



Alldays Limited & 2 others v Kamande & another (Sued as the Secretary and Treasurer of Kiamura Self Help Group and in representative capacity on behalf of 9 other Respondents as per the authority to file suit at superior court) (Civil Application E317 of 2022) [2023] KECA 1128 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KECA 1128 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E317 OF 2022
HM OKWENGU, A ALI-ARONI & JM MATIVO, JJA
SEPTEMBER 22, 2023**

BETWEEN

ALLDAYS LIMITED 1ST APPLICANT

BERNICE KANINI NGOTHO (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE JAMES MUINDI NGOTHO (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ANTHONY ATHANUS NGOTHO) 2ND APPLICANT

JAMES MUINDI NGOTHO (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ANTHONY ATHANUS NGOTHO) 3RD APPLICANT

AND

MINNIE WAHU KAMANDE 1ST RESPONDENT

ELIZABETH WANJIRU NGATIA 2ND RESPONDENT

SUED AS THE SECRETARY AND TREASURER OF KIAMURA SELF HELP GROUP AND IN REPRESENTATIVE CAPACITY ON BEHALF OF 9 OTHER RESPONDENTS AS PER THE AUTHORITY TO FILE SUIT AT SUPERIOR COURT

(Being an application under Rule 5(2(b) of the Court of Appeal Rules 2022 for stay of execution and/or stay of further proceedings pending the lodging, hearing and determination of an intended appeal from the Judgment of the Environment and Land Court at Machakos (C. Ochieng, J) delivered on 26th July 2022 in ELC No. 454 of 2017)



RULING

1. By a notice of motion dated September 7, 2022, the applicants have moved this Court for two main orders. First is, an order of stay of execution of the Judgment and Decree issued by the Hon Lady Justice C Ochieng J on July 26, 2022 in Machakos Environment & Land Court (ELC) No 454 of 2017, pending the hearing and determination of an appeal by the applicants. Secondly, an order of stay of proceedings in Machakos ELC No 454 of 2017, pending the hearing and determination of the appeal.
2. The applicants are aggrieved by the judgment of the ELC in which the learned Judge granted the respondents a permanent injunction restraining the applicants, their servants or agents from trespassing, evicting, disposing of, selling or charging or in any way interfering with the respondents' quiet use, possession, and occupation of several properties in Mavoko town namely: Mavoko Town Block 2/392; Block 2/1483/ Block 2/1378; Block 2/1379; Block 2/1380; Block 2/1361; Block 2/1359; Block 2/1362; Block 2/1363; Block 2/1360; Block 2/1440; Block 2/1481; Block 2/1482; Block 2/1486; Block 2/1394; Block 2/1395 and Block 2/1396 (herein suit properties).
3. The learned Judge also ordered the applicants to effect the transfer of the aforementioned suit properties to the various persons identified in the order, within 90 days from the date of the judgment, failing which the Deputy Registrar of the ELC would execute all the necessary consents including conveyance documents, to give force to the effectual transfer of the suit properties as well as registration of each parcel of land in the name of the respective persons.
4. The applicants having filed a notice of appeal have now moved to this Court for the aforesaid orders, contending that the intended appeal raises arguable issues as demonstrated in a draft memorandum of appeal which they have availed. They urge that if stay of execution and stay of proceedings is not granted, their intended appeal if successful, will be rendered nugatory.
5. The application is supported by an affidavit sworn by the 3rd applicant James Muindi Ngotho, (Muindi) who is one of the co-administrators of the estate of Anthony Athanus Ngotho (deceased). Muindi has produced a death certificate showing that Elizabeth Mueni Ngotho who was one of the Co-administrators of the estate of Anthony Athanus Ngotho (deceased) has also died. He maintains that the applicants' motion is in compliance with Rule 5(2)(b) of the Court of Appeal Rules as stated in *Githunguri vs Jimba Credit Corporation* No 2 [1988] KLR 838.
6. Muindi identifies the issues which they intend to canvas on appeal as whether the trial court erred: in returning a finding that the respondents were creditors in Nairobi Succession Cause No 533 of 2007 concerning the estate of Anthony Athanus Ngotho (deceased), despite the respondents flagrantly failing to participate in the suit whose existence they were well aware of; in making a declaration that the suit properties were unavailable to the applicants and third parties since the respondents were already creditors over them, notwithstanding the proceedings and orders issued in the succession cause regarding the distribution of the suit properties; in failing to take judicial notice of the observations made by Angote, J in the ruling rendered in Machakos ELC on January 31, 2019 that the purchase price of the suit properties were not clear, and that the respondents needed to prove at trial that they met their part of the bargain; in failing to return a finding whether the respondents had ascertained the purchase price of the respective suit properties at trial; and in shifting the burden of proof to the 2nd and 3rd applicants by finding that the applicants had to prove that they had received payment of the purchase price of the suit properties, notwithstanding the provisions of section 107 of the *Evidence Act* that the respondents asserting none payment should prove that fact.



