



**Timoi Farms & Estates Limited & another v Langat (Civil Application  
E164 of 2023) [2023] KECA 1005 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 1005 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E164 OF 2023  
HA OMONDI, JM MATIVO & GWN MACHARIA, JJA  
JULY 28, 2023**

**BETWEEN**

**TIMOI FARMS & ESTATES LIMITED ..... 1<sup>ST</sup> APPLICANT**

**ISAYA KIPTONUI KIMEYWO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**FLORENCE CHELANGAT LANGAT ..... RESPONDENT**

*(An application for stay execution of judgment and decree made by the Environment  
and Land Court (Okongo, J.) dated 18th April, 2023 in NRB ELC No. 606 of 2015)*

**RULING**

1. Vide an application dated April 27, 2023, the applicants seek for stay of execution of the judgment/decree and all consequential orders made by the ELC on April 18, 2023 pending the hearing and determination of their intended appeal by this court. Lastly, they pray that the costs of the application be provided for.
2. The grounds in support of the application are that:-
  - (a) the applicants are completely dissatisfied with the impugned judgment and they have lodged an appeal against the same before this court;
  - (b) that the trial court grievously erred in holding that the respondent herein was rightful owner of title numbers Olenguruone/Amalo/314, 315, 316 and 321 and that the applicants were trespassers;
  - (c) that the trial court's decision breached the rules of natural justice;
  - (d) the applicants will suffer substantial loss to the tune of 200 million if the imminent eviction of the applicants from the said parcels of land is not stopped;



- (e) the trial court despite appreciating there was a parallel matter in Nakuru HCCC No 32 of 2010 Timoi Farms & Estates Ltd v Florence Chelagata Langat & Kipngeno Arap Ngeno went ahead and gave orders that were in direct contravention to the orders and proceedings in that suit, pre-empting the suit and also ignored earlier orders requiring the two suits be heard together;
- (f) the stay is necessary to preserve the subject matter of the suit.
3. The application is opposed *vide* a replying affidavit dated May 2, 2023 sworn by the respondent, who avers that upon entering into the agreement for sale, her advocates were diligent and received written confirmation from the relevant authorities that there was no Land Control Board embargo on the suit properties and proceeded to issue the Land Board Consent. By the time she entered into an agreement of sale, the applicants had breached their agreement with the vendor and nothing stopped the vendor from entering into a sale agreement with her and she is now in possession and the lawfully registered owner of the suit properties, and that the tea bushes were also transferred to her. Consequently, the mendacious claim that the applicants stand to lose Kshs 200 million is without any factual basis.
  4. The respondent also averred that it was upon the applicants to seek consolidation of the two suits since there was no order consolidating the two suits. Consequently, the instant application is frivolous and misconceived, and she is being denied the fruits of judgment as the applicants continue harvesting tea for their own benefit and gain and prays the application be dismissed with costs.
  5. In support of the application, the applicant's counsel submitted that the intended appeal is arguable and relied on the grounds raised in the annexed draft memorandum of appeal. Briefly, the applicants claim is that the learned judge erred in declaring that the respondent had valid titles over title numbers Olenguruone/Amalo/314, 315, 316 and 321 yet it was obtained unprocedurally and fraudulently.
  6. In support of the foregoing submissions, counsel relied on this court's decision in [Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others](#) (2013) eKLR where this court held that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court.
  7. On the second condition to be fulfilled, counsel maintained that the appeal will be rendered nugatory if stay orders are not granted, since the respondent will proceed to evict the applicants from suit properties. Counsel submitted that the eviction if undertaken will occasion the applicants substantial loss of Kshs 200 million which is the value of the developments on the land. This, according to the applicants will render the intended appeal a mere academic exercise and nugatory. Counsel also submitted that the eviction would cause undue hardships, inconveniences and loss to the applicants, which cannot be compensated by way of damages. Further, counsel argued that the respondent will not be prejudiced in any manner in the event the stay orders are granted pending the hearing and determination of the intended appeal.
  8. Counsel for the respondent reiterated the contents of the respondent's replying affidavit and argued that the intended appeal is frivolous because the applicants never paid the balance of the purchase price and cannot claim ownership. Consequently, the intended appeal does not raise a single bona fide ground since the issue of fraud cannot be raised at the appellate stage when the same was never raised at trial.
  9. Counsel submitted that the respondent stands to suffer hardship because she has been denied possession and income from the suit properties for over 12(twelve) years despite being the registered proprietor of the suit property. Further, the applicants have been unjustly enriching themselves by earning income from the property despite having breached the terms of the agreement for sale with the previous owner. In conclusion, counsel submitted that the applicants have failed to discharge their



burden of proof yet the onus of satisfying the two limbs is on them as was held in David Morton Silvesrtein v Atsango Chesoni HCCA No 105 of 2000 at page 4 & 5.

