



REPUBLIC OF KENYA



KENYA LAW
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Pulei & 5 others v Pulei (Suing as Personal and Legal Representative of Kasaine Pulei alias Kasaine Ole Pulei - Deceased) & 2 others (Civil Appeal (Application) E340 of 2023) [2023] KECA 1132 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KECA 1132 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E340 OF 2023
F TUIYOTT, JW LESSIT & PM GACHOKA, JJA
SEPTEMBER 22, 2023

BETWEEN

MENTA ANERISA PULEI 1ST APPELLANT
MATIPEI OLE RISA 2ND APPELLANT
KIPIRORI OLE RISA 3RD APPELLANT
MPOYE OLE RISA 4TH APPELLANT
KIPENO ENERISA 5TH APPELLANT
KONGO OLE RISA MUNII 6TH APPELLANT

AND

MUNKET PULEI (SUING AS PERSONAL AND LEGAL REPRESENTATIVE OF KASAIN PULEI ALIAS KASAIN OLE PULEI - DECEASED) 1ST RESPONDENT
COUNTY LAND REGISTRAR, KAJIADO DISTRICT 2ND RESPONDENT
COUNTY SURVEYOR, KAJIADO DISTRICT 3RD RESPONDENT

(An application for stay of execution against the ruling/order of the Environment and Land Court of Kenya at Kajiado (M. N. Gicheru, J.) dated 15th March 2023 in ELC Case No. 960 of 2017)



RULING

1. Before us is a Notice of Motion dated 1st September 2023 said to be under rules 5(2) (b), 47, 49(5) of the *Court of Appeal Rules, 2022*, sections 3A and 3B of the *Appellate Jurisdiction Act* and Article 159 of *the Constitution* seeking the following prayers:
 - a. Spent
 - b. That pending the hearing and determination of the appeal lodged herein, this Honourable Court be pleased to grant a stay of the Ruling/Order of the Environment and Land Court of Kenya at Kajiado (M. N. Gicheru, J.) dated 15th March 2023, in ELC Case Number 960 of 2017.
 - c. That the status quo of the suit property be maintained pending the hearing and determination of the appeal.
2. In order to contextualize the application, it is necessary to give a background in summary. The applicants were the defendants in ELC Case No 960 of 2017, Kajiado High Court and the 1st respondent was the plaintiff. The parties are family members. The dispute was on the size of two parcels of land namely; LR Nos. 348 and 347 that were shared between the two families. It was contended that LR No 348 was bigger than LR No 347 by approximately 26.86 hectares. The 1st respondent sued the applicants seeking among other prayers, the resurvey of the land and sharing in equal portions. Upon hearing the parties, the ELC (M. N. Gicheru, J.) held that the 1st respondent's claim for resurvey and re-subdivision of the land was merited. The Court further held that there was a mistake in the subdivision of the two parcels as a result of which the applicants' parcel was bigger than the respondent's by 26.86 hectares. The Court allowed the 1st respondent's claim revoking the various subdivisions that had taken place. The Court ordered that there be a resurvey of land parcels Nos. LR 348 and 347 to establish the total acreage and a re - subdivision into two equal portions. It is instructive to note that the applicants did not file a notice of appeal or appeal against this judgment.
3. All was quiet until 16th May 2022, when the applicants filed an application for review of the judgment dated 20th December 2021. The application in the ELC sought orders for review, varying and/ or setting aside the judgment dated 20th December 2021 and for the hearing of the case to start afresh. Upon hearing the parties, the Court dismissed the application and the relevant part of the ruling is as follows:

“Finally, the issues before the court were only two. It was not disputed that the land was to be shared equally between the plaintiff on the one part and the defendants on the other. It was also not disputed that the plaintiff's land was less in size than it should be. The only issue was whether his claim for the rightful share of land could be defeated by limitation. The court found that it could not be defeated. Where then is the new evidence?

There is none. Any new evidence would be to the effect that the two parcels numbers 347 and 348 are equal in size. The truth is that they are not.

The second new evidence that would warrant review would be that the plaintiff was not entitled to an equal share. This has never been the defendants' defence. There being no new evidence along the two issues above, I find no merit at all in the application dated 16/5/2022



and I dismiss it with costs to the plaintiff. The prayer for the new counsel to come on record is however allowed.”