7. The applicants maintain that their intended appeal will be rendered nugatory, if the orders sought are not granted as the respondents will proceed to effect the transfer of the suit properties in accordance with the judgment of the ELC, and the respondents will be at liberty to dispose of, lease, transfer or in any other way deal with the properties, notwithstanding the pendency of the applicants' intended appeal; that the suit properties have been distributed in the succession cause and are now in the names of third parties who are not party to the suit, and the applicants are therefore unable to effect the transfers as they are not the registered owners of the suit properties; and that the 2nd and 3rd applicants are only in possession of one property, that is Mavoko town block 2/1486. The applicants assure the Court that they are ready and willing to comply with any reasonable conditions that the Court may impose for due performance pending the hearing and determination of the intended appeal.
8. In support of the motion, the applicants have filed written submissions in which they reiterate that their intended appeal is arguable and has good chance of success. They have identified issues which they believe are arguable including the orders affecting third parties who were not heard. They maintain that unless the orders sought are issued, the intended appeal will be rendered nugatory. They submit that there has been no delay in instituting the appeal or the application as the applicants were enjoying an order of stay granted by the ELC and, therefore, filed the application after the expiry of the order of stay.
9. The respondents have opposed the motion through a replying affidavit sworn by Minnie Wahu Kamande (Minnie) who is the secretary of the Kiamura Self-Help Group. She contends that the applicants have not explained the inordinate delay in filing the application for stay of execution and have only filed the application upon being served with a letter to comply with the ELC judgment; that the application was an afterthought prompted by the letter and is purely aimed at frustrating the respondents from enjoying the fruits of the judgment; that the draft memorandum of appeal does not raise any triable issues or arguable grounds; that the ELC became functus officio upon delivery of the ELC judgment, and that there are currently no ongoing proceedings before the ELC that is capable of being stayed; and that the applicants have not met the conditions set out in Rule 5(2)(b) of the Court of Appeal Rules.
10. The respondents have also filed written submissions in which they reiterate what was stated in the replying affidavit, that there was inordinate delay in filing the applicants' motion; that the intended appeal as exhibited in the draft memorandum of appeal is frivolous and not arguable as the applicants intend to raise a plethora of issues which did not even arise in the ELC; that the applicants are only interested in ensuring that the respondents do not get title deeds to their respective properties; and that the prayer to have the proceedings in the ELC stayed is superfluous as the ELC became functus officio after rendering its judgment. The respondents therefore urge the court to dismiss the applicants' motion.
11. The principles under which an application under Rule 5(2)(b) may be determined are now clear, having been restated by this Court in many decisions including *David Morton Silverstein v Atsango Chesoni* [2002] eKLR; *Ruben & 9 others versus Nderito and Another* [1989] KLR 455; and *Stanley Kangethe Kinyanjui V Tony Ketter & 5 others* [2013] eKLR. The principles are: First, that the applicant must demonstrate that he/she has an arguable appeal that is not frivolous, and second, that the intended appeal will be rendered nugatory if the orders sought are not issued.
12. The applicants have filed a draft memorandum of appeal in which they have raised several issues that they contend are arguable. As was stated in *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008, the issues raised in the intended appeal do not have to be issues that will necessarily succeed on appeal. It is enough if the issues are capable of argument



as it is not for us at this stage to determine the merits of the arguments. In this regard the issues raised in the grounds of appeal pass muster.

13. On the nugatory aspect, 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 (*Reliance Bank Ltd vs. Norlake Investments Ltd* [2002] 1 EA 227). It is clear that the dispute concerns various land parcels, and that if the orders that were granted by the learned Judge are not stayed, the title to the suit properties will be transferred to the respondents who may dispose of the suit properties or deal with them in a manner that will put them beyond the applicants' reach and it may be difficult to reverse this in the event that the applicants succeed in the appeal. As was stated in *Yellow Horse Inns Limited & another v A.A. Kawir Transporters Ltd & 4 Others* [2014] eKLR:

“...in a situation where ownership and possession is being hotly contested by several claimants, the possibility of ownership falling prematurely into the hands of a party who may ultimately not be adjudged the rightful owner at the conclusion of the litigation cannot be ruled out. The net result of such a situation arising is that the applicants if ultimately adjudged the lawful and rightful owners may very well have to undergo great expense if not inconvenience to pursue other persons for the recovery of ownership or monetary value.

14. As regards the prayer for an order of stay of proceedings pending appeal, the applicant has not satisfied this Court that apart from the execution proceedings there are any other proceedings going on or likely to go on. In the circumstances, the order for a general stay of proceedings is not deserved and is declined.
15. The upshot of the above is that the applicants have satisfied the twin principles for grant of orders of stay of execution pending appeal and we, therefore, grant this particular order as prayed.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

ABIDA ALI-ARONI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

