



REPUBLIC OF KENYA



**Kagiri v Kinyanjui (Civil Application E056 of 2022)
[2023] KECA 1576 (KLR) (17 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1576 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E056 OF 2022
W KARANJA, J MOHAMMED & LK KIMARU, JJA
NOVEMBER 17, 2023**

BETWEEN

DAVIDSON MWANGI KAGIRI APPLICANT

AND

ANNE MARY KINYANJUI RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an intended appeal against the judgment of the Environment and Land Court of Kenya at Nanyuki (Bor, J.) dated and delivered on 28th April, 2022 in ELC Case No. 13 of 2021 (Formerly Nyeri ELC No. 48 of 2016))

RULING

1. Before the court is a notice of motion dated 18th July, 2022. It is brought under Article 5(2)(b) and 47 of the Court of Appeal Rules 2010, Article 159(2)(d) of the Constitution, and Sections 3A and 3B of the Appellate Jurisdiction Act.
2. The applicant sought, inter alia, stay of execution of the judgment and decree of the Nanyuki Environment and Land Court (ELC) (Bor, J.), delivered on 28th April, 2022 in ELC Case No. 13 of 2021, and any other subsequent orders issued thereto.
3. The application is supported by grounds on its body and a supporting affidavit sworn by the applicant on 18th July, 2022, together with annexures thereto. The applicant states that he has a good appeal that raises bona fide issues with high chances of success, and that if the suit property is transferred to the respondent or other third parties, his intended appeal will be rendered nugatory. He deposed that the judgment of the ELC was not delivered in consonance with the prayers sought by the respondent in her counter-claim. He stated that the impugned judgment was premised on a sale contract that fell through after the parties failed to agree. He urged that the learned Judge's finding that the respondent paid Kshs.450,000 was not supported by evidence on record, and that the learned Judge erred in awarding



- the respondent six out of the twelve acre that she intended to purchase from the applicant. In the premises, he urged us to allow his application as prayed.
4. The application was opposed. The respondent filed a replying affidavit sworn on 26th June, 2023. The respondent deponed that the ELC's judgment dated 28th April 2022 directed the applicant to transfer the suit property to the respondent within ninety (90) days, which period lapsed on 28th July, 2022. The respondent stated that upon lapse of the said period, and failure by the applicant to abide by the orders of the ELC, she filed an application before the said court seeking to have the Deputy Registrar execute the transfer documents with respect to the suit property. The respondent deposed that the application was allowed on 16th January, 2023. The court directed the Government surveyor to undertake subdivision of the suit property. According to the respondent, the titling process is underway and therefore the applicant's application, which was filed three months after the ELC had rendered its decision, had been overtaken by events. The respondent stated that the applicant's intended appeal raised no arguable point. She invited us to dismiss the application in its entirety.
 5. The background of the application is that the applicant contends that he is the registered proprietor of land parcel LR No. 6324/10 (suit property). He stated that the respondent, sometime in March 2016, attempted to trespass on the suit property on grounds that she had purchased the same from the applicant vide a sale agreement dated 15th April 1993. This prompted the applicant to lodge Nyeri ELC No. 48 of 2016, where he sought orders to have the respondent restrained from interfering with the suit property. In response, the respondent filed a statement of defence and counterclaim. The respondent's case was that she had legally acquired plots number 90, 91 and 92 measuring 12 acres comprised in the suit property by virtue of a sale agreement dated 15th April 1993. The respondent further averred that she had been in possession of the said portions of the suit property for over twenty-three 23 years, since 1993, hence she had acquired prescriptive rights over plots 90, 91 and 92 situated within the suit property by dint of the principle of adverse possession.
 6. The ELC, after hearing the parties, dismissed the respondent's claim over the suit property by way of adverse possession. The learned Judge however found that the parties had indeed entered into a sale agreement dated 15th April 1993, where the applicant agreed to sell to the respondent 12 acres from the land comprising of the suit property for a consideration of Kshs. 850,000. The learned Judge determined that the respondent proved that she had paid Kshs. 450,000 out of the agreed Kshs.850,000 and was therefore entitled to 6 acres out of the agreed 12 acres of the suit property. The applicant's suit was dismissed. The applicant was ordered to transfer 6 acres from the land comprising of the suit property to the respondent within ninety days of the ELC's decision.
 7. Aggrieved by the said judgment of the ELC, the applicant lodged a notice of appeal dated 6th May, 2022, intending to appeal against the entire decision of the ELC. The applicant further filed the instant application seeking, inter alia, stay of execution of the judgment and decree of the ELC, pending hearing and determination of his intended appeal.
 8. The application was canvassed by way of written submissions, duly filed by both parties. On whether the appeal is arguable, counsel for the applicant, Mr. Owang, deposed that the judgment and consequential orders of the ELC, which were premised on the purported sale agreement dated 15th April 1993, were not in consonance with the respondent's prayers sought in her pleadings, as her counter-claim was anchored on a claim over the suit property by virtue of adverse possession. The appellant's counsel submitted that the respondent defaulted on the terms of the sale agreement, as she failed to pay the agreed purchase price. She therefore did not acquire any rights over the suit property. Counsel urged that there was no legal basis for the orders granted by the learned Judge in the impugned



judgment. He urged that the applicant's appeal will be rendered nugatory if the application is not allowed as the land will be transferred to the respondent pursuant to the orders of the ELC.

