



**Barkutwo & another v District Land Adjudication and Settlement  
Officer Elgeyo Marakwet County & 15 others (Civil Application  
E014 of 2022) [2023] KECA 1104 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1104 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E014 OF 2022  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**MOSES BARKUTWO ..... 1<sup>ST</sup> APPLICANT**

**NICHOLAS KIGEN ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER ELGEYO  
MARAKWET COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**BENJAMIN KIGEN ..... 3<sup>RD</sup> RESPONDENT**

**DAVID KORIR ..... 4<sup>TH</sup> RESPONDENT**

**MOSES BARMOTO ..... 5<sup>TH</sup> RESPONDENT**

**STEPHEN SANG ..... 6<sup>TH</sup> RESPONDENT**

**CHRISTOPHER SANG ..... 7<sup>TH</sup> RESPONDENT**

**JEREMIAH CHANGWONY ..... 8<sup>TH</sup> RESPONDENT**

**SAMUEL CHEMWOTEI ..... 9<sup>TH</sup> RESPONDENT**

**JOAHAN KIMULWO ..... 10<sup>TH</sup> RESPONDENT**

**DAVID BARBOI ..... 11<sup>TH</sup> RESPONDENT**

**WILSON BARMAO ..... 12<sup>TH</sup> RESPONDENT**

**STEPHEN KIPRONO KIPCHOGE ..... 13<sup>TH</sup> RESPONDENT**

**SAMWEL KWAMBAI ..... 14<sup>TH</sup> RESPONDENT**



JOSEPH WENDOT ..... 15<sup>TH</sup> RESPONDENT

RICHARD KIGEN ..... 16<sup>TH</sup> RESPONDENT

*(An application for Conservatory Order on adjudication process  
in Emsea/ Chang’ach Adjudication Section pending hearing and  
determination of the intended appeal In ELC Petition No. 16 of 2022)*

## RULING

1. Moses Barkutwo and Nicholas Kigen (the 1<sup>st</sup> and 2<sup>nd</sup> applicants respectively) have moved this court by a motion dated October 18, 2022, for a substantive order that:  
  
“pending the hearing and determination of Eldoret Court of Appeal civil appeal No E024 of 2022 Barkutwo & another v The District Land Adjudication & Settlement Officer Elgeyo-Marakwet County & 14 others, a conservatory order do issue to restrain the respondents and the interested parties their servants, agents, representatives and or/ anyone else acting for and/or their behalf from continuing with the said adjudication process in Emsea/ Chang’ach Adjudication Section.”
2. The District Land Adjudication and Settlement Officer Elgeyo Marakwet County and 15 others are the respondents.
3. The application is premised on the grounds on its face and the supporting affidavit of even date sworn by Moses Barkutwo. The said grounds are that the applicants’ petition dated August 27, 2022 was dismissed with costs to the respondents and interested parties, notwithstanding the fact that the court conceded that there was non-compliance with the two-third gender rule requirement, in violation of the constitutional edict. That the court excused the non-compliance on purported cultural grounds.
4. Consequently, the 1<sup>st</sup> respondent, in a public baraza held on October 12, 2022, published a notice of intention to commence the adjudication process on October 25, 2022 in defiance of non-compliance.
5. The applicants filed an appeal against the impugned judgment which they depose, is arguable with high chances of success. That unless their application is allowed as sought, the appeal shall be rendered nugatory, and they shall suffer substantial loss. They also depose that the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji* (2014) eKLR, appreciated that the principle of “public interest” should be considered when giving conservatory orders.
6. In response, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit sworn by Elgeyo Marakwet County Land Adjudication and Settlement Officer, G.M Bosire on March 20, 2023. They depose that in the impugned judgement the applicants petition was dismissed. That the court found that there was sufficient evidence to show that there was public participation and that the election of the 3<sup>rd</sup> to 16<sup>th</sup> respondents as members of the Land Adjudication Committee was competitive, transparent, open, and fair.
7. They aver that following the judgment, the adjudication process had been undertaken to near logical conclusion and an order to stay the almost complete process would not be efficacious. That it would result in a miscarriage of justice, loss of public funds and unnecessary anxiety and setback to the general populace, who are desirous to see the adjudication completed.



