



**Nagda v Morjaria (Civil Application E010 of 2022)
[2023] KECA 967 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 967 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E010 OF 2022
F SICHALE, LA ACHODE & WK KORIR, JJA
JULY 28, 2023**

BETWEEN

NARENDRA CHANDULAL NAGDA APPELLANT

AND

MANSUKHLAL JAMNADAS MORJARIA RESPONDENT

*(An application for stay of execution of the Ruling of (Mutungi J)
delivered on the 3rd February, 2022) in Nakuru E.L.C No.135 of 2019)*

RULING

1. The applicant, Narendra Chandulal Nagda has moved this Court under Rule 5(2)(b) of this Court's Rules, vide a Notice of motion dated March 4, 2022, for orders:
 - a. Spent
 - b. spent
 - c. That the Court be pleased to issue stay of execution of the Ruling issued on February 3, 2022 by Mutungi J in Nakuru E L C No 135 of 2019 pending the hearing and determination of this application.
 - d. That the Court be pleased to issue stay of execution of the Ruling issued on February 3, 2022 by Mutungi J in Nakuru E L C No 135 of 2019 pending the hearing and determination of the applicant's intended appeal.
 - e. That any other or further orders may be made that this Honourable Court deems fit to meet the ends of justice.

The respondent is Mansukhlal Jamnadas Morjaria.



2. The dispute began with a suit in the Environment and Land Court being Nakuru ELC 135 of 2019, which was filed by the respondent against the applicant. The respondent alleged that he was the registered proprietor of all that land identified as Title No. Nakuru Municipality Block 4/31 (the suit property). Upon being served with the summons, the applicant entered appearance, but did not file any defence. The respondent gave his evidence on the strength of which the learned Judge entered judgment in his favour, against the applicant, on June 15, 2021.
3. Subsequently, the applicant filed an application to set aside the said judgment. The application was dismissed in a ruling delivered on February 3, 2022, provoking the filed Notice of Appeal and the instant application for stay of the said ruling.
4. The instant application is premised on the grounds on its face and the supporting affidavit of the applicant, sworn on March 4, 2022.
5. The grounds of the appeal are that the applicant's defence and counterclaim raises triable issues which need to be canvassed during hearing. The applicant avers that the suit property was gifted to him, facts which he would have canvassed during trial. That this being a land matter, justice demands that both parties must be heard, however, the ruling dated February 3, 2022 locked him out from being heard. Further, that unless the orders sought are granted the applicant will suffer substantial loss and prejudice, in the event that the intended appeal succeeds.
6. The applicant avers that the respondent will not be prejudiced by the orders sought and can easily be compensated by damages if any. Lastly, he deposes that he is willing to abide by any condition, or any other such terms that this Court may deem fit to make on granting the application.
7. In opposition, the respondent filed his replying affidavit sworn on November 7, 2022 deposing that the signature in the Gift Certificate is a forgery. He avers that he had no reason to "gift" the suit property to the applicant and that he has never gifted the suit property to the applicant and/or dealt with him in any way whatsoever. He prays that the instant application be dismissed with costs.
8. This application was disposed of by way of written submissions. The firm of M/S Naomi Muriithi & Co Advocates filed submissions dated March 21, 2022, on behalf of the applicant, and the firm of M/S Mongeri Kinyanjui & Co. Advocates filed those dated March 29, 2023, on behalf of respondent. During plenary, learned counsel Mr. Bosire was present for the applicant in the virtual hearing, while learned counsel Mr. Sarvia held brief for Ms. Mongeri for the respondent. Both counsel relied entirely on their written submissions.
9. In his submissions the applicant urges that he is the registered owner of the suit property, having been gifted on August 5, 2015 by the respondent. That if the orders sought are not granted, he stands to suffer irreparable loss and damages that cannot be compensated, as the respondent may dispose of the suit property.
10. The applicant submits that he was not given a chance to be heard. He prays that the chance to be heard be availed to him, this being a land matter and the grounds of opposition he had raised in Nakuru E L C No 135 of 2019, were not addressed by the Judge. Further, that his intended appeal has high chances of success, hence, if the orders sought are not granted the appeal will be rendered nugatory.
11. In rebuttal, the respondent contends that the Judge simply found that the applicant's defence to the respondent's claim was nothing more than a mere denial of the respondent's claim and was not arguable. Further, that if the respondent is prevented from proceeding with the extension of the government lease which expires by November 30, 2023 if not renewed, the property will be lost resulting in substantial loss and prejudice for the respondent.



12. On the nugatory aspect, it is contended that the stay of the ruling is practically meaningless as it would not operate as stay of the judgment. That it is the judgment that the respondent is executing and not the ruling and the applicant's intended appeal will not be rendered nugatory, as he will still be able to prosecute his alleged intended appeal.
13. We have perused the application, the replying affidavit and the submissions of both parties. The jurisdiction under Rule 5 (2)
 - (b) of this Court's Rules is original and discretionary and is guided by the interest of justice. It is now settled law that under the exercise of this discretion, the court must be satisfied on the twin principles that the appeal is arguable and that the appeal would be rendered nugatory if the orders sought are not granted and the appeal succeeds.
14. This Court's decision in *Trust Bank Limited and Another v Investech Bank Limited and 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 facts and circumstances of each case...”
15. We are cognizant of the fact that an arguable appeal does not mean that it should be one that will necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. We are also aware that in considering an application brought under rule 5 (2) (b) we must not make definitive or final findings of either fact or law at this stage, as doing so may embarrass the ultimate hearing of the main appeal. See *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR
16. The second principle to be satisfied is that the appeal will be rendered nugatory if the orders sought are not granted. Whether or not an appeal will be rendered nugatory depends on whether or not what is being sought to be stayed if allowed to happen will be reversible. If it is not reversible, the court may consider whether damages will be adequate compensation to the aggrieved party. See *Multimedia University & Another v Professor Gitile N. Naituli (Supra)* and *Attorney General v Okiya Omtatah Okiiti & Another* [2019] eKLR.
17. In the instant application, the applicant seeks to stay execution of the ruling issued on February 3, 2022. In opposition, the respondent urges that stay of the ruling is practically meaningless as it would not operate as stay of the judgment.
18. We note that in the impugned ruling the learned Judge declined to grant the applicant's application to set aside the judgement dated June 15, 2021. The court did not grant positive orders that required any of the parties to act, or to forbear from acting.
19. It is therefore, clear that the order issued in the ruling was a negative order and is thus unenforceable. This Court in *George Ole Sangui v Kedong Ranch Limited*, Civil Application No. Nai 55 of 2015), citing the famous case of *Western College of Arts and Applied Sciences v Oranga & Others* [1976] KLR 63, pronounced itself as follows: -

“In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the



doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution .

It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from

doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.” (Emphasis ours)

20. Consequently, we find that the ruling dated February 3, 2022 having culminated in a negative order, there is nothing to execute for which stay orders could be called for. Accordingly, the application dated March 4, 2022 is found to lack merit and is hereby dismissed with costs.

DATED AND DELIVERED IN NAKURU THIS 28TH DAY OF JULY, 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

