



REPUBLIC OF KENYA



KENYA LAW
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**Manyabera & 9 others v Leuda & another (Civil Application
E432 of 2021) [2023] KECA 1159 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1159 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E432 OF 2021
HM OKWENGU, JM MATIVO & WK KORIR, JJA
OCTOBER 6, 2023**

BETWEEN

**CHAIRMAN ROMBO GROUP RANCH LEMARON OLE
MANYABERA 1ST APPLICANT
SECRETARY ROMBO GROUP RANCH SITELU NKIPAPAI 2ND APPLICANT
TREASURER ROMBO GROUP RANCH JACOB LOGELA 3RD APPLICANT
SCHOOL MANAGEMENT COMMITTEE OLOSHONYOKIE PRIMARY
SCHOOL 4TH APPLICANT
REGISTERED BOARD OF TRUSTEES OF AFRICAN INLAND CHURCH
OLOSHONYOKIE (LOITOKTOK) 5TH APPLICANT
BOARD OF TRUSTEES FREE PENTECOSTALFELLOWSHIP CHURCH
OLOSHONYO 6TH APPLICANT
KALII OLE MANKII 7TH APPLICANT
KODE OLE JUMBO 8TH APPLICANT
FALE MUHAMEDI 9TH APPLICANT
MANAGEMENT COMMITTEE OF OLOSHONYOKIE WATER
PROJECT 10TH APPLICANT**

AND

**JACINTA KEUKE LEUDA 1ST RESPONDENT
LEONARD NTAWASA LEUDA 2ND RESPONDENT**

(Being an application for stay of execution of the decree and the subsequent orders from the judgment of the Environment and Land Court at Kajiado (C. Ochieng, J.) dated 26th July 2021 in ELC case No. 11 of 2018)



RULING

1. This is an application dated August 16, 2021 brought under a certificate of urgency through which the applicants seek two main prayers being an order staying the execution and/or further execution of the judgment issued by the Environment and Land Court (ELC) at Narok on July 26, 2021 in Case No 11 of 2018 and an order restraining the 1st and 2nd respondents and their agents from evicting the applicants or interfering with their properties on the disputed parcel of land. The application is supported by the affidavit of John Sitelu sworn on the date of the application.
2. The application is premised on the grounds that Rombo Group Ranch is the registered proprietor of land parcel number Loitoktok/Rombo 'B'/406 measuring approximately 38,326.42 hectares. The parcel of land borders Loitoktok/Olkaria/325 registered in the name of the deceased Joel Peter Orumoi whose estate is being administered by the 1st and 2nd respondents. The applicants' averment is that after a boundary dispute arose pertaining to these two parcels of land the matter was referred to the Land Registrar, Kajiado. Subsequently, on October 18, 2017 the Land Registrar delivered a determination on the dispute and the applicants being aggrieved by the determination moved to the ELC at Kajiado seeking the setting aside of the decision on the ground that it contravened Section 7 of the Limitation of Actions Act. However, the ELC in its judgment adopted the report of the Lands Registrar as an order of the court and issued eviction orders against the applicants. The applicants aver that they are apprehensive that the respondents may execute the decree of the ELC unless stay is granted. According to them, the execution of the decree will result in the destruction of the 4th, 5th, 6th and 10th applicants' properties, as well as the matrimonial homes of the 7th, 8th and 9th applicants. The applicants also attest that they have lodged an appeal against the impugned orders of the ELC which appeal has high chances of success and would be rendered nugatory if the execution of the decree is not stayed by this Court. In conclusion, the applicants assert that it is in the interest of justice that the orders sought be granted as the respondents will not suffer any prejudice that damages cannot remedy.
3. The application is opposed through an affidavit sworn by the 1st respondent on September 1, 2021 in which she avers that the 1st applicant had not submitted evidence in support of his averment that he is the chairman of Rombo Group Ranch nor has he demonstrated that he has authority to sue on behalf of the 2nd to 10th applicants. It is also the respondents' averment that they only learned of the encroachment on their land by the applicants in 2010 and their complaint to the Land Registrar was therefore not barred by statute. It is further the respondents' deposition that they have not threatened to execute the decree and that the applicants were enjoying a three months' stay of execution granted to them by the trial court. According to the respondents, an order of stay would be prejudicial to them as they will be denied utilization of the 500 acres which the applicants have encroached upon. They therefore pray that this application be dismissed.
4. The firm of Taliti Collins Advocates appeared and filed submissions for the applicants while the firm of Larabi Lesantos & Associates Advocates appeared and filed submissions for the respondents. When the application came before us for virtual hearing, counsel for the parties opted to rely on the written submissions.
5. For the applicants, their counsel submitted that the ruling of the learned Judge of the ELC was not supported by the evidence on record and the law hence their pending appeal is arguable. Counsel also contended that if the decree of the trial court is executed, it will result into destruction of the 4th applicant school which is vital to the well-being of the surrounding community. Further, that execution will also lead to the destruction of other institutions run by the applicants and which form



part of the livelihoods and well-being of Rombo village. Counsel also argued that if the decree is executed, the applicants will suffer irreparable loss which will render the intended appeal nugatory. Counsel therefore urged the Court to intervene by granting the orders sought as the outcome of execution cannot be compensated by way of damages.

