



Machage v Kiruri (Legal representative of the Estate of Eunice Wariara Ngigi (Deceased) (Civil Appeal (Application) E092 of 2022) [2023] KECA 1114 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KECA 1114 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E092 OF 2022
F SICHALE, FA OCHIENG & WK KORIR, JJA
SEPTEMBER 22, 2023**

BETWEEN

DOUGLAS MUSA MACHAGE APPLICANT

AND

**SAMUEL NGIGI KIRURI (LEGAL REPRESENTATIVE OF THE ESTATE OF
EUNICE WARIARA NGIGI (DECEASED) RESPONDENT**

(Being an application for stay of execution pending the hearing and determination of an intended appeal from the Judgment of the Environment and Land Court at Nakuru, (D. O. Ohungo, J.) dated 25th May, 2022 in ELC Case No. 43B of 2016)

RULING

1. Before us is an application dated November 28, 2022 in which the applicant prays for an order of stay of execution of the judgment of the Environment and Land Court (D. O. Ohungo, J.) dated May 25, 2022 pending the hearing and determination of the intended appeal.
2. The application is brought pursuant to rules 5(2)(b) and 44(1) of the *Court of Appeal Rules, 2022* and sections 3(1) & (2), 3A and 3B of the *Appellate Jurisdiction Act*. The application is supported by the applicant's affidavit and on the grounds that:
 - a. The applicant, vide a sale agreement dated March 12, 2011 purchased 10 acres of land from the respondent for a consideration of Kshs. 6,000,000/-.
 - b. The respondent attempted to resale the land, prompting the applicant to institute the trial court suit to compel the respondent to complete the sale.
 - c. During the pendency of the suit, the respondent sold the land to a third party who has since filed Nakuru ELC No 308 of 2018.



- d. The trial court held that the sale agreement dated March 12, 2011 was unenforceable and ordered the respondent to refund the applicant the purchase price.
 - e. The applicant was also ordered to vacate Lr No 4815/5 and 4815/6 within 90 days of the impugned judgment, and in default, the respondent shall be at liberty to evict him.
 - f. The applicant was dissatisfied with the judgment and has since lodged a Notice of Appeal and requested for proceedings on May 27, 2022.
 - g. The respondent has since written a letter of intention to commence the execution of the decree before the lapse of the 90 days.
 - h. The respondent has also cut down his live fence and trees on the land, and proceeded to subdivide the land.
 - i. The applicant believes that the intended appeal is arguable on the grounds: whether a sale agreement is unenforceable on account of lack of a signature of a co-owner of land, where the co-owner has knowledge of the sale and benefitted from the proceeds of the sale; whether the court erred in making an eviction order when the said order was not prayed for; and whether the court erred in holding that there was no evidence of payment of Kshs. 300,000/- for outgoings when the evidence is on record and the same has not been denied by the respondent.
 - j. The applicant is apprehensive that if the judgment is not stayed, he will be evicted, his developments pulled down, his trees cut down resulting in substantial loss and that the intended appeal will be rendered nugatory.
 - k. The applicant is willing to furnish security and fulfil any conditions the court may order for the due performance of the decree.
 - l. The applicant is of the view that the orders sought will not prejudice the respondent.
3. In his replying affidavit, the respondent stated that:
- a. The application is frivolous and an abuse of court process as it is meant to only delay him from enjoying the fruits of the judgment spanning to over 6 years.
 - b. The impugned judgment directed that the applicant vacates the land within 90 days and the respondent to pay the Kshs. 6 Million with interest at court rates.
 - c. He did not execute the sale agreement dated March 12, 2011 and therefore the said agreement was invalid and unenforceable.
 - d. Despite the judgment, the applicant moved to the land and planted crops therein. The crops would not have matured on August 25, 2022 when he was expected to vacate.
 - e. In the letter dated May 31, 2022 he instructed his advocates to refund the applicant Kshs. 6 Million and further requested the applicant to compute the interest for comparison.
 - f. By the contents of the applicant's letter dated June 8, 2022 the present application can be seen as an abuse of the court process.
 - g. The applicant is not in occupation of the land and is not conducting any activities therein and therefore, he will not suffer any prejudice should the application be dismissed.
 - h. The intended appeal will not be rendered nugatory as the respondent is willing to refund the decretal amount as ordered in the judgment.