9. In rebuttal, counsel for the respondent, Ms. Wanyonyi, on whether the appeal is arguable, submitted that the grounds contained in the applicant's draft memorandum of appeal did not raise a single arguable issue. Counsel urged that the 6 acres awarded to the respondent have already been excised from the larger LR No. 6324/10, and therefore, as it stands, the application has been overtaken by events. On the second element of whether the appeal will be rendered nugatory, counsel for the respondent submitted that in the event the applicant's appeal succeeds, the suit property can always be transferred back to the applicant. Counsel explained that the decision of the ELC was rendered more than a year ago and the applicant in that period never challenged the same until the instant application. Counsel submitted that the application was unmerited and urged us to dismiss the same.
10. We have considered the application, the grounds in support thereof, the replying affidavit, the submissions, the authorities cited and the law. The principles for granting stay of execution under Rule 5 (2) (b) of this Court's Rules are well settled. This Court in the case of *Trust Bank Limited and Another v Investech Bank Limited and 3 Others* [2000] eKLR delineated the jurisdiction of this Court in such an application as follows:

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..."
11. On the first principle of whether the appeal is arguable, this court in *R.F.S. v J.D.S.* [2013] eKLR observed thus:

"Now an appeal is said to be arguable when it contains grounds, points or issues that can genuinely be asserted, on which there can be divergent legal or factual positions of some merit worthy of juridical investigation and determination. To succeed, it is enough that even a single, solitary ground of such description exists and the same need not be one that must necessarily succeed an appeal."
12. Applying the above threshold to the applicant's grounds, and being mindful not to prejudice the hearing of the intended appeal, we are of the view that the grounds of appeal set out in the draft memorandum of appeal annexed to the application are arguable. An arguable ground is not necessarily one that must succeed, but merely one that is deserving of consideration by the court.
13. Turning to the second principle, will the intended appeal, if successful, be rendered nugatory if we decline to issue the orders sought? The position in law is that this depends on whether or not what is sought to be stayed or enjoined, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. See the case of *Reliance Bank Ltd v Norlake Investments Ltd.* [2002] 1 EA 227.
14. What is sought to be stayed in this application is the order issued by the ELC requiring the applicant to transfer six acres to the respondent to be excised from the suit property. The applicant is apprehensive that if the transfer is effected, his appeal will be rendered nugatory in the event it eventually succeeds. The respondent in rebuttal is of the view that the question of ownership of the portion of the suit property in contention is capable of restitution if the applicant's appeal is successful. The respondent



further stated that sub-division of the suit property has already taken place pursuant to the orders of the ELC dated 16th January, 2023, and the titling process is about to be completed.

15. This Court has previously held that the Court will not stay or injunct that which has already happened. In this case, the order of the ELC issued on 16th January 2023 directed that a Government surveyor to undertake sub-division of the suit property for the purpose of excision of six acres in favour of the respondent, and the further direction for the Deputy Registrar of the court to execute transfer documents in respect of the six acres, following the court’s decision dated 28th April, 2022, has already been given effect to. The letter annexed by the respondent dated 1st March, 2023 addressed to Integro Surveyors showed that indeed the process is already underway. In *Jaribu Holdings Ltd v Kenya Commercial Bank Ltd*. [2008] eKLR this Court expressed itself on this issue as follows:

“It will not be within reason for us to grant an order of stay of a decree which we know and the applicant itself concedes has been executed. The general policy of the law is that courts should not act in futility”.

16. The position in law is that both prerequisites must be satisfied before a party can be granted relief under Rule 5(2)(b) of the *Court of Appeal Rules*. Since only one prerequisite has been satisfied, the application is unsustainable.
17. In the circumstances of this case, we find that the applicant has not established that his appeal will be rendered nugatory in the absence of the orders sought. What he seeks to stay has already taken place. In any event if his appeal was to succeed, the undertaken transfer process can be reversed or alternatively the applicant can be compensated by an award of liquidated damages. It is our considered view that the applicant has not satisfied the twin principles required for grant of an injunction under Rule 5(2) (b) of the rules of this Court. His application must fail.
18. The upshot therefore is that the applicant’s notice of motion dated 18th July 2022 lacks merit and is hereby dismissed with costs to the respondent.

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

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

