



REPUBLIC OF KENYA



KENYA LAW
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**Huts of Gold Limited v Wamaua & 7 others (Civil Application
E004 of 2023) [2023] KECA 1633 (KLR) (17 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1633 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E004 OF 2023
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
NOVEMBER 17, 2023**

BETWEEN

HUTS OF GOLD LIMITED APPLICANT

AND

HON MARY WAMAUA 1ST RESPONDENT

NAGAMI DAM SELF HELP GROUP 2ND RESPONDENT

SUSAN WANJIRU WAITHAKA 3RD RESPONDENT

HON ATTORNEY GENERAL 4TH RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 5TH
RESPONDENT**

WATER RESOURCES AUTHORITY 6TH RESPONDENT

**NATIONAL WATER HARVESTING AND STORAGE AUTHORITY 7TH
RESPONDENT**

**INSPECTOR GENERAL OF THE NATIONAL POLICE
SERVICE 8TH RESPONDENT**

*(Being an application under rule 5(2)(b) of the Court of Appeal Rules against
the orders from the ruling and decree of the ELC Court at Murang'a (L.
Gacheru, J) dated 8th December 2022. in ELC Petition No. E002 of 2022)*

RULING

1. The Notice of Motion application, the subject of this ruling is dated 23rd January, 2003. It is brought under Section 3A and 3B of the Appellate Jurisdiction and Rule 5(2)(b) of the Court of Appeal Rules 2010. The applicant seeks in the main orders:



- i. That pending the hearing and determination of the intended appeal, this honorable court be pleased to order a stay of execution of the conservatory orders made on 8th December, 2022 restraining the 4th to 8th respondents from preventing the 1st to 3rd respondents from farming, obstruction, and use of dam water and from interfering with the 1st to 3rd respondents and the community members' crop grown/plants on the spilled way area adjacent to the Nagami dam;
 - ii. That pending the hearing and determination of this application, this Court be pleased to stay execution of the conservatory orders made on 8th December, 2022 restraining the 4th to 8th respondents from preventing the 1st to 3rd, respondents from farming and use of the Nagami dam, obstruction and use of the dam water, and from interfering with the 1st to 3rd respondents and community members' crops grown/planted on the spilled way area adjacent to the Nagami dam.
 - iii. That pending the hearing and determination of this application, this court be pleased to issue an order, staying any further proceedings in the Environment and Land Court, (ELC), Petition number E002 of 2022 Honourable Mary Wamaua and 2 others vs The Honourable Attorney general and 5 others.
2. The application is predicated on the grounds on its face and supported by an affidavit sworn by Peter Mwangi Maina together with annexures thereto. It is deposed that the ELC issued a conservatory order that restrained the 4th to 8th respondents from preventing the 1st to 3rd respondents from farming and use of the Nagami dam, pending the hearing and determination of the cited petition. The applicant was dissatisfied with the decision and has appealed to this Court.
3. According to the applicant, the 1st to 3rd respondents are a group of people from the Gikono area, who without consent of the applicant encroached on its land registered as Mitubiri/Wempa/Block 1 13337 and Mitubiri/Wempa/Block 1/13338 in the belief that the area is riparian and that the dam spills waters to their land yet the dam is a private dam and not a public dam, a fact acknowledged by the learned Judge.
4. It is worth noting that the appeal is from an interlocutory order and the main suit has yet to be heard, and the rights of the parties have yet to be determined. However, it is not disputed that the applicant owns part of the parcel of land which Nagami dam extends to. It is also noted that the respondents have not laid any claim to the dam itself.
5. The applicant maintains that it has an arguable appeal with triable issues with high chances of success; it is being deprived of its constitutional right to own and enjoy its property; it shall suffer irreparable loss and harm if the prayers sought are not granted, and it is in the interest of justice that the application be allowed to prevent the public from taking over the private dam.
6. On the nugatory aspect, the applicant believes that in the absence of stay orders, the intended appeal may be rendered nugatory and a mere academic exercise, and there is a need to maintain the status quo pending the hearing and determination of this application and intended appeal.
7. The application is opposed through the replying affidavit sworn by Susan Wanjiru Waithaka who deposes that the affected land had been reserved as a spillway for Nagami dam during its construction and that the claim that it is not riparian land cannot stand. Further, the applicant had already chased them out of the land irrespective of the orders issued by the ELC. It was further contended that the 1st to 3rd respondents had a right to a clean and healthy environment as residents of the area since no boundary had been demarcated to ascertain the riparian side of the dam and the private land.



8. The applicant filed submissions, which learned counsel, Mr. Karei, who held brief for Mr. Mwangi for the applicant relied on entirely without highlighting. On the other hand, Mr. Keaton for the the 1st to 3rd respondents told the Court that they would rely on the replying affidavit and also made brief oral submissions on points of law. Articulating the law applicable in applications made under Rule 5(2) (b) of this Court’s rules, Mr Keaton conceded that as the applicant only needs to demonstrate one arguable point, and it needs not be one that would succeed on appeal, the applicant’s appeal is not frivolous. He therefore, conceded the first limb on arguability of the appeal.
9. On the second limb, however, Mr Keaton was emphatic that the appeal would not be rendered nugatory if the stay orders sought were not granted because the orders appealed against were conservatory orders given by the Environment and Land Court to preserve the subject matter of the suit, and the court was enjoined to grant such orders pending the hearing and determination of the petition. He also urged that the trial court should not be stopped from proceeding with the matter as that was the only way the rights of the parties could be determined.
10. We have considered the application, the rival affidavits, counsel’s submissions and the relevant law. It is settled law that for an application of this nature to succeed, an applicant has to demonstrate both arguability and the nugatory aspect of the appeal or intended appeal. See Stanley Kangethe Kinyanjui and another vs. Tonny Keter and others [2013] eKLR. As the limb on arguability was conceded, we only need to address the nugatory aspect. The two limbs are, nonetheless, conjunctive and so demonstrating one and not the other will not be of much help to the applicant. In Trust Bank Limited & Another vs. Investech Bank Limited & 3 Others, Civil Application Nai. 258 of 1999 (unreported) this Court stated that:

“The jurisdiction of the Court under Rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...” (Emphasis added)

The only point raised by the applicant on the nugatory aspect is that if the proceedings before the trial court are allowed to proceed, “it’s rights to own and enjoy its private property shall be on the verge of being arbitrarily deprived and restricted by private persons.”

11. As stated earlier, the ownership of the dam is conceded, and the only question is its boundary. The trial court has ordered a survey of the properties, and we were informed that this has already been done. The surveyor’s report will need to be adopted by the Court, and the parties’ rights cannot be determined elsewhere but within the proceedings the applicant is entreating this Court to stop. In any event, the intended appeal being one on interlocutory orders, if the suit before the trial court is determined, any aggrieved party can still move to this Court to challenge to the resultant judgment.
12. We are not persuaded that the intended appeal will be rendered nugatory, absent of stay. Accordingly, we find this application devoid of merit and dismiss it accordingly with costs to the 1st, 2nd and 3rd respondents.

DATED AND DELIVERED AT NYERI THIS 17TH DAY OF NOVEMBER 2023.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

