



**Ngurimu (Suing as Guardian Ad Litem of Daniel Ngurimu Mungai) v Mungai & 2 others
(Civil Application E471 of 2022) [2023] KECA 534 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 534 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E471 OF 2022
MA WARSAME, A ALI-ARONI & JM MATIVO, JJA
MAY 12, 2023**

BETWEEN

**JAMES MUNGAI NGURIMU (SUING AS GUARDIAN AD LITEM OF DANIEL
NGURIMU MUNGAI) APPLICANT**

AND

HARUN NJENGA MUNGAI 1ST RESPONDENT

KINYANJUI MUNGAI 2ND RESPONDENT

RACHEL MUGURE 3RD RESPONDENT

(Being an application for orders of injunction/inhibition restraining the respondents from undertaking any dealings/transactions in respect of LR Nos. Kiganjo/Kiamwangi/854 and Kiganjo/Kiamwangi/855 pending the lodging, hearing and determination of this suit at Nairobi (Bor, J.) dated 13th April, 2021 in HCA CA NO.190 of 2010)

RULING

1. This ruling determines the application dated December 19, 2022 brought under rules 5(2) (b) and 41 of the [Court of Appeal Rules, 2022](#) seeking orders:
 - a. That the court be pleased to issue an inhibition order against LR Nos. Kiganjo/Kiamwangi/854 and Kiganjo/Kiamwangi/ 855 inhibiting all dealings on the land until the instant application is heard and determined.
 - b. That pending the hearing and determination of the Appeal at the Court of Appeal in COACA/739/2022 an inhibition order against LR Nos. Kiganjo/Kiamwangi/854 and Kiganjo/Kiamwangi/855 be issued inhibiting any subdivision, sale, transfer, mortgage pending the hearing and determination of the instant suit.



- c. That pending the hearing and determination of the Appeal in the Court of Appeal in COACA/739/2022 a temporary order of injunction do issue restraining the Respondents, their agents, servants or anyone acting or claiming through them from entering, trespassing, building houses, subdividing, registering and or in any other manner interfering with the applicant's parcel of land being parcel Nos. Kiganjo/Kiamwangi/854 and Kiganjo/Kiamwangi/855 pending the hearing and determination of the suit herein.
2. Briefly, the grounds in support of the application as we glean from the application, the applicant's supporting affidavit sworn on December 19, 2022 filed therewith, the supplementary affidavit sworn on February 15, 2021 and a further affidavit sworn on March 2, 2023 are: (a) that their father had informed them that he owned the suit property; (b) that the Magistrate's Court had ruled in their father's favor; (c) that they were aware that their father was represented by an advocate in the court proceedings; (d) that their father developed senile dementia in 2014 and since then they never received updates from their father's advocate; (e) it was only after going through his father's documents that he located the advocate's contacts: (f) efforts to communicate with the said advocate were futile because he never responded to the applicant's e-mails; and, (g) he could not be traced in his offices in Naivasha where he relocated in 2017.
3. Further, the applicant states that: (a) they are victims as they lacked proper representation as a result of which they were denied the right to be heard; (b) judgment was entered against them without their knowledge; (c) they only found out about the impugned judgment after the respondents served them with the judgment; (d) that they were not served with any pleadings and in any event since the original applicant was of unsound mind, he could not have stood trial and therefore the judgment was irregular; (e) the applicant 's father has been a victim of grave injustice and has been denied his constitutional rights to be heard and the right to a fair trial.
4. Further, the applicant states that there is a pending suit before this court being COACA 739 of 2022 whose subject matter is the suit properties but the respondent and their agents have invaded the said properties and they are destroying mature coffee trees which are the applicant's source of livelihood. The applicant is also apprehensive that the respondents may subdivide and dispose of the suit property before the appeal is heard rendering the appeal nugatory and an academic exercise.
5. Further, the applicant avers that since they are the registered owners of the suit property and the respondents have never held any interest in the suit property save for what was apportioned to them by the impugned judgment, the disposal of the suit property by the respondents will occasion them irreparable loss that cannot be compensated by way of damages, unless orders of inhibition and injunction are granted.
6. The respondents did not file any response to the application or written submissions despite having been served. Notably, on the March 7, 2023, Mr. Mboha appeared for the all respondents and he informed the Court that filed submissions on their behalf and he wished to rely on the said submissions. As a follow up, on March 9, 2023 the registry contacted the respondents' advocate reminding him that the response to the application dated December 19, 2022 was not on record. In response, vide a letter dated March 14, 2023 the law firm of Mwihia & Mutai Co. Advocates acknowledged that the instant application was pending ruling but they never addressed the issue why their response to the instant application and submission were not on record. The court was unable to locate the respondents' response or submissions in the e-filing system casting doubts as to whether they were



ever filed. Accordingly, we have determined this application the absence of the respondent's reply and submissions notwithstanding.

