



**Kirobon Farmers Co. Ltd v Nyarangi (Civil Application
E105 of 2022) [2023] KECA 1194 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1194 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E105 OF 2022
FA OCHIENG, LA ACHODE & WK KORIR, JJA
OCTOBER 6, 2023**

BETWEEN

KIROBON FARMERS CO. LTD APPLICANT

AND

SAMUEL ONCHURU NYARANGI RESPONDENT

(Being an application for stay of execution of the judgment and decree of the Environment and Land Court at Nakuru (M. Njoroge, J.) dated 21st June 2022 in ELC No. 29 of 2017)

RULING

1. Before us is a motion dated February 16, 2023 brought by the applicant, Kirobon Farmers Co Limited, pursuant to sections 3A and 3B of the [Appellate Jurisdiction Act](#), rules 5(2)(b) and 31 of the [Court of Appeal Rules](#) as well as article 40 of the [Constitution](#) of Kenya. In the application, the applicant seeks stay of execution and any further proceedings emanating from the judgment issued on June 21, 2022 by the Environment and Land Court (E&LC) in Nakuru E&LC Case No 29 of 2017. The applicant also prays for costs attendant to the application. The application is supported by the affidavit of Samuel K. Birir sworn on February 16, 2023.
2. The gist of the application is that the applicant being aggrieved with the judgment of the trial court has filed and served an appeal and record of appeal. That the applicant had lodged before the trial court an application for stay pending the hearing and determination of the appeal but the same was still pending determination as at the time of the lodging the present application. The applicant avers that the respondent, Samuel Onchuru Nyarangi, had obtained orders for police assistance on execution and was using the orders to threaten, harass and intimidate the applicant.
3. The applicant further avers that the respondent is apparently also not satisfied by the judgment and has filed an application to the trial court to review its judgment and issue an order of eviction. It is the applicant's assertion that the matter has become convoluted and that the existence of the application for



review by the respondent is an indication that the present appeal is arguable. The applicant also deposes that unless stay of execution is granted it stands to suffer substantial and undue loss and prejudice as the respondent intends to force his way into the applicant's parcel of land. The applicant therefore prays that stay of execution be granted.

4. The application is opposed by an undated replying affidavit sworn by the respondent. The respondent avers that he is the owner of the suit property as the title registered in the applicant's favour was invalidated. He adds that the applicant has a similar application seeking stay still pending before the trial court hence the present application renders the one live before the trial court untenable. He also avers that this matter is not convoluted as the two applications pending before the trial court were due for delivery of ruling on April 13, 2023. The respondent asserts that he has executed the decree of the trial court and what remains is the eviction of the applicant from the suit property. He also opposes the application on the grounds that it has been brought in bad faith and is targeted at denying him the opportunity to enjoy the fruits of his judgment; that the intended appeal is not arguable and has minimal chances of success; and, that he will suffer prejudice and irreparable loss if stay is granted. On a without prejudice basis, the respondent urges the Court to impose a condition of deposit of security to the tune of Kshs 100,000,000 if stay is to be granted as the amount is his estimated value of the suit property.
5. When this matter came up for hearing on June 27, 2023, Mr Ochieng Gai appeared for the applicant while Mr Naibei appeared for the respondent. Counsel had filed their written submissions which they relied upon. In arguing the case for the applicant, Mr Gai relied on the case of *Halai & Another v Thornton & Turpin* (Nairobi HCA No 15 of 1990) to submit that this Court has inherent powers to grant stay of execution pending appeal. As to the conditions attendant to the grant of an order of stay, counsel relied on *UAP Provincial Insurance Co. Ltd v Michael John Beckett* (Nairobi CA No 204 of 2004) to submit that an applicant is only required to demonstrate that the intended appeal is arguable and is likely to be rendered nugatory if stay is not granted. Counsel submitted that the applicant was apprehensive that the respondent would execute the judgment thereby rendering the intended appeal nugatory. Counsel also submitted that both parties had expressed their dissatisfaction with the judgment hence the intended appeal is arguable and is likely to succeed. Counsel pointed out that the impugned judgment and resulting decree is ambiguous hence incapable of being implemented. Counsel consequently urged that the application should be allowed so that the intended appeal, if successful, will not be rendered nugatory.
6. For the respondent, Mr Naibei submitted that the applicant's intended appeal is hinged on his own failure to enjoin the Registrar of Lands in the case which mistake cannot be cured by this court. Counsel also contended that the annexures relied upon by the applicant in his supporting affidavit did not form part of the documents on record of the trial court and cannot therefore be relied upon to argue the impending appeal. He additionally submitted that no draft memorandum of appeal was attached to enable the court assess whether the intended appeal is arguable. According to counsel, the intended appeal cannot therefore be said to be arguable in such circumstances. On the question as to whether the intended appeal will be rendered nugatory, counsel submitted that there is nothing to stay since the applicant's title to the suit property was cancelled by the Registrar of Lands on August 8, 2018. Counsel added that the respondent had partially executed the judgment and that the decree had already been booked what remains is the issuance of a title deed to the respondent and the eviction of the applicant's agents from the suit property.
7. Mr Naibei further submitted that any loss that may be suffered by the applicant can be compensated by damages. Counsel held the view that it was the respondent who was likely to suffer since the applicant had defied several court orders by using its agents to forcefully occupy and cultivate the suit property.



