



**Kitati & another v Kithongo (Civil Application E009 of 2023)
[2023] KECA 1425 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1425 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E009 OF 2023
HA OMONDI, A ALI-ARONI & GWN MACHARIA, JJA
NOVEMBER 24, 2023**

BETWEEN

MUINDE MASILA KITATI 1ST APPLICANT

DANIEL MASILA 2ND APPLICANT

AND

PETER NZIOKI KITHONGO RESPONDENT

(An application for stay of execution of the judgement and decree pending an appeal arising from the judgement of the Environment and Land Court at Makueni (Mbogo, J.) delivered on 26th January, 2023 In ELC. Case No. 80 of 2018)

RULING

1. The applicants being aggrieved by the judgement of the Makueni Environment and Land Court (Mbogo, J.) which was delivered on 26th January 2023, in Case No. 80 of 2016, preferred an appeal. The applicants filed a notice of appeal and have moved this Court by way of a Notice of Motion dated 16th March, 2023 pursuant to rule 5 (2) (b) of the [Court of Appeal Rules](#), seeking for a stay of the judgement pending hearing and determination of the appeal and for costs to abide the outcome of the appeal.
2. The application is predicated on grounds that the intended appeal is arguable; the applicants are at the risk of being evicted from the suit premises, where they live with their families; if stay is not granted they will suffer irreparable loss; and the appeal shall be rendered nugatory.
3. In the supporting affidavit of the 1st applicant sworn on 16th March, 2023, he deposes that each of the respondents have their matrimonial homes on the subject properties, where they live with their families. Further, they were issued with ownership documents by the government in 2000.
4. The respondent opposed the application by way of a replying affidavit sworn on 30th of March 2023, where he contends that the applicants have not met the twin principles necessary for granting stay, as



they have failed to demonstrate that their appeal is arguable; that they have not sufficiently addressed the nugatory aspect; and that they have not demonstrated that damages will not adequately compensate them in the event the appeal is successful.

5. In his submission counsel for the applicants submits that the applicants have lived in the suit premises all their lives, the record shows that the respondent acquired the suit premises fraudulently. Counsel further rehashed the contents of the applicants' affidavit on the grounds of appeal and the reasons why the appeal will be rendered nugatory. We need not repeat them.
6. On the part of the respondent, counsel submits that the draft memorandum of appeal was not attached to the application; that the case in the trial court was on eviction and the court declared the respondents as trespassers; and that the applicants did not claim adverse possession or file a counterclaim.
7. The application before us is based on rule 5 (2) (b) of this Court's Rules which provide that;
 - “(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:
 - a.
 - b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”
8. In an application such as the one before us, the applicant is required to satisfy the court that he has an arguable appeal, one which is not frivolous, but not necessarily that the appeal will succeed in the end. Secondly, the applicant has to demonstrate that in the event stay is not granted the appeal will be rendered nugatory.
9. The twin principles referred to above were well captured in the following cases; -

Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR where this Court stated:

“That in dealing with Rule 5(2)(b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court. The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

Multimedia University & Another vs. Professor Gitile N. Naituli [2014] eKLR it was stated:

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underling those decisions was summarized



in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR.”

And *Kenya Industrial Estate & Another vs. Matilda Tenge Machia* Civil Application No.211 of 2020 where as regards the nugatory aspect this Court stated:

“On the nugatory aspect, 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; reversible whether damages will reasonably compensate the party aggrieved”

10. We have carefully considered the application, the supporting affidavit, the replying affidavit, all annexures, submissions by both the applicants and the respondent’s counsel and the authorities cited by both sides. Without saying much so as not to appear to delve into the main appeal, from the affidavits and submissions we note the applicants have raised issues that deserve the courts attention, which leads us to the conclusion that the appeal is arguable.
11. The subject matter is land, it is not disputed that the applicants have lived in the suit premises with their families for years, indeed they have urged that the same is their ancestral home. Further, it has not been disputed that execution proceedings have commenced. In our view therefore, should we not grant the relief sought, this will pave way for the respondent to execute the judgement and decree in his favour, which is likely to lead to an irreversible consequence, and is likely to be prejudicial to the applicants in the event of a successful appeal.

In Re Estate of Harish Chandra Hindocha (Deceased) [2021] eKLR, this Court stated, inter alia;

“Turning to the second prerequisite, the position in law is that, an appeal would be rendered nugatory if the consequential effects for the failure to grant the relief sought would be either irreversible or highly prejudicial so as to render of no consequence the intended appeal or appeal if ultimately successful. Herein, what is sought to be forestalled is basically the execution of the exparte judgment and decree. We appreciate the respondent filed a replying affidavit which as we mentioned above was not laid before us so as to gauge as to whether he had made provision for preservation of the substratum of the intended appeal, pending hearing and determination of the intended appeal or giving some guarantee, undertaking or assurance that the substratum of the proceedings which is title to the suit property will not fizzle out before the determination of the intended appeal, having found none in the written submissions. Instead, the theme of those written submissions in our consideration is that he should be allowed to proceed with the execution of the ex-parte Judgment and decree as subsequently reinstated.”

12. In the end, we find that the applicants have satisfied the two limbs necessary for grant of stay of execution. Accordingly, stay of judgement and execution is hereby granted pending hearing and determination of the intended appeal or until further orders of the Court.
13. Costs to abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

H.A. OMONDI

.....

JUDGE OF APPEAL



ALI-ARONI

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