4. Aggrieved by that ruling, the applicants lodged a Notice of Appeal of their intention to appeal against the said decision and now seek stay of execution of the order of the ELC. In an affidavit sworn by Kipirori ole Risa, the applicants’ position is that the appeal is arguable and has cited various grounds, among others: that the ruling of the ELC construed the provisions of orders 45 of the [Civil Procedure Rules](#) narrowly; that the judge erred in holding that there was no error apparent on the face of record; that there was no discovery of new and important evidence to warrant reviews; that discretion was not exercised properly; and that the mistake of the previous advocate should not have been visited on the applicant.

5. The applicants have also filed written submissions dated 11th September 2023 which were highlighted orally at the hearing.

The grounds reiterate that the applicants have an arguable appeal and that the appeal will be rendered nugatory unless the stay is granted. The applicant cites the ruling of this Court in [RWW v EKW](#) [2019] eKLR.

6. In opposition, the 1st respondent has filed a replying affidavit sworn on 7th September 2023. This replying affidavit gives a background to the suit and we take the liberty to summarize its’ contents as follows: that the application is incompetent; that the applicants did not appeal against the judgment that was delivered on 20th December 2021; that the land registrar had implemented the decree of the ELC and that land measuring about 16 hectares had been returned to the estate of the 1st respondent’s father and that therefore the application had been overtaken by events. On their part, the 2nd and 3rd respondents though duly served did not file any response or submissions.

7. In addition, the 1st respondent filed written submissions dated 7th September 2023 in support of their arguments which, in nutshell ,are: that the applicants have not met the threshold for grant of the order for stay of execution as the intended appeal is not arguable; that in any event the appeal will not be rendered nugatory as the decree has been implemented; that the order sought to be stayed is of a negative nature thus not capable of being stayed; and that in any event the applicants failed to appeal against the judgment and that the application is incompetent. The 1st respondent cites [Multimedia University & another v Professor Gitile N. Naituli](#) [2014] eKLR and [Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others](#) [2013] eKLR in support of his arguments.

8. The principles that apply in applications under rule 5(2) (b) of this Court’s Rules for stay of execution pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal, or appeal (if any) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory, if execution or further proceedings arising from a judgment, decree or order are not stayed. These principles have been enunciated in various judicial pronouncements of this Court, including those cited by the parties.

9. On the first limb of the twin principles, in [Anne Wanjiku Kibe v Clement Kungu Waibara & IEBC](#) [2020] eKLR this Court held that for stay orders to issue, the applicant must demonstrate that the appeal or intended appeal would, in the absence of stay be rendered nugatory. This brings us to the question: Is the intended appeal arguable?

10. Before we address the question, whether the applicants have met the threshold for the grant of the order for stay of execution, it is imperative that we first address the question of whether the orders sought are capable of being stayed in the first place. We note that the trial Judge dismissed the application



for review. Being an order for dismissal without any other order for any positive action to be taken, the order that the applicants are now seeking to stay are negative in nature. This Court has addressed this question in a number of authorities and it is now trite that an application that seeks to stay a negative order is incompetent as there is nothing to stay in a negative order. See Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR (quoted with approval in Supreme Court Petition No E004 of 2023 Kenya Tea Growers Association & others v The National Social Security Fund & others.)

11. In our view, applying to stay a negative order, as the applicants are attempting to do is an exercise in futility.
12. We also note that the applicants have also sought an order for the status quo to be maintained. The parties are not agreeable on what is the status quo as the 1st respondent maintains that the judgment of the ELC, which was not appealed against has been implemented. This Court cannot venture into the realm of speculation as urged by the applicants and order for maintenance of a status quo that is not clear and contested.
13. Even if we were to look into the issue whether the applicants have an arguable appeal, upon reading the grounds of appeal, the rival affidavits, the respective written and oral submissions of the learned counsels for the parties, we are not persuaded that the applicants have an arguable appeal. We will say no more on the merits or otherwise of those grounds, as we shall leave that question to the bench that will hear and determine the appeal.
14. Having held that the application is incompetent for seeking stay of execution of a negative order and having doubts on the arguability of the appeal, we need not address the second limb on whether the appeal will be rendered nugatory.
15. In view of the foregoing, we find that this application has no merit and we dismiss it with cost to the 1st respondent.

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

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

M. GACHOKA FCIARB

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