7. In his submissions Mr. Mwaure, who led Ms. Mwangi reiterated that the applicant had satisfied the tests for grant of the order of inhibition as set out in *Japhet Kaimenyi M'Ndatbo v M'Ndatbo MMBwiria* (2012) eKLR. He argued that the respondents had embarked on destroying the suit property and they have severally visited the suit property accompanied by surveyors with a view to subdividing the property. Consequently, the applicant is apprehensive that the respondents may dispose of the suit property. In which, they had immensely invested in for over 50 years.
8. On whether the intended appeal is arguable, counsel cited this court's dictum in *Kenya Industrial Estate Limited & Another v Matilda Tenge Mwachia* (2021) eKLR where it was held:

“...an arguable appeal is one that is not frivolous but raises a bona fide issue deserving determination by a court and a single bona fide issue would suffice.”
9. Counsel reiterated that the learned judge erred in law and in fact in his ruling instead of deciding the 12 prayers set therein, at page four (4) of his ruling he narrowed the issues of determination to only 3 issues thereby leaving out 7 other issues undetermined. He also submitted that the denial of the right to be heard as enshrined in *the Constitution* and the suing a mentally ill person are sufficient grounds to prove an arguable case.
10. On the second limb, it is the applicant's submission that if the suit property is sub-divided and or disposed, then the appeal would be rendered nugatory and the same will be an academic exercise. He cited *Films Rover International & Others v Cannon Films Sales Ltd* 1986 3 ALL ER 772 which held that where both parties claim to be in possession of the property subject of a suit, an order of inhibition will not affect those rights but serve the greater interest by preserving the said land pending determination of their proprietary interests.
11. Our invitation to intervene on behalf of the applicant has been invoked under rule 5(2) (b) of the *Court of Appeal Rules*, 2022 which provides:

5(2) (b) In any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.
12. The principles that guide the court in the discharge of its mandate under the above rule and which we fully adopt are as crystallized by this court in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* (2013) eKLR. An applicant seeking relief premised on the above Rule must demonstrate that the appeal or the intended appeal is arguable and second, that the appeal will be rendered nugatory should it ultimately succeed after the substratum of the appeal is no more or out of reach of the successful appellant.
13. We are also guided by the decision in *Eric Makokha & 4 others v Lawrence Sagini & 2 others* (1994) eKLR CA where this court in an application under rule 5 (2) (b) stated:

“An application for injunction under rule 5 (2) (b) is an invocation of the equitable jurisdiction of the court. So its grant must be made on principles established by equity...”
14. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant



ventilation before this court. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (2013) eKLR where this court described an arguable appeal in the following terms:

- “vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
 - viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”
15. Regarding the first prerequisite, namely, whether the intended appeal is arguable, the applicant relies on the grounds in support of the application whose contents are already highlighted above and which we find no need to rehash. Our take on the same is that in law an arguable appeal is not one which must necessarily succeed, but one which is not frivolous but raises a bona fide issue that can be argued fully before the court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
16. Turning to the second prerequisite, whether the appeal, if successful, would be rendered nugatory in the event we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (supra) this court stated:
- “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
17. In determining whether or not an appeal will be rendered nugatory, the position in law is that this depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. See *Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA 227.
18. We have considered the above threshold, in light of the applicant’s positions herein on this prerequisite. The applicant in his affidavits deposes that the respondents and their agents have invaded the suit property and they are destroying mature coffee crops which are the applicant’s source of livelihood. The applicant is also apprehensive that the respondents may subdivide and dispose of the suit property before the appeal is heard rendering the said appeal nugatory and an academic exercise. It is evident that the applicant’s affidavits have not been controverted. From the circumstances of this case, we are satisfied that if an order of injunction and/or inhibition is not granted to preserve the suit property and the property is dealt with in an adverse manner, the substratum of the appeal will have been lost and the appeal COACA 739 of 2022 shall have been rendered nugatory. To use the word of the Supreme Court in *Teachers Service Commission v Kenya National Union of Teachers & 3 others*, Sup. Court App 16/2015 (2015) eKLR:
- “(23) It is clear to us that rule 5(2) (b) is essentially a tool for preservation. It safeguards the substratum of the appeal in consonance with principles developed over the years.



(27) Rule 5 (2) (b) of the *Court of Appeal Rules* is derived article 164(3) of *the Constitution*. It illuminated the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of the appeal/intended appeal.”

19. We are persuaded that the applicant has satisfied the two prerequisites. Accordingly, we hereby grant orders in terms of prayer 2 and 3 of the application dated December 19, 2022. Costs of the application shall abide by the outcome of Nairobi COACA 739 of 2022.

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

M. WARSAME

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

