



REPUBLIC OF KENYA



**KENYA LAW**  
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**Korir v Nakuru Joyteck Enterprises (Civil Application  
E021 of 2023) [2023] KECA 1215 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1215 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E021 OF 2023  
FA OCHIENG, LA ACHODE & WK KORIR, JJA  
OCTOBER 6, 2023**

**BETWEEN**

**RAPHAEL K KORIR ..... APPLICANT**

**AND**

**NAKURU JOYTECK ENTERPRISES ..... RESPONDENT**

*(An application for stay of execution pending the hearing and determination of an intended appeal from the Ruling of the Environment and Land Court at Nakuru (M. Njoroge, J.) dated 30th January, 2023 in ELC Case No. 143 of 2019)*

**RULING**

1. Before us is an application dated March 13, 2023 in which the applicant prays for an order of stay of execution of the ruling of the Environment and Land Court (M Njoroge, J) dated January 30, 2023 pending the hearing and determination of this application and the intended appeal. The applicant also prays for an order restraining the respondent and its servants from entering, selling, subdividing, advertising LR No Njoro/Ngata/Block 2/100, hereinafter, 'the suit property' pending the hearing and determination of this application and the intended appeal.
2. The application is brought pursuant to Rules 5(2)(b) and 42 of the *Court of Appeal Rules, 2022*. The application is premised on the grounds that:
  - a. The applicant filed an application to set aside a judgment which he claimed was entered albeit without his evidence being adduced or considered by the court.
  - b. The applicant was not notified of the date of the hearing of the suit. Therefore, the failure to attend court was not premeditated but it was the mistake of his advocate.



- c. The applicant was denied access to justice which resulted in the miscarriage of justice.
  - d. The respondent has no basis in law for acquiring the suit property.
3. The application was further supported by the applicant's affidavit, in which he stated as follows:
  - a. The applicant took a loan facility with Post Bank Credit Limited, hereinafter, 'the bank'. The bank claimed that the loan was not fully repaid and subsequently sold the suit property by public auction.
  - b. The applicant claimed that the sale and subsequent registration and subdivision of the suit property into 130 plots was marred by fraud.
  - c. The applicant claimed that it was unheard of for a purported public auction where the charged property is subdivided into two leaving a portion to the chargor.
  - d. The applicant's application to set aside the judgement was dismissed.
  - e. The applicant was served with an eviction order dated February 24, 2023.
  - f. The applicant is of the view that his right to own property as provided for by *the Constitution* has been violated.
  - g. The applicant has since filed a Notice of Appeal.
4. In response to the application, the respondent through its director, Benjamin Kisoi Sila stated that:
  - a. The intended appeal is frivolous and raises no arguable issues as the applicant has failed to raise any valid grounds to warrant the orders sought. The decision of the trial court was rendered after careful consideration of the evidence and legal arguments presented.
  - b. Execution proceedings have been finalized and the application for stay of execution had been overtaken by events. Issuing the orders sought will be in vain as the applicant has already been evicted from the suit property and the respondent is in possession. Furthermore, the suit property has been sold to a third party and the respondent is in the process of transferring it to the said purchaser.
  - c. It is in light of the foregoing that the respondent points out that it will suffer irreparable harm if the orders sought are granted.
  - d. The court in granting an order of stay of execution exercises discretion and must balance the interests of all the parties, and in the circumstances of this case, the applicant failed to disclose material facts and he is therefore not worthy of this court's discretion.
  - e. The firm of J.K. Bosek has not entered appearance formally to act for the applicant and as such the firm has no right of audience before this court.
  - f. The application has not met the threshold for an order of stay of execution and is therefore devoid of merit, and ought to be dismissed.