10. We have considered the motion, the supporting affidavit, the rival submissions and the law. The application before us is made pursuant to the provisions of rule 5 (2) (b) of this Court's Rules. The principles that govern the exercise of this court's discretion in an application of this nature are well settled. Firstly, the applicant must demonstrate existence of an arguable appeal; and secondly, the applicant must show that the intended appeal, if successful, is likely to be rendered nugatory unless the order sought is granted. See Trust Bank Limited & another v Investech Bank Limited & 3 others (2000) eKLR.

11. We are also guided by the decision in Eric Makokha & 4 others v Lawrence Sagini & 2 others (1994) eKLR where this court in an application under rule 5 (2) (b) stated:

“An application for injunction under rule 5 (2) (b) is an invocation of the equitable jurisdiction of the court. So its grant must be made on principles established by equity...”

12. On the first principle, as to whether or not the 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 in order to warrant ventilation before this court. In Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others (supra) this court described an arguable appeal in the following terms:

“vii). 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.

viii). In considering an application brought under rule 5

(2)

(b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

13. In satisfaction of the first prerequisite, the applicants relied on the grounds set out in the applicants' draft memorandum of appeal in support of their application whose contents we highlighted earlier. In law, an arguable appeal is not one, which must necessarily succeed, but one, which is not frivolous but raises a bona fide issue that, can be argued fully before the court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.

14. Turning to the second prerequisite, whether the appeal, if successful, would be rendered nugatory in the event we decline to grant the orders sought and the intended appeal succeeds, in Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others (supra) this court stated that:

“ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

x). 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.”

15. In determining whether or not an appeal will be rendered nugatory, the position in law is that this 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. (See the case of *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227).

16. We have considered the above threshold, in light of the applicant's positions herein on this prerequisite. The applicants in their affidavit depone that they have been in occupation of the suit properties since the year 2008, therefore if a stay of execution is not granted, the respondent will proceed to evict them from the suit properties occasioning them a substantial loss to the tune of Kshs 200 million being the value of their developments thereon rendering the appeal a mere academic exercise. On the part of the respondent she depones that she has been denied possession of the suit properties for a period exceeding 12 years while the respondent continues to unjustly enrich themselves from the suit properties.

17. We find that it has been demonstrated that the developments on the suit properties are enormous and a lot of time and money has gone into the developments. We are persuaded that if the application is declined, the applicants may never be able to recoup what has gone into the developments, were they to succeed with their appeal. That will render the appeal nugatory. To use the word of the Supreme Court In the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 others*, (2015) eKLR:

“(23) It is clear to us that rule 5(2) (b) is essentially a tool for preservation. It safeguards the substratum of the appeal in consonance with principles developed over the years.

...

[27] Rule 5 (2) (b) of the Court of Appeal Rules is derived article 164(3) of the *Constitution*. It illuminated the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of the appeal/intended appeal.”

18. We are satisfied that the applicants have satisfied the twin requirements for granting of orders under rule 5(2)(b) of the *Court of Appeal Rules*. However, since an orders of stay of execution is equitable remedy, we find that it is proper for the income from the tea bushes to be preserved in a joint interest earning account in the name of the parties herein pending hearing and determination of the appeal. Consequently, we allow the application dated April 27, 2023 and order as follows:

- a. Pending the hearing and determination of the appeal there shall be a stay of execution of the judgment and orders issued in Nrb ELC No 606 of 2015 on April 18, 2023;
- b. That the income from the tea bushes to be preserved in a interest earning account in the joint names of the parties herein pending hearing and determination of the intended appeal.
- c. Costs of the application shall abide by the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL**

**J. MATIVO**

.....

**JUDGE OF APPEAL**

**G.W. NGENYE-MACHARIA**



.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

