



**Nteere v Kongoni Camp Limited (Civil Application
E100 of 2022) [2023] KECA 1626 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 1626 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E100 OF 2022
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
JUNE 9, 2023**

BETWEEN

COL (RTD) LAWRENCE NTEERE APPLICANT

AND

KONGONI CAMP LIMITED RESPONDENT

*(Being an application for stay of execution pending appeal from
the judgment of the Environment and Land Court at Nanyuki
(K. Bor, J.) dated 13th October 2022 in ELC NO. 34 of 2021)*

RULING

1. Rule 5(2)(b) of the [Court of Appeal Rules](#) provides as follows:-
 - “(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:
 - (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”
2. The principles for consideration in the exercise of our unfettered discretion under Rule 5(2)(b) to grant an order of stay of execution of a judgment and decree of the superior court pending the hearing and determination of appeal are now well settled. As was observed in [Stanley Kangethe Kinyanjui v Tony Ketter & 5 others](#) [2013]eKLR, the applicant has to satisfy that he has an arguable appeal. This is not an appeal that will necessarily succeed, but one that is neither frivolous nor idle. It is an appeal that ought to be argued fully before the Court. Secondly, the applicant has to demonstrate that unless the order of stay is granted the appeal or intended would be rendered nugatory. It has to be shown that if



stay is not granted what is sought to be stayed, if allowed to happen, will be irreversible or that damages will not reasonably compensate the applicant.

3. The applicant, Col. (RTD) Lawrence Nteere, is the chairman of Samat Estate Residents Association that was created in line with “Nyumba Kumi” initiative. He brought a suit before the Environment and Land Court at Nanyuki on his behalf and on behalf of the members of the association seeking declarations and permanent orders against the respondent, Kongoni Camp Limited, in respect of land parcel LR No 12272 (the suit property). The association members had since 1936 bought their parcels of land on which they had settled, but that the respondent had in 2008 bought the above parcel of land and on 13th June 2016 blocked their road of access thereby causing them to be landlocked. They sought that the road at the tail end of their properties be declared to be a road of access and that an easement be created to benefit them. The respondent opposed the suit, and denied the fact that the suit property had any encumbrances. Its case was that the association members were trespassing on the suit property. The learned Judge (K. Bor, J). heard the dispute which she dismissed with costs. It was found, inter alia, that the claim for an access order had not been properly brought as required under section 140 of the *Land Act*. The applicant and his members were given 60 days within which to pursue other avenues of getting access to their parcels of land.
4. Before us is the applicant’s notice of motion brought under sections 3A and 3B of the *Appellate Jurisdiction Act*, Rules 5(2)(b) and 47 of the *Court of Appeal Rules* and Article 159 of the *Constitution*, seeking that we be pleased to order the stay of execution of the judgement and decree delivered on 13th October 2022 pending the hearing and determination of the appeal whose notice has been duly filed. In the grounds and supporting affidavit, the applicant stated that the execution of the decree arising from the appeal was imminent as the bill of costs has been filed, and that the Deputy Registrar of the court may proceed to tax it if stay is not granted. It was deponed that the application had timeously been brought, and that the applicant had an arguable appeal given the annexed draft Memorandum of Appeal.
5. In the draft Memorandum of Appeal, the applicant’s complaint was that the learned Judge had failed to apply and give effect to the existing laws and thereby failed to do substantive justice to the members of his association; that the court had wrongly ignored the parties’ pleadings and evidence; and had wrongly failed to find that the respondent’s closure of the road to access which the members had used since 1936 to date was illegal, unlawful and wrongful.
6. Edwin Anderson swore a replying affidavit on behalf of the respondent to oppose the application, which he termed as frivolous, vexatious, bad in law and an abuse of the process of the court. He stated that the 60 days’ window given to the applicant and its members had come and gone without any action on their part. His case was that the applicant’s suit had been dismissed, and therefore the orders sought to be stayed were of negative nature and not capable of being stayed.
7. Learned counsel Mr. Abwuor appeared for the applicant and Mr. Ng’ang’a for the respondent. It was submitted for the applicant that the seven (7) grounds in the draft Memorandum of Appeal raised weighty issues that ought to be considered on appeal, and therefore that the appeal was arguable. It was argued that if stay was not granted the applicant and his members would suffer prejudice; that the road should be allowed to remain open, as the respondent’s claim that it had since closed the road following the expiry of the 60 days was not true. It was, consequently, argued that there had been demonstration that the appeal would be rendered nugatory if stay was not granted.
8. Counsel for the respondent made reference to *Southern Credit Banking Corporation Ltd v Grandways Ventures Ltd & another*, Civil Application No Nai 321 of 2001, and submitted that it had not been shown that if stay is not granted the appeal would be rendered nugatory, as any closed road would be



re-opened if this Court were to ultimately order so. Secondly, it was argued that the dismissal of the suit constituted a negative order, and that it was trite that stay could not be granted in those circumstances. Reference was made to the decision in *Francis Kabaa v Nancy Wambui & another* Civil Application No NAI 298 of 1996.

9. We have considered this application, the submissions by learned counsel along with the relevant law. It is evident that the applicant's suit was dismissed with costs. The applicant and his members were, gratuitously, given 60 days to bring their claim within the law, as it were. They did not take advantage of it, as was deponed by the respondent and there was no demur. In essence, there was no positive order that was capable of execution, except for costs which cannot attract stay. As was observed in *Western College of Arts and Applied Sciences v E.P. Oranga & 3 others* 1976 KLR 63 at page 66, where the superior court did not order any of the parties to do anything or to refrain from doing anything or to pay any sum, this was a negative order which is incapable of execution save in respect of costs only.

10. The consequence is that, the application lacks merits. It is dismissed with costs.

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF JUNE 2023.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

