hearing and determination of an intended appeal.
2. The applicants further seek that the costs of the application be in the appeal.
3. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the 1<sup>st</sup> applicant, Ntetia Ene Kortot who deposed *inter alia* that on July 1, 2021, they had filed an originating summons at the Environment and Land Court at Kilgoris seeking to be registered as the proprietors of land parcel number Transmara/Mapashi/329 (the suit property), having acquired the same by way of adverse possession, which suit was dismissed by Washe J on September 22, 2022.
4. That, being dissatisfied with the aforesaid judgment, they had filed and served a notice of appeal against the same and that as such, orders of stay ought to issue to preserve the subject matter and further that the intended appeal was arguable with good prospects of success and that unless orders of stay of



execution were issued, the intended appeal would be rendered nugatory as the respondent will have greatly interfered with the suit property.

5. When the matter came up for plenary hearing on January 31, 2023, Miss Pion, learned counsel for the applicants submitted that the applicants were in possession of the suit property; that they had leased some portions of the suit property and that they would be prejudiced if the instant application was not allowed. She further submitted that they had an arguable appeal as per the annexed draft memorandum of appeal.
6. There was no response on part of the respondent despite being served with the hearing notice on December 28, 2022 and neither did he file written submissions.
7. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicants' oral submissions and the law.
8. The applicants motion is brought *inter alia* under rule (5) (2) (b) of this court. Rule 5 (2) (b) of this [Court's Rules](#) which guide the court in applications of these nature provides:
  - “(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:
    - a. ...
    - b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”
9. The principles for our consideration in the exercise of our unfettered discretion under rule 5 (2) (b) to grant an order of stay of execution/proceedings or injunctions are now well settled. 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 and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles were summarized by this court in the case of [Stanley Kangethe Kinyanjui v Tony Ketter & others](#) [2013] eKLR.
10. A cursory perusal of the pleadings herein doesn't show that the applicants have an arguable appeal for the following reasons; firstly, the applicants admitted that the respondent purchased the suit property from their deceased husband on May 12, 1998. Secondly, *vide* an originating summons dated July 1, 2021, the applicants had sought to be registered as the proprietors of the suit property through adverse possession which originating summons was dismissed by the court on September 22, 2022.
11. In essence, although there were other orders issued contemporaneously with the dismissal of the originating summons, what was issued by the court was in the nature of a negative order incapable of execution and as such there is nothing to stay.

See *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, where Makhandia,J (as he then was) stated thus:

The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The



applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise..."

12. Of course we are mindful of the fact that we can say no more at this stage regarding arguability of the intended appeal lest we embarrass the bench that may eventually be seized of the intended appeal.
13. From the circumstances of this case and the applicants motion having been merely dismissed by the superior court, it is our considered opinion that there is nothing to stay and the intended appeal will not be rendered nugatory if stay orders are not issued.
15. On the nugatory aspect, admittedly, the applicants are not in occupation of the suit property as in the 1<sup>st</sup> applicant's supporting affidavit dated October 17, 2022, she deponed that they have been ploughing, grazing livestock and leasing the suit land. Ultimately therefore, we are not satisfied that the intended appeal would be rendered nugatory if stay orders are not issued.
16. In view of the above, and the applicants have failed to establish the twin principles for consideration in an application under rule 5(2) (b) of this court to grant an order of stay of execution, the applicants motion is devoid of merit and the same must accordingly fail.
17. The upshot of the foregoing is that the applicants motion dated October 17, 2022, is without merit and the same is hereby dismissed in its entirety with costs to the respondent.

**DATED AND DELIVERED AT NAKURU THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

