



REPUBLIC OF KENYA



KENYA LAW
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**Ngugi v Nduta (Civil Appeal (Application) E736 of 2021)
[2023] KECA 1162 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1162 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E736 OF 2021
HA OMONDI, A ALI-ARONI & JM MATIVO, JJA
OCTOBER 6, 2023**

BETWEEN

MICHAEL MUKUNDI NGUGI APPLICANT

AND

NAOMI MWIHAKI NDUTA RESPONDENT

(Being an application for stay of proceedings pending hearing and determination of the appeal from the ruling and order of the Environment & Land Court at Nairobi (Bor, J.) dated 1st February 2021 in ELC Appeal No. 37 of 2016)

RULING

1. The notice of motion application dated January 31, 2023, and supported by the affidavit of even date, sworn by the applicant, is brought pursuant to rule 5(2)(b) of the *Court of Appeal Rules* seeking orders: - that pending the hearing and determination of the appeal herein, there be a stay of proceedings before the Environment and Land Court (ELC) in Nairobi ELC Appeal No. 37 of 2016, being an appeal against the decision by the Magistrate's court at Thika.
2. It is indicated that the applicant's substantive appeal is pending before this Court and submissions have been filed; further that the ELC court has issued directions for the respective parties to file and serve submissions in the appeal pending before it and the same is to be mentioned on March 14, 2023 to take a judgment date.
3. The background to this matter begun when a dispute arose between the parties regarding the acquisition of LR. No. Juja/Juja/East/Block/1/1159 and the respondent filed a suit in Thika RMCC No. 895 of 2011, against the applicant vis a vis a disputed sale agreement relied on by the respondent. In the course of the hearing, on February 13, 2012, the trial court directed the Criminal Investigations Department to investigate and establish the authenticity of certain entries in the said sale agreement. Upon the matter being heard, the trial court made findings in favour of the respondent.



4. Aggrieved by the outcome, the applicant filed an appeal before the ELC, among the grounds raised, was that the trial court had ignored the respondent's fraudulent acquisition of the parcel in question. The applicant also, by a notice of motion dated February 15, 2019, sought to be allowed to adduce additional evidence, being documents obtained from the Kenya National Registration Bureau (KNRB) which purported to denote forgery on the respondent's part in respect of certain details in the sale agreement, as presented to the trial court. The said documents it was urged would have a significant influence and would remove any doubts on how the respondent acquired the land; and help the court reach a fair and just determination of the appeal.
5. At the ELC, the respondent opposed the application stating that the said information had been sought and obtained from KNRB by a different advocate, thus it would yield the same results already considered by the trial court; the applicant failed to conduct due diligence, during the five years that the matter was pending in court; and the applicant simply wanted to patch up its evidence after the judgment.
6. The learned Judge in dismissing the application held that the proposed evidence was unnecessary as still required an analysis of the same documents the trial court had already considered the said documents/evidence; and if allowed, the impact would be to fill in the gaps and omissions of the first report, and result in patchwork in a bid to boost the applicant's case.
7. The decision of the trial court above led to the filing of the pending appeal and the present application. In his memorandum of appeal, the applicant contests the decision saying no elaborate reason was given for the dismissal; and that the learned Judge failed to consider that at the core of the appeal was the validity of the impugned document; further the appeal is arguable as this court ought to determine whether or not additional evidence ought to be admitted in the appeal before the ELC, because, in the event that the appeal in the ELC is determined, additional evidence cannot be adduced in the event an appeal is preferred from the substantive appeal from the ELC to this court.
8. The applicant is apprehensive that should the appeal in the ELC be determined then the appeal before this court will have been overtaken by events, and there is a risk of the respondent levying execution against the applicant to recover the decretal amount before the hearing of the application rendering the appeal nugatory.
9. The respondent did not file any response to the present application, and we proceeded with the matter *ex parte*.
10. On whether the applicant has satisfied the requirements necessary for granting an order for stay of proceedings, we have considered the application, the grounds in support thereof, the rival affidavits, submissions, cases cited and the relevant law.
11. The jurisdiction under rule 5(2) (b) of this *Court's Rules* is original and discretionary and is guided by the interests of justice. In order for the application to succeed, the applicant must demonstrate that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory. See *Trust Bank Limited and Another vs. Investech Bank Limited and 3 Others* [2000] eKLR.
12. In the case of *Attorney General vs. Okiya Omtata & Anor* [2019] eKLR this court held:

the principles for our consideration in exercise of our unfettered discretion under rule 5(2) (b) to grant an order of stay is well settled. Firstly, the applicant must satisfy that it has an



arguable appeal. However, this is not to say that the appeal will necessarily succeed but suffice it that the Appeal is not idle or frivolous.”

13. Also in *Co-operative Bank of Kenya Ltd vs. Banking Insurance and Finance Union Kenya* [2014] eKLR this court stated that: “it is sufficient that the issues raised are arguable.” In Kisumu Civil Appeal 74 of 2016, *George O. Gache & Anor vs. Judith Akinyi Bonyo & Others* this court stated:

“at this stage the court is not expected to inquire into the merits of the case and whether or not the Appeal will succeed. It is sufficient that the applicant has met the threshold as existence of a single bona fide issue is sufficient.”

14. An appeal need not raise a multiplicity or any number of points, indeed, a single arguable point is sufficient to earn an applicant such a relief. See *Damji Praji Mandavia vs. Sara Lee Household & Body Care(K) Ltd*, Civil Application No. Nai. 345 of 2004(UR). Upon perusal of the Memorandum of Appeal we note that it raises the issue of whether the trial court erred in disallowing the application for adducing additional evidence. Since an arguable point is not necessarily one that must succeed but merely one that is deserving of consideration by the court, we hold that the appeal is an arguable one.

15. On the Appeal being rendered nugatory, this court has held in the case of *Reliance Bank Limited vs. Norlake Investment Limited* [2002] 1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides.

16. In the case of *African Safari Club Limited vs. Safe Rentals Limited*, [2010] eKLR this court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

17. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if this court declines to grant the orders sought and the intended appeal succeeds. The ELC dismissed the applicant’s application to adduce new evidence. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the ELC is in the nature of a negative order incapable of execution and as such there is no positive and enforceable order made which can be the subject matter of the application for stay of proceedings. By parity of reasoning therefore the applicant has failed to prove the second limb of rule 5(2) (b).

18. As the applicant is required to establish both limbs, the applicant has failed to satisfy the requirements under rule 5(2) (b) of this *Court’s Rules*. Accordingly, the Notice of motion is hereby dismissed with costs to the respondents.

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

H. A. OMONDI

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