5. At the hearing of the application Mr Bosek, learned counsel appeared for the applicant whereas Mr Karanja, learned counsel appeared for the respondent. Counsel relied on their respective written submissions which they opted to briefly highlight as follows.
6. Mr. Bosek submitted that the subject matter herein was land, which has been subdivided into many plots and is at the risk of being transferred to third parties, and if that happens, it would subsequently be cumbersome to reverse the position. Counsel submitted that it would be in the interest of justice that the suit property be preserved. Counsel faulted the court for failing to resolve the issue of the legality of the auction, which was suspicious, considering that no statutory notices were served prior to the auction.
7. Citing the cases of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR* and *Attorney General v Okiya Omtata Okoiti & Another [2019] eKLR*, the applicant submitted that this court has wide and unfettered discretion to order stay of execution. In so doing, the court is guided by the principles that: the appeal is arguable, and the appeal will be rendered nugatory if the order is not granted. The applicant also noted that an appeal is arguable even where a single bona fide arguable ground has been raised, and that an arguable appeal need not be one which must necessarily succeed but one which ought to be fully argued before the court. The applicant relied on the case of *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Limited, Civil Application No 345 of 2004* to buttress this submission.
8. On whether or not the applicant has an arguable appeal, the applicant pointed out that he was disgruntled by the findings of the learned Judge in the impugned judgment dated September 23, 2020.
9. As regards the nugatory aspect, the applicant cited the case of *Africa Eco-Camps Limited v Exclusive African Treasures Limited [2014] eKLR* in submitting that the suit property was at risk of being disposed of to third parties. The applicant urged that the application be allowed.
10. Mr Karanja on the other hand pointed out that the application had been overtaken by events, as the applicant has been evicted from the suit property. The eviction order annexed to the application named the person who had bought the suit property at the auction. The respondent bought a portion of the suit property from the purchaser who had bought the suit property at the auction. Counsel submitted that the respondent had to sue in order to obtain vacant possession.
11. The respondent submitted that the application herein is far from attaining the threshold of illustrating an arguable appeal. Relying on the case of *Martin Kabaya v David Mungania Kiambi [2015] eKLR* the respondent was of the view that the applicant is just stalling time to ensure litigation does not come to an end.
12. Citing the case of *West Kenya Company Limited v Luther Angatia [2018] eKLR* the respondent submitted that the applicant has failed to provide any compelling circumstances to justify granting orders of stay of execution since no irreparable harm or substantial loss will occur to them and therefore no prejudice.
13. The respondent pointed out that the application has been overtaken by events and therefore the orders sought only serve to vex the respondent. The applicant's fear of execution is unwarranted as eviction has already taken place. The respondent urged that the application be dismissed with costs.
14. 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.



15. 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:

- ' i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion. See *Ruben & 9 Others v Nderitu & Another* [1989] KLR 459.
- ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
- iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75 *Halai & Another v Thornton & Turpin* [1963] Ltd [1990] KLR 365.
- iv. In considering whether or not an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No Nai 189 of 2001.
- v. An applicant must satisfy the court on both of the twin principles.
- vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004.
- 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. *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008.
- 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. *Damji Pragji* (supra).
- ix. The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
- 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.
- xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniosity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.'

16. 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 *Trust Bank Limited & Ano v Investech Bank Limited & 3 Others* [2000] eKLR.



17. In determining whether the appeal is arguable or not, this Court in the case of *Dennis Mogambi Mang'are v Attorney General & 3 others [2012] eKLR* held that:

' An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration.'

18. 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 is that he was disgruntled by the decision of the trial court. It is our considered view that the mere fact that the applicant is disgruntled by the decision of the trial court does not mean that he has an arguable appeal.

19. On whether the appeal will be rendered nugatory should the impugned judgment not be stayed, the applicant has not disputed that he has already been evicted from the suit land. Furthermore, it would appear that the suit land is already in the hands of persons who are not parties to this application. If the court made an order that might impact upon persons who had not been accorded a hearing, that might be tantamount to condemning them unheard. But most importantly, the applicant has not satisfied this Court that the intended appeal would be rendered nugatory, if the orders sought are not granted.

20. In the result, the applicant has failed to demonstrate the existence of both limbs as required by Rule 5(2)(b) of this Court's Rules and in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in the case of Stanley Kangethe Kinyanjui, (supra). The upshot is that we decline to grant a stay of execution pending the hearing and determination of the intended appeal.

21. Accordingly, the application dated March 13, 2023 is dismissed with costs to the respondent.

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

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

