



Sigei v Jackson (Civil Application E072 of 2022) [2023] KECA 480 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KECA 480 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E072 OF 2022
F SICHALE, LA ACHODE & WK KORIR, JJA
MAY 12, 2023**

BETWEEN

JULIUS SIGEI APPLICANT

AND

TANYAANG SHINANAI JACKSON RESPONDENT

(Being an application for stay of execution of the ruling and the subsequent orders of the Environment and Land Court at Narok (Mbogo, J.) dated 24th March, 2022 In ELC Case No. 021 of 2021)

RULING

1. Before us is a notice of motion dated 4th November 2022 brought under Rule 5(2)(b) of the Court of Appeal Rules, 2022 (“the Rules”). The application is supported by an affidavit sworn by the applicant, Julius Sigei, on the date of the application. The applicant’s prayer is for an order staying execution of the orders dated 24th March 2022 issued by the Environment and Land Court (ELC) at Narok in ELC Case No. 021 of 2021.
2. The application is anchored on the grounds that the applicant is aggrieved by the entire decision of the ELC and has since lodged a Notice of Appeal. It is also the applicant’s assertion that his appeal is arguable on the grounds highlighted on the face of his application as well as in his supporting affidavit. The applicant states that the appeal will be rendered nugatory if the orders sought are not granted and that no prejudice will be suffered by the respondent if the orders sought are granted. Finally, the applicant asserts that the balance of convenience tilts in his favour and the interests of justice will be served if the orders sought are granted.
3. The respondent did not file a replying affidavit but filed submissions opposing the application. When the matter came up for hearing on 25th January 2023, the parties had filed their written submissions which they briefly highlighted and sought to rely on. Ms Ngetich and Mr Okumu appeared for the applicant and the respondent respectively.



4. Ms Ngetich referred to the case of *Chris Munga N. vs. Richard Nyagaka Tongi & 2 Others* [2013] eKLR and submitted that for an application for stay of execution to succeed, the applicant must disclose an arguable appeal and demonstrate that the appeal will be rendered nugatory if stay is not granted. On whether the intended appeal is arguable, counsel submitted that the appeal is premised on the ground, among others, that the learned Judge of the Environment and Land Court erred in failing to appreciate that the applicant had been in possession of 94 acres of the suit land since 1996. Counsel relied on the case of *Josephine Mueni Kiluta vs. Florence Ngina Kimeu* [2021] eKLR to submit that a single arguable ground of appeal is sufficient. Counsel also submitted that an arguable appeal must not necessarily be one that will succeed, but it must be one that is not frivolous. Counsel's view was that the applicant's intended appeal met the criteria.
5. On the nugatory aspect, counsel submitted that the import of the impugned decision of the Environment and Land Court was that the applicant would be evicted from the suit land based on an interim order. Counsel further submitted that if evicted, his client would be prejudiced since he has been living on the suit property from 1996 and has been utilizing his portion of the suit property as a source of his livelihood. According to counsel, if the orders sought were not granted, the applicant can be evicted thereby rendering the intended appeal nugatory as the respondent will be free to deal with the suit property thus putting it at the risk of being disposed hence defeating recovery in the event the intended appeal succeeds. Counsel relied on the case of *Total Kenya Ltd vs. Kenya Revenue Authority* [2018] eKLR to submit that the purpose of Rule 5(2)(b) of the Rules is to avert loss that would be suffered by a party in the event stay is not granted. She concluded by urging us to find that the application has merit and grant stay pending appeal so that the status quo is maintained.
6. Mr Okumu for the respondent opened his arguments by stating that this application should be denied since it is brought with lack of candor, unclean hands and inordinate delay. According to counsel, the applicant failed to disclose to the Court that a similar application had been denied by the Environment and Land Court in a ruling delivered on 5th July 2022 and this Court should therefore not grant the application. Mr Okumu also submitted that this application was brought nine months after the ruling of the Environment and Land Court arguing that the period of delay is inordinately long. Counsel also stated that record of appeal had been lodged nine months down the line and no explanation for the delay had been tendered by the applicant and no steps had so far been taken to cure the failure. Counsel also urged that the notice of appeal on record was not compliant with Rules 75 and 77 of the Rules as it was not endorsed by the registrar of the Environment and Land Court nor was it served upon the respondent within the mandatory seven days. Counsel argued that such an application is for striking out as was held in the case of *Daniel Nkirimpa Monirei vs. Sayialel Ole Koitel & 4 others* [2016] eKLR. In a nutshell, Mr Okumu urged us to dismiss the application with costs to the respondent.
7. We have duly considered the notice of motion, the supporting affidavit and the submissions by the parties. Before we embark on the determination of the application, we answer the respondent's challenge to this Court's jurisdiction to entertain this application. Under Rule 75 as read with Rule 5(2)(b) of the Rules, the jurisdiction of this Court can only be invoked once a notice of appeal has been lodged. The question then is whether there is a notice of appeal filed by the applicant. In the record, there is a notice of appeal marked JS-7. However, the respondent challenged the validity of the notice of appeal on the ground that the same does not bear the Court stamp. In rebuttal, it was submitted that the applicant was yet to get a stamped copy from the Court's registry. In addressing this issue, we proceed from the understanding that there is a notice of appeal on record whose validity is not the subject of the instant proceedings. With the confirmation that there is a notice of appeal on record, we are satisfied that the applicant is entitled to bring an application for stay pending appeal as he has filed



