



**M'Mwitari v Gatekia & 3 others (Civil Appeal (Application)  
E118 of 2022) [2023] KECA 1052 (KLR) (24 August 2023) (Ruling)**

Neutral citation: [2023] KECA 1052 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) E118 OF 2022  
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA  
AUGUST 24, 2023**

**BETWEEN**

**STANLEY IRIGA M'MWITARI ..... APPLICANT**

**AND**

**MERCY KANYIRI GATEKIA ..... 1<sup>ST</sup> RESPONDENT**

**PENINA NKIROTE MARETE ..... 2<sup>ND</sup> RESPONDENT**

**PURITY KAROKI MARETE ..... 3<sup>RD</sup> RESPONDENT**

**IREENE NTINYARI (SUING AS THE LEGAL AS THE LEGAL  
REPRESENTATIVES AND ADMINISTRATORS OF THE ESTATE OF THE  
LATE SILAS GATEKIA M'MWITARI - DECEASED) ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution pending appeal from  
the judgment of the Environment and Land Court at Meru (C.K  
Nzili, J.) dated 9th March 2022 in ELC Appeal No. E042 of 2021)*

**RULING**

1. The Senior Principal Magistrate's Court at Githongo on February 8, 2021 rendered a judgment for the respondents, Mercy Kanyiri Gatekia, Penina Nkirote Marete, Purity Karoki Marete and Ireene Ntinyari (who were suing as the legal representatives of the estate of their late father Silas Gatekia M'Mwitari) against the applicant, Stanley Iriga M'Mwitari in respect of land parcel No. Abothuguchi/Ruiga/1866 (hereinafter referred to as "the suit property"). The trial court found that the applicant was the brother of the late father of the respondents; that the suit property was the family's ancestral land; that the applicant had been registered in respect of the land to hold it in trust for the respondents' father in equal shares; that this was a customary trust that did not have to be noted in the register; and, therefore, that an order would issue cancelling the applicant's registration in respect of the suit property



to allow the respondents to get half of the land through registration. The applicant's counterclaim seeking that the caution that the respondents had lodged against the title was dismissed with costs.

2. The applicant's appeal to the Environment and Land Court (ELC) at Meru in ELC Appeal No. E042 of 2021 was dismissed with costs. The appellate court agreed wholly with the findings of the trial court.
3. The applicant was not done. He filed an appeal to this Court, and in it he has filed the present notice of motion dated November 30, 2022 under Rule 5(2)(b) of the [Court of Appeal Rules, 2022](#) and sections 3A and 3B of the [Appellate Jurisdiction Act](#) seeking that:-

“(2) That this Honourable Court be pleased to stay execution and/or further proceedings in Meru Environment and Land Court Appeal No. E042 of 2022 pending hearing and determination of the appeal herein ”

4. The grounds upon which the applicant's appeal was based were that:-

“(1) That the learned Judge of the superior court erred in law in holding that the respondents had proved the threshold of founding a customary trust over land Ref. No. Abothuguchi/Ruiga/1806.

2. That the learned Judge erred in law in misapplying the test set by the Supreme Court on claims of customary trusts as set out by the apex court in [Isack M'MInanga Kiebia v Isaaya Tebeuri M'Intari & another](#) [2018] eKLR thereby reaching a wrong conclusion.
3. That the learned Judge erred in law in misapplying the doctrine of slayer of forfeiture rule which was not present in the instant appeal below.
4. That the superior court erred in law for failure to find the trial court shifted the burden of proof at the trial contrary to sections 107-112 of the [Evidence Act](#) cap 80.
5. That the learned Judge erred in law in not finding that the appellant's right to accurate translation of proceedings at the trial court was contrary to fair hearing under Article 50 of the [Constitution](#).
6. That the learned Judge erred in law for failing to apply the doctrine of indolence laches, which is paramount in relation to late filing of the claim by the respondents.
7. That the entire judgment of the superior court is against the weight of evidence and bad in law.”

5. In the affidavit that the applicant swore to support the instant application, he deponed that he is, and has always been, in occupation of the suit property. His fear is that if the decree is executed before the appeal is heard and determined, he will be removed from the suit property which will render the appeal nugatory as the substratum will have been destroyed. His case was that, given the grounds in the Memorandum of Appeal, he had an arguable appeal on which he would like to be heard before any action is taken. His learned counsel Mr. Mwendwa filed written submissions in support of the application. He was allowed to highlight them orally. He reiterated that the applicant's appeal raised serious questions of law, one of which was the finding that there was a customary trust when there was no evidence to prove it. Secondly, he submitted, his client will be evicted and that this will render



the appeal nugatory. He referred this Court to the decision in *Nchiru Catholic Church -v- Domiciano Ratanya*, Civil Application No. 89 of 2020 in which it was emphasised that, in such an application:-

“ The applicant must (first) demonstrate that he has an arguable appeal which is not frivolous. Secondly, he also needs to show that the result of such appeal, if successful, would not be rendered nugatory if the application for stay was refused.”

6. The respondents opposed the application through the replying affidavit of the 1<sup>st</sup> respondent. Their case was that the application had been filed inordinately late; that despite the two judgments against him the applicant had forcefully remained on the land to their exclusion; that any execution had been rightly earned; and that the applicant had not demonstrated that he had any sufficient cause or that he would suffer irreparable loss if stay is not granted. Learned counsel M/s Kaburu appeared for them having filed written submissions. She submitted that the applicant had made the application late in the day, and that the delay had not been explained. It was further submitted that what the two lower courts found was that the applicant was entitled to half of the suit property and the respondents were entitled to the other half, and therefore it was not true that failure to grant stay would result in the applicant’s removal or eviction therefrom. Relying on the decisions in *Stephen Kitbi Ngumbo T/a Steve Kitbi & Co. Advocates -v- China Wu Yi (Kenya) Company Limited*, Civil Application No. 50 of 2020 at Mombasa; *Licinus Investments Limited -v- Maurizio Dalpiaz*, Civil Application No. 43 of 2020; *Jescah Gatakaa Amboka & Jackson Amboka Wanyungu -v- Wilfred Keli Ndolo*, Civil Application No. 166 of 2019 at Eldoret; and *Paul Njeru Mwathe -v- Vidya Thira Mwathe & 3 Others*, Civil Application No. 122 of 2019, learned counsel submitted that the applicant’s application for stay had not satisfied the twin limbs as required under Rule 5(2)(b) of this Court’s *Rules*.
7. We have carefully considered this application and the rival submissions. We are alive to the fact that in dealing with an application under Rule 5(2)(b) of this Court’s Rules, this Court is exercising original and discretionary jurisdiction; and that such discretion is wide and unfettered, and is exercised to achieve justice given the particular circumstances of each application (*Stanley Kangethe Kinyanjui -v- Tony Ketter & 5 others* [2013]eKLR). The applicant must satisfy the Court that he has an arguable appeal, and that, if stay is not granted, the appeal will be rendered nugatory.
8. In this application, however, the applicant’s appeal to the Environment and Land Court was dismissed with costs. This is, therefore, a negative order which is incapable of stay, because the Environment and Land Court did not order the parties to do anything or refrain from doing anything. On the basis of *Western College of Arts and Applied Sciences -v- Oranga & Others* [1976]KLR 63, we find that the application cannot be granted as there is nothing existing out of the Environment and Land Court’s judgment for this Court to stay.
9. The result is that we dismiss the application with costs.

**DATED AND DELIVERED AT NYERI THIS 24<sup>TH</sup> DAY OF AUGUST 2023.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**A.O. MUCHELULE**



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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

