



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwololo v Kamula & 2 others (Civil Application E191 of 2022)  
[2023] KECA 745 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KECA 745 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E191 OF 2022  
K M'INOTI, HA OMONDI & KI LAIBUTA, JJA  
JUNE 22, 2023**

**BETWEEN**

**BONIFACE KIOKO MWOLOLO ..... APPLICANT**

**AND**

**STEPHEN KIVANDI KAMULA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPHINE MUTINDI KILUVA ..... 2<sup>ND</sup> RESPONDENT**

**BELLA ROSE LAVI ..... 3<sup>RD</sup> RESPONDENT**

*(Application for stay of execution pending the hearing and determination  
of an appeal from the Judgment and Decree of the Environment and Land  
Court at Makueni (Mbogo, J.) dated 12th May 2022 in ELCC No. 24 of 2018)*

**RULING**

1. By his motion on notice dated 3<sup>rd</sup> June 2022, the applicant, Boniface Kioko Mwololo, seeks stay of execution of the judgment and decree of the Environment & Land Court (ELC) at Makueni (Mbogo, J.) dated 12<sup>th</sup> May 2022, pending the hearing and determination of an appeal which he has already filed, being, Nairobi Civil Appeal No. E434 of 2022. The short background to the application is as follows. At all material times, the applicant was the registered owner of the property known as Makueni/Emali Town/234 (the suit property). On 8<sup>th</sup> February 2017 and 18<sup>th</sup> January, 2018 the applicant entered into agreements for sale of the suit property to the respondents for Kshs. 10,000,000.00. The respondents paid an initial deposit of Kshs 3,000,000. and subsequently, Kshs. 6,698,896. However, the respondents were not able to transfer and take possession of the suit property because, as it turned out, the applicant had charged the same to Sidian Bank (the bank). On 12<sup>th</sup> February 2018, the respondents registered a caution on the suit property to protect their interests. For its part, the bank placed another caution on 7<sup>th</sup> March 2018.



2. Ultimately, the respondents filed a suit in the ELC at Makueni against the applicant and the bank seeking, among others, an order of specific performance, eviction of the applicant from the suit property, a permanent injunction to stop the applicant and the bank from interfering with, transferring or alienating the suit property, removal of the caution by the bank; and recovery of monthly rents being collected by the applicant from the suit property. The applicant and the bank filed their defences to the suit and after hearing evidence, the trial court identified three issues for determination, namely:-
  - i. whether the agreement for sale dated 8th February 2017 was valid and enforceable;
  - ii. whether the agreement for sale dated 18th January 2018 was valid and enforceable; and
  - iii. whether the bank had a legally enforceable claim to the suit property.
3. In its judgment, the trial court found that the agreement of 8<sup>th</sup> February 2017 was legally binding and enforceable, that the agreement of 18<sup>th</sup> January 2018 was invalid; and that the bank did not have a registered charge over the suit property. Accordingly, the learned judge granted the remedies that the respondents had prayed for and directed them to pay to the applicant the balance of the purchase price of Kshs 300,000.
4. The applicant was aggrieved and, after filing the appeal we have already adverted to, filed the motion now before us. The applicant, through his learned counsel, Mr. Muia, submitted that the appeal is arguable because the learned judge erred by failing to hold that the respondents did not pay the full purchase price; by failing to find that an equitable remedy was not available to the respondent by reason of their unclean hands arising from failure to pay the balance of the purchase price; by failing to hold that the respondents relied on false and forged evidence; and by ignoring the applicant's evidence.
5. On whether the appeal risked being rendered nugatory, the applicant submitted that he was the registered proprietor of the suit property and in possession and that he risked eviction therefrom should the court not grant the order of stay of execution. He relied on the decisions of this Court in *Paul Wathiru Ngure v. Philip Njoroge Ngure & another* [2002] eKLR and *John Elloy O. Nyasoro v. National Bank of Kenya Ltd* [2007] eKLR on the two principles that guide the Court on an application under rule 5(2) (b) of the *Court of Appeal Rules*.
6. The respondents opposed the application vide a replying affidavit sworn by the 1<sup>st</sup> respondent, Stephen Kivandi Kamula, on 27<sup>th</sup> March 2023 and written submission of the same date. The bulk of the respondents' response was totally irrelevant to an application for stay of execution. They took issue with the respondents' application and appeal, contending that the notice of appeal was not served within the stipulated time; that there is no letter bespeaking proceedings; that the appeal was not filed within sixty days of the lodging of the notice of appeal; and that the application was served almost eight months after it was filed.
7. As regards the merits of the application, the respondents submitted that the appeal is not arguable because it is based on generalised complaints whilst the applicant does not deny entering into the agreement for sale of the suit property and receiving the bulk of the purchase price. They contended that the issues of alleged fraud and forged documents that the applicant intends to raise on appeal were neither pleaded nor determined by the ELC, and that the applicant was unjustly enriching himself by continuing to receive rental income from the suit property whilst still holding onto the purchase price. The respondents relied on the decision of this Court in *Multimedia University & Another v. Gitile Natuli* [2014] eKLR and urged us to find that there was no arguable appeal which stood to be rendered nugatory because the applicant could be adequately compensated by award of damages. The respondents further cited the decisions in *Kenya Shell Ltd v Benjamin Karuga Kibui & Another* [1986]