- i. The applicant has not demonstrated the substantial loss or prejudice he will suffer if the application is not allowed.
 - j. The application is brought in bad faith the applicant having failed to obtain similar orders from the trial court.
 - k. The application lacks merit and the same should be dismissed.
4. At the hearing of the application Mr. Ratemo, learned counsel appeared for the applicant whereas Mr. Chege, learned counsel appeared for the respondent. Counsel relied on their respective written submissions.
 5. The applicant pointed out that the twin principle to be satisfied before a grant of stay of execution are: there is an arguable appeal; and the appeal will be rendered nugatory in the absence of stay. To buttress this submission, the applicant relied on the cases of *Rajab Ahmed Karume v the Chief Land Registrar & others*, Civil Application No E390 of 2020 and *Ben Nyakundi v Rajab Ahmed Karume & 3 others* [2020] eKLR.
 6. On whether he has an arguable appeal or not, the applicant made reference to the grounds raised in his draft memorandum of appeal. He argued that he had demonstrated various arguable points to be raised in the appeal like, the learned Judge erred in holding that the sale agreement dated March 12, 2011 was invalid and unenforceable. The applicant was of the view that an arguable appeal does not necessarily mean that the appeal or intended appeal must be one which ought to succeed but rather, one that raises a question of law or reasonable argument deserving consideration by the court. The applicant placed reliance on the cases of *Dennis Mogambi Mong'are v Attorney General & 3 others*, [2012] eKLR and *Rajab Ahmed Karume v the Chief Land Registrar & others*, (*supra*).
 7. On the nugatory aspect, the applicant pointed out that he was in exclusive possession of the land for over 10 years and it was not possible for him to get alternative property within the same locality. The court ordered that the applicant vacates the land or he be forcibly evicted. There is evidence that the respondent has previously attempted to sale the land to a third party. The respondent has since cut down the applicant's trees and subdivided the land with a view of selling it to third parties. The applicant is apprehensive that if stay of execution is not granted, the respondent will dispose of the land and render the intended appeal nugatory. The applicant urged that it is in the interest of justice that the application is allowed with costs.
 8. Relying on the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others* [2013] eKLR the respondent was of the view that the applicant had not demonstrated the requirements of rule 5(2)(b) of the *Court of Appeal Rules*. The respondent contended that the applicant had not complied with rules 84 and 85 of the *Court of Appeal Rules* as the Notice of Appeal lodged on June 6, 2022 ought to be deemed as withdrawn, having been filed out of time. The respondent was of the view that, given the circumstances, the applicant does not have a meritorious appeal to be considered by the court.
 9. On the nugatory aspect, the respondent submitted that the applicant had not demonstrated how the intended appeal would be rendered nugatory if there is execution of the impugned judgment. The applicant has not adduced any evidence that the respondent intends to dispose of the land. The respondent further pointed out that transfer of land is reversible and therefore, should the appeal succeed, the land would be transferred to the applicant's name and in any case, the respondent has demonstrated that he is a man of means and as such he is ready and willing to compensate the applicant in damages should the appeal succeed. The respondent urged that the application be dismissed with costs.



10. We have carefully considered the application, the grounds in support thereof, the affidavits, submissions by counsel, authorities cited and the law. We take cognizance of the fact that the jurisdiction of this Court under rule 5(2)(b) is original, independent and discretionary. However, we note that the discretion is to be exercised judiciously and with reason; not on impulse or pity.
11. First, we note that there is a notice of appeal on record. Although the respondent invited this Court to deem the said notice as withdrawn, we decline to do as there is no application before us, currently, requiring us to give consideration to that contention.
12. And as regards the assertion that there is no meritorious appeal, we find that that is an issue which can only be determined substantively, by the court that would be called upon to hear the appeal. It would be premature for us to purport to determine the merits or otherwise of the appeal, at this stage.
13. Rule 5(2)(b) is a procedural innovation designed to enable the court to preserve the subject matter of an appeal where one has been filed or an intended appeal where the notice of appeal has been filed. In the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others*, (*supra*) this Court stated inter alia:

“That in dealing with rule 5(2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court.”

The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”
14. It follows therefore that, the applicant has a duty to demonstrate that he has an arguable appeal, and upon satisfying that principle, he has the additional duty to demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay as demonstrated in the case of *Ben Nyakundi v Rajab Ahmed Karume & 3 others*, (*supra*).
15. In determining whether the appeal is arguable or not, this Court in the case of *Dennis Mogambi Mang'are vs Attorney General & 3 others*, (*supra*) held that:

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”
16. On whether the applicant has established an arguable appeal, we have considered the applicant’s annexed draft memorandum of appeal. Among the issues raised and emphasized by the applicant which we think merit consideration by this Court is the contention that the court held that the sale agreement dated March 12, 2011 was invalid and unenforceable as the respondent did not sign the same. The other interesting issue being raised in the draft memorandum is whether or not the trial court could make an order directing the applicant to vacate the land when there was no such prayer in the pleadings. The respondent contends that he did not co-sign the sale agreement and therefore, the agreement was invalid and unenforceable.
17. We find that the solution to the contestations by the parties herein, can only be determined at a full hearing. Therefore, this and the other issues raised in the draft memorandum of appeal are in our considered view not frivolous and are deserving of the court’s consideration.
18. On whether the appeal will be rendered nugatory should the impugned judgment not be stayed, it is not disputed that the applicant has been in possession of the land, has erected a live fence, planted trees and was farming on the land. It is also trite that the trial court could not have ordered the applicant



to vacate the land if he was not in occupation of the said land. The respondent has also not disputed that he sent the applicant a letter informing him of his intention to execute the decree or that he has cut down the applicant's fence and trees.

19. We find the concern by the applicant that he might be evicted from the land to be a legitimate concern. It is our considered view that, the applicant might be evicted from the land if the orders sought are not granted and he will be forced to look for alternative land having been in occupation of the land for over 10 years. The applicant has also demonstrated that he will not be able to obtain alternative land at the same price being offered as compensation in the event he is evicted and the orders sought are not granted. In *Reliance Bank Ltd v Norlake Investments Ltd* [2002] E.A. 227, this Court stated that:

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.” (Emphasis ours).

20. In the circumstances of the present case, we are persuaded that the applicant has demonstrated an arguable appeal which may be rendered nugatory should stay not be granted.
21. Accordingly, the application dated November 28, 2022 is hereby allowed. Costs shall abide the outcome of the intended appeal.

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

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