8. The respondents also aver that the intended appeal is not arguable for reasons that the primary ground that the gender aspect was not fulfilled when constituting the adjudication committee is refuted, since it was demonstrated that the 3<sup>rd</sup> to 16<sup>th</sup> respondents were elected, as opposed to the applicant's claim that they were appointed. They assert that the appeal will not be rendered nugatory since the 3<sup>rd</sup> to 16<sup>th</sup> respondents have been performing the duties of Land Adjudication Committee Members, and the applicants can be compensated by award of damages, should their appeal succeed.
9. It is deposed that the balance of convenience and public interest militate towards allowing the adjudication process to be concluded, so that the residents of Emsea/Chang'ach section can be fully ascertained and public funds are not lost.
10. In opposition to the application, the 3<sup>rd</sup> to 16<sup>th</sup> respondents also filed a replying affidavit sworn by the Chairperson of Emsea/ Chang'ach Land Adjudication Committee, David Barboi, on November 4, 2022. They depose that the present application was an afterthought, the applicants having waited for over three months to file it, after the judgment was delivered. It is averred that the intended appeal is not arguable as the trial court correctly found that the applicants did not rebut the evidence by the respondents that there was public participation. They assert that there is no evidence that Covid 19 pandemic disenfranchised senior citizen. Lastly, that in electing the members of the committee, the people were entitled to choose their own representatives notwithstanding the two third rule.
11. It is further deposed that the appeal cannot be rendered nugatory even if the adjudication process is completed, because the petition only challenged the procedure of the appointment of the adjudication committee and not the adjudication process itself. In addition, the rights of the applicants and all other parties are protected by the *Land Adjudication Act*, which gives parties elaborate rights for challenging any elections they are unsatisfied with. That the applicants have not demonstrated that any of their substantive property rights will be violated if adjudication proceeds to conclusion.
12. It is averred that the journey of acquiring the title deeds has been bumpy, long, and expensive and it would be frustrating for the residents of Emsea and Chang'ach sub-locations not to benefit from the adjudication process on account of a frivolous and malicious application, which does not serve any of their interests.
13. The firm of M/S Tororei & Company Advocates filed written submissions dated October 31, 2022 on behalf of the applicants, while Senior State Counsel, M.W Odongo filed written submissions dated March 20, 2023 on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the firm of M/S Kalya & Company Advocates filed theirs dated November 9, 2022 on behalf of the 3<sup>rd</sup> to 16<sup>th</sup> respondents. The submissions were highlighted during plenary on March 21, 2023.
14. The applicants urge that they have an arguable appeal as enumerated in their memorandum of appeal. They reiterate that the trial court found that there was non-compliance with the gender rule requirement as set out under article 27 of the *Constitution*, but excused it on cultural basis. They contend that the issue of whether the court has the power to excuse non-compliance with a constitutional provision is not a frivolous.
15. Relying on the Supreme Court decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Other* (2014) eKLR and *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* (2011) eKLR, they assert that the issues raised in this application are of public importance. That it is therefore, necessary for this court to issue conservatory orders, failure to which the subject matter shall be overtaken by events and the appeal rendered nugatory. Further, that there is a danger of public funds being spent in an exercise that is illegal and is costing taxpayers' money.



