



REPUBLIC OF KENYA



KENYA LAW
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Njau v Mbuki (Civil Application E415 of 2022) [2023] KECA 524 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KECA 524 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E415 OF 2022
K M'INOTI, HA OMONDI & KI LAIBUTA, JJA
MAY 12, 2023

BETWEEN

JOSEPH NDUNGU NJAU APPLICANT

AND

MARGARET MAGIRI MBUKI RESPONDENT

(Being an application for stay of execution of orders from the Environment & Land Court at Nairobi (Komingoi, J.) dated 30th September 2022 in Milimani ELC No. 1608 of 2007)

RULING

1. The Notice of Motion Application dated November 11, 2022 and supported by the affidavit of even date, sworn by Joseph Ndungu is brought pursuant to rule 5(2) (b) of the *Court of Appeal Rules*, seeking orders to stay execution of the judgment and orders dated September 30, 2022 (Komingoi J); and that costs be in the cause.
2. The applicant had filed case in the Environment and Land Court (ELC) seeking a declaration that, having been allotted the parcel of land situated at Jamhuri Phase II Estate, Nairobi, being Title Number Nairobi Block 63/99, he was entitled to the ownership, possession and registration of the said plot. He averred; that the lease certificate which the respondent relied on to claim ownership over the same property was forged or obtained by fraud. He also and he sought a permanent injunction to restrain the respondent and her agents or such other related persons, from encroaching on the property or interfering with his occupation; and damages of trespass.
3. The respondent in her defence, while conceding that she was never issued with an allotment letter from the Council, nonetheless contested the claims, contending that she purchased the suit land from a third party, and was subsequently issued with a certificate of lease, so she did not require to enter into a lease agreement with the City Council of Nairobi. She filed an amended counter-claim seeking to be declared the bona fide owner of the said plot, and a permanent injunction to issue against the applicant restraining him from interfering with the said plot in any manner.



4. The trial court in its judgment dismissed the applicant's claim on grounds that he failed to demonstrate that the respondent had fraudulently acquired title to the suit property or that the registration as the owner was fraudulent. The trial court declared that the respondent was the bona fide registered owner of the suit property; issued a permanent injunction against the applicant, in respect of the suit property, and directed the applicant to demolish all the structures he had erected, and vacate the property within 120 (one hundred and twenty days). The respondent was also awarded general damages of Kshs 5,000,000.00 for trespass.
5. Aggrieved by the outcome, the applicant filed this appeal on grounds inter alia that there was adequate proof that he was the original allottee of the suit property in contrast to the respondent who did not even have a duly executed lease agreement between her and the City Council the trial court erred in relying on a sale agreement, yet the purported vendor was not availed for cross-examination; and the damages awarded were without any rationale, and excessive.
6. He also filed this application seeking stay of execution pointing out that the grounds of appeal raised are arguable, and that the appeal will be rendered nugatory if the respondent is allowed to demolish the residential buildings within the stipulated 120 days without depositing security for costs, which will result in irreparable harm bearing in mind that the residential apartments erected by the applicant on the disputed property have tenants in occupation.
7. In opposing the application, the respondent; by a replying affidavit dated February 17, 2023 sworn by herself maintains that the applicant has not demonstrated how the appeal would be rendered nugatory should stay be denied; that in any event there is nothing to suggest that she would not be able to pay the decretal sum should the application succeed. The applicant views the application as a delaying tactic to deny her the fruit of her judgment.
8. This Court has stated that whether it be an application for injunction, stay of execution or stay of proceedings, the applicable principles are the same. To succeed in an application under 5(2) (b) the applicant has to establish that:
 - i. The appeal is arguable;
 - ii. The appeal is likely to be rendered nugatory if the stay is not granted and appeal succeeds.
9. In the case of *Wasike v Swala* [1984] KLR 591 this Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court. In addition, in the case of *Attorney General v Okiya Omtata & Anor* [2019] eKLR this Court held:

“the principles for our consideration in exercise of our unfettered discretion under Rule 5(2) (b) to grant an order of stay is well settled. Firstly, the applicant must satisfy that it has an arguable appeal. However, this is not to say that the appeal will necessarily succeed but suffice it that the appeal is not idle or frivolous.”
10. This Court has also pointed that it is sufficient that the issues raised are arguable as was held in *Co-operative Bank of Kenya Ltd v Banking Insurance and Finance Union Kenya* [2014] eKLR. In Kisumu Civil Appeal 74 of 2016, *George O. Gache & Anor v Judith Akinyi Bonyo & Others* this Court stated:

“at this stage the court is not expected to inquire into the merits of the case and whether or not the appeal will succeed. It is sufficient that the applicant has met the threshold as existence of a single bona fide issue is sufficient.”

Indeed, an arguable appeal is one that is not idle and/or frivolous.



11. Our perusal of the Memorandum of Appeal herein in this Court’s view raises several arguable issues and in particular the ownership of the suit property, which this Court ought to adjudicate with finality upon as well as the basis of the damages awarded and whether it was excessive.
12. As to whether the appeal will be rendered nugatory if the orders sought are not granted, 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.
13. In the case of *African Safari Club Limited v Safe Rentals Limited*, Nai Civil Application 53 of 2010 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.”
14. In the case of *Africa Eco Camps v Exclusive African Treasures Ltd* [2014] eKLR this Court held ‘as was observed in *National Credit Bank v Aquinas Francis Wasike and Another* – a legal duty is placed on the applicant to prove that its intended appeal will be rendered nugatory because the respondent will be unable to pay back the decretal sum should the applicant succeed on appeal. This requirement is however not absolute. It is qualified in that it is unreasonable to expect the applicant to know in detail the resources owned by a respondent or the lack of them. Once the applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden shifts to the respondent to show what resources he has to satisfy the decree should the appeal succeed as this is a matter likely to be peculiarly entirely within the respondent’s knowledge.
15. It is not in dispute that the applicant has erected residential apartments which are currently under occupation by his tenants. This in effect means the property is in the applicant’s hands, there are third parties involved who will be adversely affected by the looming order of demolition. Once demolished, he will not only lose the property, but also the tenants, and damages would certainly not restore the tenants who will be required to vacate, and even if the appeal were to succeed, the premises will have been demolished and there will be no room at the inn, so to speak. With that in mind, if the applicants prayer for stay of execution is denied and the appeal eventually succeeds, and the applicant having given the value of the suit property at Kshs.20,000,000.00, we take note that the respondent has merely stated that she is able to pay the decretal sum should the appeal succeed, but has failed to show how she will be able to finance the same, and this only goes to fortify the applicant’s lament that a successful appeal will be rendered nugatory.
16. It is in view of the above that we come to the conclusion that the applicant has established the twin principles under Rule 5(2) (b) and deem it fit to grant orders of stay of execution pending the hearing of the intended appeal. The costs of the Motion shall be in the intended appeal.

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