Mr Naibei pointed out that when this application was filed, the applicant had a similar application pending before the trial court and which application was dismissed on April 13, 2023. Counsel relied on the cases of *Alfred Mincha Ndubi v Standard Ltd* [2020] eKLR, *Teachers Service Commission v Kenya National Union of Teachers*, SC Appl No 16 of 2015 and *Stanley Kangethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR and urged us to dismiss this application.

8. This is an application seeking stay of execution under rule 5(2)(b) of the *Court of Appeal Rules*. For an applicant desirous of enjoying the discretionary intervention of this Court in the form of grant of stay, he or she ought to establish the existence of two factors, namely, that the intended appeal is arguable and that if stay is not granted, the intended appeal will be rendered nugatory. These principles were restated in *Attorney General & another v Eunice Makori & another* [2021] eKLR thus:

“Undoubtedly, this court has unfettered discretion under rule 5(2) (b) to grant an order of stay. The principles guiding the exercise of such discretion are well settled. Firstly, an applicant has to demonstrate that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory.”

9. During the hearing of this matter, the advocates for the parties informed this court that at the time this application was filed on February 16, 2023 there was a similar application pending determination before the trial court. We were further informed that the application before the trial court was scheduled for ruling on April 13, 2023, and counsel for the respondent did indeed confirm that the application was dismissed on that date. It is trite that under rule 5(2)(b), this court exercises discretion as a court of first instance and not as an appellate court. Thus, in *Equity Bank Limited v West Link Mbo Limited* [2013] eKLR, this court stated that:

“It is trite law that in dealing with 5 (2)(b) applications the court exercises discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6(1) of order 42 CP. Rules and refused, the Court in dealing with a fresh application still exercises an original independent discretion as opposed to appellate jurisdiction.”

10. Our understanding is that the discretionary jurisdiction donated by rule 5(2)(b) of this *Court's Rules* can only be exercised upon the conclusion of any similar application filed at the court appealed from. In essence, the court appealed from must have pronounced itself with finality on a similar application before a party can then invoke this court's original discretion. In the present case, we are faced with a situation where the trial court was yet to render itself on a similar application made by the applicant. It would follow that even though the exercise of discretion under rule 5(2)(b) is not in the form of an appeal, the action of a party who seeks to game the system by filing similar applications before the court appealed from and this court must be frowned upon for being an abuse of the court process. In our view, rule 5(2)(b) does not contemplate a situation where an application for stay is still pending before the court appealed from and yet a similar application is made before this court. This provision does not open the window for parties to abuse the judicial process by lodging multiple suits in different fora. Adopting a practice where a party is allowed to lodge an application before the court appealed from, abandons it midstream, then moves an appellate court for the same relief without withdrawing the earlier application may not only lead to an embarrassing outcome but amounts to playing lottery



with the judicial process; a sin which section 6 of the *Civil Procedure Act* abhors. The said provision provides that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

11. In *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR, among the examples given by this court on what amounts to an “abuse of court process” are:

“Instituting different actions between the same parties simultaneously in different courts even though on different grounds; and Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.”

12. In our view, the applicant’s action of instituting the present application while a similar supplication was still alive before the E&LC is a perfect example of what amounts to abuse of the court process. We therefore have no reservation in reaching the conclusion that the present application is for striking out for being an abuse of the court process.

13. At this point we are really not compelled to consider the present application on merit. However, noting that the E&LC rendered itself on its application during the pendency of this matter, we have opted to proceed to independently determine whether the application meets the threshold for grant of stay pending appeal. With regard to the question whether the intended appeal is arguable, we concur with the submission by counsel for the respondent that the failure to annex the draft memorandum of appeal to the application denies us the opportunity of assessing whether the appeal is arguable. The applicant simply submitted that it is aggrieved by the decision of the trial court and this makes the intended appeal arguable. Further, that its intended appeal is arguable because the respondent has sought a review of the judgment before the trial court. However, without the benefit of a draft memorandum of appeal and in the absence of substantive grounds alluded to in this application, there is no basis for holding that the intended appeal is arguable. Our rationale finds support in the holding by this court in *Attorney General & another v Eunice Makori & another* [2021] eKLR that:

“These principles construe that an applicant must bring to the court’s attention the subject matter of the intended appeal which he/she wishes to preserve through orders for stay and the grounds upon which he/she intends to challenge the impugned decision. Therefore, having noted that the impugned decision is not on record, it is apparent that this alone stands against the applicant’s motion as there is no basis for this court to exercise its discretion.”

14. With regard to whether the intended appeal, if successful, will be rendered nugatory, counsel for the applicant submitted that the applicant was apprehensive that the respondent would execute the judgment of the trial court thereby rendering the intended appeal nugatory. On the other hand, counsel for the respondent indicated that the orders of the E&LC had been partially executed and that the decree had already been booked and that the respondent was waiting for the new title deed in his name to be issued and the applicant’s agents to be evicted from the suit property. In our considered view, the actions so far taken are reversible and it cannot therefore be said that the appeal, if successful, will be rendered nugatory. Further, it is our view that were the applicant to win the intended appeal, any other loss suffered that cannot be recompensed through restoration to the property can always be compensated by way of damages.



15. The upshot of the foregoing is that this application is without merit and is for dismissal. And we so order.
16. As concerns the costs of this application, we find no reason to depart from the general rule that costs follow the event unless for good reason the court determines otherwise. In this matter we find nothing to make us depart from the rule considering that we have found this application is an abuse of the court process. Consequently, the respondent shall have the costs of this application.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF OCTOBER, 2023.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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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

