



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwinzi v Kaesa (Suing on behalf of the Estate of Kaesa Kiiti - Deceased) (Civil Application E137 of 2023) [2023] KECA 1356 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1356 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E137 OF 2023  
HM OKWENGU, JM MATIVO & GWN MACHARIA, JJA  
NOVEMBER 10, 2023**

**BETWEEN**

**SAMUEL MUSINGILA MWINZI ..... APPLICANT**

**AND**

**EATHER MASAA KAESA (SUING ON BEHALF OF THE ESTATE OF KAESA  
KIITI - DECEASED) ..... RESPONDENT**

*(Being an application for stay of execution of the Judgment and Decree  
(L. Kimani, J.) at the ELC Court, Kitui, delivered on 9th February 2023  
in ELCA No. E002 of 2022 formerly ELCA No. 83 of 2022 Machakos)*

**RULING**

1. What is before us for determination is a Notice of Motion dated 14<sup>th</sup> March 2023 brought pursuant to sections 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 5 (2) (b) and 75 of the [Court of Appeal Rules](#).
2. It is supported by the grounds on the face of it and the applicant's affidavit sworn on 14<sup>th</sup> March 2023. He avers that the respondent filed a suit, being Chief Magistrate's Civil Case No. 111 of 1988- *Kaesa Kiiti v Peter Kiiti Ngui & Benson Mukiti Mutio*, at Mwingi Law Courts where judgment was delivered against him.
3. At the outset, we wish clarify the manner in which parties are cited in courts below. The aforesaid Magistrate's Court Judgment is annexed to the supporting affidavit, and its title does not make reference to the applicant. However, the body of the Judgment refers to five defendants. The Judgment delivered by Environment and Land Court, at Machakos (which we shall revert to hereafter) where the applicant preferred an appeal, refers to the parties in the trial court as *Esther Masaa Kaesa v Peter Kiiti Ngui, Simon Munyasya, Samuel M. Mwinzi, Christopher Mutei & Kitui County Council*. From this chronology, we conclude that the applicant was the 3<sup>rd</sup> defendant in the trial court, and the failure to



- cite all the parties in the title of the trial court judgment was an oversight on the part of the learned trial magistrate.
4. Being aggrieved, the applicant preferred an appeal in the Land and Environment Court (ELC) at Machakos, being ELCA No. 083 of 2011- *Samuel Musingila Mwinzi v Esther Masaa Kaesa (Suing on behalf of the Estate of Kaesa Kiiti (deceased))*. The appeal was allowed in his favour. The respondent then filed an application to set aside the Judgment on ground that the applicant's counsel had failed to serve them with their submissions. The court set aside the Judgment, and transferred the file to the ELC in Kitui where it was allocated number ELCA No. 2 of 2022. The appeal was heard and dismissed, meaning that ELC upheld the lower court's decision.
  5. Aggrieved, the applicant has filed the instant application. At the same time, the respondent has also filed an application, being Civil Application E107 of 2023, seeking to strike out the applicant's Notice of Appeal, which application is yet to be heard.
  6. The applicant contends that he had constructed a huge storey building on the suit land prior to the commencement of the primary suit; that the execution of the decree means that the building would be demolished which in turn would occasion him irreparable loss, thus render the appeal nugatory; and that it is in the best interest of justice that the application be allowed so as to preserve the suit land.
  7. The respondent opposed the application vide a replying affidavit sworn on 24<sup>th</sup> March 2023. It is her contention that the first judgment in Machakos ELCA No. 83 of 2011 was set aside on the ground that the applicant's counsel had failed to serve their submissions as ordered by the court; and that the notice of appeal was served outside the 7-day period provided for under the *Civil Procedure Rules*. She states that she has, as a result, filed before this Court an application, being application No. E107 of 2023 seeking to strike out the applicant's notice of appeal which application is still pending for determination. She refutes that the applicant has a huge storey building on the suit land; that in fact, what stands on the suit land is an unfinished structure; that she has since executed the impugned Judgment by registering the suit land in her name, and all that is remaining is demolition of the unfinished structure; and finally, that the applicant has not demonstrated he has an arguable appeal consequent to which the application ought to be dismissed.
  8. The application was canvassed before us on a virtual platform on 21<sup>st</sup> June 2023. Learned counsel Ms. Mbilo appeared for the applicant while learned counsel Mr. Kimondo appeared for the respondent. Both counsel wished to rely on their written submissions and were granted opportunity to orally highlight them. The applicant's submissions are dated 7<sup>th</sup> June 2023 while those of the respondent are dated 12<sup>th</sup> June 2023.
  9. Ms. Mbilo submitted that the main ground on which the application is hinged is the substantial loss to be suffered by the applicant if the orders sought are not granted. He submitted that the applicant has illustrated how he has constructed a 2-storey building, and that its demolition would occasion him substantial loss which cannot be compensated by way of damages. Furthermore, it is submitted, that the applicant has an arguable appeal. Counsel submitted that the appeal will be rendered nugatory if the orders of stay of execution are not granted for reason that the respondent will proceed and execute the Judgment, rendering the appeal an academic exercise. She urged us to exercise our discretion in the applicant's favour so as to preserve the suit property. Reliance was placed on the case of *Stanley Kang'ethe Kinyanjui v. Tony Ketere & 5 others* (2013) eKLR in support of the principles governing grant of a stay of execution under rule 5 (2) (b) of the *Court of Appeal Rules*, 2022.
  10. In response, Mr. Kimondo submitted that the applicant has not satisfied the twin principle under rule 5(2)(b) of the *Court of Appeal Rules* to warrant this Court to exercise its discretion in his favour; more