16. In rebuttal, State Counsel, M.W Odongo urges that the appeal is frivolous. That the issue of public participation was extensively belaboured in the trial court and the applicants have offered no evidence to rebut the court's finding. Also, that the trial court rightly found that what the [Land Adjudication Act](#) anticipates is not appointment of the Land Adjudication Committee members but rather an election. On the issue of senior citizens being disfranchised due to Covid 19 pandemic, it is contended that it was beyond the control of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. That Covid-19 pandemic effects notwithstanding, government operations did not stop and in any case, there was no proof that indeed, senior citizens were disenfranchised.
17. On the nugatory aspect, counsel argues that when the petition was dismissed, the adjudication process continued from where it had been left and is almost complete. He asserts that the general public will be prejudiced if an injunction is granted at this stage, since the local citizens are upbeat that the process shall be concluded sooner than later so that they can enjoy the commercial benefits in their land. That a huge amount of public funds have been utilized in the exercise and any further delay is likely to be a blow to the taxpayer.
18. He submits that the reliefs sought in the trial court by the applicants are an order for damages and a declaration that their rights and fundamental freedoms were violated. That even if the stay is not granted, these reliefs are still available to the applicants if the intended appeal succeeds. Further, that if the local people were to suffer any prejudice by the 3<sup>rd</sup> to 16<sup>th</sup> respondents presiding over the adjudication, the [Land Adjudication Act](#) provides other mechanism for challenging any finding or decision of the Land Adjudication Committee.
19. The 3<sup>rd</sup> to 16<sup>th</sup> respondents reiterate their replying affidavit in their submissions and agree with the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the intended appeal is frivolous, and it will not be rendered nugatory if the appeal succeeds.
20. We have considered the application, the replying affidavits and the rival submissions. This application is brought under rule 5(2)(b) of this [Courts Rules](#). The rule is 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 which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory. These principles are well entrenched in this court's decisions. A case in point is the decision in [Trust Bank Limited and another v Investech Bank Limited and 3 others](#) (2000) eKLR where it was stated thus:

“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...”
21. The applicants urge that they have satisfied the first leg of this rule. That their intended appeal is arguable on the grounds that the trial court conceded that the formation of the adjudication committee did not comply with article 27 of the [Constitution](#) on the two-third gender rule, yet it excused this non-compliance. Also, that there was non-participation of the members of public and senior citizens were disfranchised due to Covid-19 pandemic. The respondents on the other hand oppose these grounds on the basis that the Adjudication Committee members were elected, and the people were entitled to choose their own representatives notwithstanding the two- third rule and that the issues raised herein were be-laboured in the trial court and not found to have been proved.



We are guided by the decision in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR, this court described an arguable appeal as follows:

- “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.”

Having looked at the memorandum of appeal, and the grounds enumerated there at, we are satisfied that the applicants have demonstrated that they have an arguable case.

- 22. On the second leg, the applicants argue that if the application is not allowed, and the appeal succeeds it will be rendered nugatory. The applicants further argue that the issues arising are of public importance and therefore, it is necessary for conservatory orders to issue. That public funds shall be spent on an exercise that is illegal. In rebuttal, the respondents argue that the larger public stands to be prejudiced if the order sought is granted. They state that the balance of convenience tilts in favour of not allowing the orders sought and that it has not been demonstrated that the appeal will be rendered nugatory if it succeeds.
- 23. The applicants aver that the 1<sup>st</sup> respondent through a public baraza held on the October 12, 2022, published a notice of intention to commence the adjudication process on the October 25, 2022. The respondents confirm that 99% of the process is done and the adjudication process is near completion. It is also clear from the pleading that this process of adjudication had stalled for some time.
- 24. In respect to nugatory aspect, *Stanley Kang'ethe Kinyanjui* supra 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”.
- 25. We have weighed the contending interests of the parties in this application and are of the view that in the event the appeal succeeds the applicants can be reasonably compensated. We are therefore not convinced that if the order sought is not granted and the appeal succeeds it will be rendered nugatory. As such, we find that the second limb of the rule has not been satisfied. Accordingly, this application is dismissed with costs to the respondents.

**DATED AND DELIVERED IN ELDORET THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**



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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