eKLR and *Patrick Muir & Another v Mutua Nyamai* [2018] eKLR in support of the proposition that the burden was on the applicant to satisfy the Court why the respondents should be kept from enjoying the fruits of their judgment.

8. We have carefully considered the application, the judgment of the ELC, the submissions and the authorities presented by the parties. We do not find it necessary to delve into the issues raised by the respondents on the competence or otherwise of the application and the appeal. The respondents have a tailor-made remedy in rule 86 of Court of Appeal Rules, which they are free to pursue if they wish. We cannot resolve the disputed issues raised by the respondents in an application under rule 5(2) (b).
9. As far as the merits of this application are concerned, the parties are on the same page as regards the two principles that guide the Court in an application for stay of execution. Firstly, the applicant is obliged to satisfy the Court that he has an arguable appeal and secondly, that the appeal risks being rendered nugatory if we do not intervene (See *J. K. Industries Ltd. v. Kenya Commercial Bank Ltd.* [1982 – 88] KAR 1088. At this stage, we are not required to consider the merits of the appeal. That is the business of the bench which will ultimately hear the appeal. (See *Stanley Kang'ethe Kinyanjui v. Tony Ketter & Others* [2013] eKLR). But that is not to say that at this stage the Court's hands are so tied that it must invariably find every conceivable appeal to be arguable. Our proper duty is to consider whether, prima facie, there is a bona fide issue, even one, worth of the Court's consideration (See *Abmed Musa Ismael v. Kumba Ole Ntamorua & 4 Others* [2014] eKLR).
10. The applicant does not deny having entered into the sale agreement with the respondents and having received the purchase price of Kshs 10 million save a paltry Kshs 300,000. The completion of the transaction was thwarted by either the applicant's non-disclosure of a material fact, or his decision to charge the suit property to the bank whilst knowing he had sold it to the respondents. The applicant does not deny that fact either. The learned judge did not merely order the applicant to transfer the suit property to the respondents: he directed the respondents to pay the balance of the purchase price to the applicant as a condition for transfer of the suit property because they satisfied the court that they were able, ready and willing to pay the amount save for the caution placed on the title by the bank. The alleged issues of fraud, as the respondents correctly pointed out, were never raised before the trial court. In these circumstances, and from the applicant's submissions and affidavits, we do not see any good faith arguable point that the Court is being asked to engage with.
11. To the extent that the applicant has failed to satisfy us that he has a bona fide arguable appeal, it is not necessary to delve into the second limb of the principles as to whether the appeal risks being rendered nugatory. To entitle the applicant to the orders sought, he must satisfy both principles rather than only one (see *Republic v. Kenya Anti-Corruption Commission & 2 Others* [2009] KLR 31). For the foregoing reasons, this application is dismissed with costs to the respondents. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JUNE, 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**

