



**Osundwa v Adhiambo & another (Civil Application E112 of 2023)
[2023] KECA 1313 (KLR) (6 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1313 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E112 OF 2023
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
NOVEMBER 6, 2023**

BETWEEN

ZAKARIA MARI OSUNDWA APPLICANT

AND

BONFACE WESONGA 1ST RESPONDENT

MORRIS SHYALLA ADHIAMBO 2ND RESPONDENT

(An Application for injunction from the Ruling of the Environment and Land Court at Siaya (Koross, J.) dated 23rd March, 2023) in ELC Case No. E012 OF 2021)

RULING

1. The applicant herein has approached this Court for orders of temporary stay pending the hearing and determination of the appeal he has filed before this Court. His prayers are in the following terms:
 1. – spent -.
 2. – spent –
 3. Pending the hearing and determination of the appeal, a temporary injunction do issue restraining the Defendants/Respondents, their servants and/or agents jointly and severally from evicting the applicants, cultivating, selling, transferring, disposing and/or interfering whatsoever with the suit property.
 4. The costs of this application be provided.
2. A very brief summary of the case would suffice to deal with the application. The original claim in the Environment and Land Court (ELC) was for adverse possession by the applicant. It was dismissed by the ELC on 23rd February, 2023. In that suit, the applicant claimed, and it was a point of contention, that he was in occupation and possession of the suit property for more than 40 years. He claimed that



he was born and was raised on that parcel of land. The determination of the case did not really turn on the possession of the suit property but on whether the ingredients for adverse possession had been met or not.

3. In its decision of 23rd February, 2023, the ELC concluded that the elements of adverse possession had not been met and ruled in favor of the respondent. It, therefore, dismissed the appellant's suit and, consequently, ordered his vacation of the suit premises.
4. The applicant is aggrieved by that decision and has filed a Notice of Appeal before this Court. It is unclear if he has already regularly filed a Memorandum of Appeal and Record of Appeal. Contrary to the respondent's argument, neither is necessary for the determination of the matter before us at this time.
5. When the parties' advocates appeared before the Court for the hearing of the application today, Ms. Akinyi appeared for the applicant while Mr. Mwebi appeared for the respondent.
6. Rule 5(2)(b) of the [Court of Appeal Rules](#) which the applicant has invoked before us provides that:

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 -

 - (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 stay of any further proceedings on such terms as the Court may think just.
7. As this Court has said countless times, this rule clothes this Court with original jurisdiction to preserve the substratum of the appeal pending before it. The invocation of the rule does not usher in an analysis akin to an appeal against the impugned decision of the superior court; neither is the rule aimed at correcting the exercise of discretion by the trial court.
8. It is common ground between the parties that for the applicants to succeed, they must satisfy the twin principles enunciated in our jurisprudence: demonstration that the appeal is arguable; and a demonstration that the appeal would be rendered nugatory but for the prayed-for relief of stay of execution or injunction.
9. On the first principle, whether the appeal is arguable, we have to consider whether the appeal, as filed, raises at least a single bona fide arguable point noting, as the Court defined it in [Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others](#) [2013] eKLR, that an arguable appeal is not one with a high probability of succeeding; it is, instead, one which ought to be argued fully before the Court. Differently put, an arguable appeal is one which is not frivolous.
10. The respondent argues that the appeal is not arguable but hardly proffers any reasons for that position. The issue in the ELC was one for adverse possession and the relationship between the elements for an executed gift and adverse possession. It is not possible to say, with a straight face, that the issue, presented for the first time to the appellate court with a right to exercise de novo review of the evidence is not arguable.
11. Turning to the question whether the appeal would be rendered nugatory if the orders are not granted, we note that the issue is one about land. The applicant's position at the ELC, not disputed at all, is that he was in possession of the suit property for over forty years during the pendency of the suit. The respondent has not demonstrated how and when, if at all, the applicant vacated the premises. The applicant insists that although the respondent has attempted to close his ingress and egress from the suit premises, he remains in occupation and possession. We are persuaded, on the basis of the evidence



tendered by affidavit evidence and the record before us, that the applicant is in possession of the suit premises.

12. Given our finding that the applicant is in possession and in occupation of the suit premises, it follows that the appeal would be rendered nugatory if he is to be evicted as his appeal is pending before this Court.
13. The conclusion, then, is foregone: the applicant has satisfied both prongs of the test for granting stay or injunction orders under Rule 5(2)(b) of the *Court of Appeal Rules*, 2022. We, therefore, hereby grant the orders sought in prayer 3 in the Notice of Motion dated 30th August, 2023. It is the only just outcome to preserve the substratum of the appeal until it is heard and determined. The costs will be in the cause.
14. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 6TH DAY OF NOVEMBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