6. In opposition to the application, counsel for the respondents submitted that the applicants had not met the threshold for grant of stay and injunctive orders. According to counsel, the pending appeal is frivolous and does not raise any bona fide issues requiring full consideration by this Court. To buttress the submission, counsel argued that in exercising the powers granted by sections 18 and 19 of the [Land Registration Act](#), the Land Registrar is not bound by the [Limitation of Actions Act, 2012](#). Counsel also submitted that the applicants had not established how the intended appeal will be rendered nugatory were it to succeed. Counsel asserted that there is no evidence of threat of impending execution and that the applicants had been granted a 90 days' stay of execution by the trial court. Counsel consequently argued that the present application is an abuse of the court process and urged us to dismiss it with costs.
7. This being an application under rule 5(2)(b) of the [Rules of this Court](#), the applicants who seek the discretionary intervention of this Court in the form of grant of stay ought to establish that the intended appeal is arguable and that if stay is not granted, the intended appeal will be rendered nugatory. Our above statement of the law aligns with the holding of this Court in [Attorney General & another vs Eunice Makori & another](#) [2021] eKLR that:

“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.”

8. We have duly considered the application, the replying affidavit and the submissions of the parties. The obvious question in such an application is whether the intended appeal is arguable, and if so, whether the appeal will be rendered nugatory if the orders sought are not granted.
9. We start by considering the arguability of the intended appeal.

We note that the applicants have exhibited a Notice of Appeal and a Memorandum of Appeal. A perusal of the Memorandum of Appeal discloses that the gist of the intended appeal is the import of the provisions of section 7 of the [Limitation of Actions Act](#) vis-à-vis the powers of a Lands Registrar in respect of complains touching on boundary disputes. The pleadings before us indicate that the applicants' position is that the respondents made the complaint 22 years after becoming aware of the alleged boundary dispute. On the other hand, the respondents contend that they discovered the problem in 2010 and filed the complaint with the Land Registrar within 12 years hence complying with the provisions of Section 7 of the [Limitation of Actions Act](#). All these are matters that go to the substance of the intended appeal and it is not in our place to speak to the arguments at this stage as this is likely to embarrass the bench that will eventually hear the appeal. Our considered view is that what the papers filed before us disclose is that there is an arguable issue that requires the consideration of this court. The applicants' Memorandum of Appeal is not petty or idle. As such, we are satisfied that the applicants' appeal is arguable. As was stated in [Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others](#) [2013] eKLR, an arguable appeal is one which is not frivolous and not one which must necessarily succeed, but that which ought to be argued fully before the court.



10. As for the nugatory aspect of the intended appeal, the applicable standard is as was stated by this Court in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* (*supra*) that:

“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.”
11. Before us, the applicants contend that if stay is not granted, then the execution of the trial court’s decree will result in the destruction of the 4th, 5th, 6th and 10th applicants’ premises, as well as the matrimonial homes of the 7th, 8th and 9th applicants. The 4th applicant is a school which the applicants argue is a vital institution depended upon by the Rombo village. The 10th applicant is a water project that serves the same village. The 5th and 6th applicants are churches serving the spiritual needs of the villagers. The respondents on their part argue that the appeal will not be rendered nugatory for reasons that the applicants had been granted a stay of 90 days by the trial court and that they had not commenced or threatened to commence execution of the said judgment.
12. As things stand, we have no evidence whether the said stay by the trial court was extended. It is also the law that the institution of an appeal before this Court does not act as stay of execution. As was stated in *Safaricom Limited vs Ocean View Beach Hotel Limited & 2 others* [2010] eKLR, a stay under rule 5(2)(b) is meant to guarantee an applicant an interim relief where the applicant has preferred an appeal to this Court. It follows that since the institution of an appeal does not act as a stay of execution, the party in whose favour the judgment was issued is always at liberty to execute. The statement by a respondent that there is no intention to execute the judgment does not confer sound sleep upon an applicant unless such intention is accompanied by a recorded consent that the respondent will not execute the decree pending the hearing and determination of the intended appeal. In the absence of a consent, execution can come like a thief in the night to the detriment of the applicant.
13. We agree that the underlying purpose of an order of stay is as was expressed by this Court in *Rhoda Mukuma vs John Abuoga* [1988] eKLR that:

“The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore it is necessary to preserve the status quo.”
14. In this case, the disputed area is about 500 acres. If stay is not granted, a school, two churches, a water project and three homes are likely to be brought down in a bid to reclaim the disputed piece of land by the respondents. The loss to be suffered were the decree to be executed is not easily quantifiable and may not be adequately compensated by damages. The community’s children will miss school, all will be thirsty and persons of faith will go without spiritual nourishment. These are benefits that cannot easily be quantified so that damages can be awarded. We are therefore satisfied that the applicants have demonstrated that were the intended appeal to succeed, the judgement will be of no use meaning that the intended appeal will be rendered nugatory.
15. On the other hand, there is nothing that has been placed before us by the respondents that apart from the delay in the enjoyment of the fruits of judgment that will be occasioned by an order of stay, there is any other prejudice to be suffered. They have not been in occupation of the disputed piece of land at any given time. However, the applicants’ intended appeal, if successful, will be rendered nugatory if the stay order sought is not granted.



16. Consequently, we find that the notice of motion dated August 16, 2021 is merited and we allow it in terms of the third prayer so that the execution and/or further execution of the Judgment delivered on July 26, 2021, the Decree and all the consequential orders arising from the Judgment in ELC Case No 11 of 2018 is stayed pending the hearing and determination of the applicants' intended appeal. The costs of this application shall abide the outcome of the main appeal.

17. It is so ordered.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