a notice of appeal. We are therefore not persuaded by the respondent's assertion that this Court does not have the requisite jurisdiction to entertain this application and we reject this argument.

8. We now move to consider the application on its merit. An application for stay brought under Rule 5(2)(b) of the Rules turns on satisfaction of two limbs; whether the appeal is arguable and whether the appeal will be rendered nugatory if stay of execution is not granted. On this, we find authority in *Attorney General & another vs. Eunice Makori & another* [2021] eKLR where this Court stated as follows:

“Undoubtedly, this Court has unfettered discretion under Rule 5(2) (b) to grant an order of stay. The principles guiding the exercise of such discretion are well settled. Firstly, an applicant has to demonstrate 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. (See: *Multimedia University & Another v. Professor Gitile N. Naituli* (2014) eKLR).”

9. Therefore, the first line of our inquiry is whether the applicant's intended appeal is arguable. An arguable appeal is one which is not frivolous but must not be one that will necessarily succeed. In *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR, an arguable appeal was defined thus:

“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.”

10. We have considered the proposed grounds of appeal in paragraph 8 of the applicant's supporting affidavit vis-à-vis the judgment and the pleadings before the trial court. We note that at the centre of the intended appeal is the applicant's proprietary rights and the implications of the impugned ruling on those rights. Also, core to the intended appeal is the question of the scope of interlocutory orders. In our view, these, among other grounds, raise issues that call for adjudication by this Court. We are therefore satisfied that the intended appeal is arguable.

11. The second test that this application must pass is whether the intended appeal will be rendered nugatory if the stay orders are not granted. An appeal is likely to be rendered nugatory where its successful outcome will not only be defeated but be rendered worthless because no stay orders had been issued. In determining whether an appeal will be rendered nugatory, one of the factors to be taken into consideration is whether or not what is sought to be stayed is reversible. In the event that what is sought to be stayed is irreversible, the court should then assess whether damages can adequately compensate the party seeking stay. It is only if the thing sought to be stayed is irreversible and damages cannot reasonably compensate the party seeking stay that it can be said that the appeal qualifies as one which will be rendered nugatory. This Court in *Stanley Kangethe Kinyanjui* (supra) spoke to this point as follows:

“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.”

12. This application concerns a suit property whose ownership is disputed between the applicant and the respondent. The applicant alleges that he has been in occupation of 94 acres of the suit property since the year 1996. The plain import of the impugned ruling is that the applicant will be evicted from the suit property pending the hearing and determination of the case before the Environment and Land



Court. According to the applicant, he has been in occupation of a portion of the suit property which he has also continuously utilized as a source of his livelihood. He also argues that if the orders sought are denied the possession of the suit property will revert to the respondent who will be free to dispose of it thereby rendering the success, if any, of his appeal nugatory. The respondent on his part has not challenged the averments made by the applicant. We are therefore inclined to accept the fears and apprehensions raised by the applicant.

13. Before we conclude, it is necessary to consider whether the respondent will suffer any prejudice if the stay orders are granted. In our consideration of the record before us, it is in the interest of justice that the status quo be maintained in regard to the utilization of the suit property. That way, and in the absence of any other evidence to suggest otherwise, no party will be occasioned any prejudice.
14. In the circumstances, we find that the Notice of Motion dated 4th November 2022 is merited. The same is allowed and an order of stay is hereby issued effectively staying the execution of the orders of the Environment and Land Court at Narok in ELC Case No. 021 of 2021 dated 24th March, 2022 pending the hearing and determination of the intended appeal. The costs of this application shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF MAY 2023

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

