



REPUBLIC OF KENYA



**Kihuto v Gitui (Civil Appeal (Application) E119 of 2022)  
[2023] KECA 1018 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KECA 1018 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) E119 OF 2022  
W KARANJA, J MOHAMMED & LK KIMARU, JJA  
JUNE 16, 2023**

**BETWEEN**

**CHARLES KINYUA KIHUTO ..... APPELLANT**

**AND**

**JOSEPH KIHARA GITUI ..... RESPONDENT**

*(Being an application for stay of execution of the judgment of the High Court at Meru (Mbugua, J.) dated 18th May, 2022 and all other consequential orders ensuing therefrom pending hearing and determination of the appeal in ELC NO. 10 OF 2018)*

**RULING**

1. By an application dated December 15, 2022, expressed to be brought under inter alia, Rule 5(2)(b) of the *Court of Appeal Rules*, Charles Kinyua Kihuto, the applicant, seeks in the main an order of stay of execution of the judgment delivered on May 18, 2022, ruling delivered on December 7, 2022 and all consequential orders thereto, pending the hearing and determination of the appeal. The application is predicated on the grounds on its face and on the supporting affidavit of the applicant sworn on November 15, 2022. It is strongly opposed by the respondent Joseph Kihara Gitui vide his replying affidavit sworn on January 6, 2023.
2. The pith and substance of the contents of the grounds cited on the application and the depositions in the rival affidavits is, in a nut shell, as follows:

The parties herein are not strangers as the applicant is married to the respondent's biological sister, and that makes them brothers-in-law. During the subsistence of the cordial family relationship that existed between them, according to the respondent, he offered shelter to his sister, her husband and their children on temporary basis on his property Land Parcel No LR No 11969/123 Marsabit township (the suit property). According to the applicant, however, the respondent agreed to sell to him the suit



property and even handed over the original title deed to him. He and his family moved into the premises in the year 2006 or thereabouts.

3. The truth or otherwise of these statements will be canvassed and determined at the hearing of the appeal and we must eschew the temptation to delve into the same for purposes of this ruling as we cannot make any determinative findings at this stage. It suffices, however, to state that there was no sale agreement signed between the parties, or at least documentary evidence adduced in court in support of the purported sale. The parties appear to have lived amicably, but at some point their relationship appears to have gone south.
4. As a result, the appellant moved to the Environment and Land Court (ELC) vide a plaint dated July 30, 2012 seeking, inter alia, orders that the respondent be ordered to surrender the said title deed or in default, the original title deed be declared obsolete and another title deed be re-issued to him.
5. The suit was opposed by the respondent who along with his statement of defence filed a counter claim seeking to be deemed owner of the suit premises by virtue of adverse possession, saying that he had stayed on the suit premises uninterrupted for a period of 12 years. He also prayed for orders of specific performance for execution of transfer documents for the suit premises by the executive officer of the Court in the event that the respondent declined to sign them.
6. The appellant withdrew his claim later after obtaining another title deed for the property but the counter claim proceeded to hearing. After hearing the parties and considering the evidence placed before the court, the learned Judge (Mbugua, J) made a finding that the occupation of the suit property was with the respondent's permission, and adverse possession was, therefore, not established. Furthermore, the learned Judge found that in absence of evidence on the last date of payment of the purchase price, it was not possible for the court to determine when time started running against the registered owner of the suit property. The counter claim was accordingly dismissed with no orders as to costs.
7. The appellant filed a notice of appeal against the said judgment. About six months after delivery of the judgment, the respondent filed an application for eviction of the applicant from the suit premises, which application was heard, and in a ruling dated December 7, 2022 Nzili, J directed that an eviction notice be served on the respondent within 7 days of the date of the ruling and if the appellant failed to vacate the premises, the respondent be at liberty to execute the said judgment. Those are the orders that triggered this application.
8. We have considered the evidence as summarized above along with the submissions filed by both parties and the relevant law as articulated in many decisions of this Court. The principles for granting stay of execution, injunction or stay of proceedings under rule 5(2)(b) of this Court's rules are well settled. This Court in the case of *Trust Bank Limited & another v Investech Bank Limited & 3 others [2000] eKLR* delineated the jurisdiction of this court in such an application as follows:

' the jurisdiction of the court under rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against the facts and circumstances of each case.'
9. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction. On the first principle, as to whether or not the intended 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 which warrants ventilation before



this Court. 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. On the first principle, on arguability, we note that the applicant has not demonstrated that his appeal against the judgment is arguable. He has not proffered a single point on arguability of the appeal. Instead, he has concentrated on arguability of the subsequent Ruling allowing the respondent to issue the eviction Notice. There is no separate appeal against that Ruling and it has no life of its own outside the judgment giving rise to the substantive appeal herein.
11. The applicant has not demonstrated to the Court that the learned Judge of the ELC erred in law in dismissing the counterclaim on adverse possession. There has not been even the feeblest attempt by the applicant to demonstrate how and where the learned Judge deviated from the settled tread of the law in regard to adverse possession which this Court will be called upon to determine on appeal. We find that the first principle on arguability of the appeal itself has not been demonstrated as required by law. As the two principles are conjunctive, failure to establish the first principle renders the nugatory aspect moot.
12. The application does not therefore meet the threshold set for applications of this nature to succeed. Accordingly, we find this application devoid of merit and the same is dismissed with costs in the Appeal.

**DATED AND DELIVERED AT NYERI THIS 16TH DAY OF JUNE 2023**

**W. KARANJA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