so that he failed to demonstrate that he acquired the suit property legitimately. We were accordingly urged to disallow the application.

11. We have considered the application, the affidavits both in support of, and in opposition to, the application, the submissions made and the law. The application is expressed to be brought under rule 5 (2) (b) of this Court's Rules. Under the rule, an applicant must meet two requirements, being firstly, he must demonstrate that he has an arguable appeal, and secondly, that the appeal will be rendered nugatory if the order sought is not granted. In *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* [2013] eKLR which was aptly relied on by the applicant, this Court elaborated on the limb of arguability as follows:
  - i. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
  - ii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. See *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.”
12. What we glean from the application as the arguable points on appeal are: who the proprietor of the suit land is; whether the suit land was allotted to the applicant in an illegal or fraudulent manner; and whether the respondent proved on a balance of probabilities that the plot purchased by her late husband formed part of the suit land.
13. At the outset, we point out that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous and merits to be argued fully. Further, that it is sufficient if the appeal raises only one triable issue. In our view, we think that the applicant has raised issues which are not frivolous and, therefore, merit consideration. To this extent we find that the intended appeal is arguable.
14. On the nugatory aspect, the applicant averred that the appeal, if successful, will be rendered nugatory if stay of execution is not granted for the reasons that the respondent will demolish the storey building on the suit plot which will occasion him loss that cannot be compensated by an award of damages.
15. The respondent in her response was adamant that she had already registered the suit plot in her name, and she did not deny the averment that she intends to demolish the building on it.
16. In the premises, we hold that there is a danger of the suit property being interfered with more specifically the building on it, being demolished. In the circumstances, in exercising our discretion under rule 5 (2) (b) of the Rules of this Court, we must do our best to balance the two-competing interests; that of the successful litigant not being denied the fruits of his judgment, and that of the unsuccessful litigant exercising his right of appeal which should be protected from being rendered nugatory.
17. Taking this into account, and considering that the applicant has already taken steps to register herself as the new owner of the suit land, nothing then prevents her from dealing with the land in any manner whatsoever, including selling it to third parties. Further, the applicant has always been in possession of the suit plot, he has developed it and with time has developed sentimental attachment to it. In this case, we find that the failure to grant the orders sought is likely to render the appeal nugatory.
18. Accordingly, we find that the applicant's application dated 14<sup>th</sup> March 2023, has merit and we allow it. Costs of the application shall abide the outcome of the appeal.



DATED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. M. MATIVO

.....

JUDGE OF APPEAL

G.W NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

