



REPUBLIC OF KENYA



**Waiganjo v Kimani & another (Civil Application E411 of 2023)
[2023] KECA 1567 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1567 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E411 OF 2023
S OLE KANTAI, M NGUGI & PM GACHOKA, JJA
DECEMBER 19, 2023**

BETWEEN

JAMES KARIMI WAIGANJO APPLICANT

AND

LANGATA REALTY LIMITED 1ST RESPONDENT

ANDREW MWANGI KIMANI 2ND RESPONDENT

(An application for stay of proceedings against an order of the Environment and Land Court of Kenya at Nairobi, (Oguttu Mboya, J.) made on 27th July 2023 in ELC Case No. 195 of 2017)

RULING

1. Before us is a Notice of Motion dated 21st August 2023 said to be filed under rule 5(2) (b) of the [Court of Appeal Rules](#), seeking the following prayers:
 - (a) Spent;
 - (b) Spent;
 - (c) Pending the hearing and determination of the intended appeal by the applicant, there be a stay of the orders of Mboya, J. made on 27th July 2023 in Nairobi High Court (sic) ELC Case No. 195 of 2017. For the avoidance of doubt, the orders be lifted and/or held in abeyance pending the hearing and determination of this application inter-partes.
2. The facts in this application are straightforward and agreed between the parties. The applicant was enjoined as a defendant in the suit at the Environment and Land Court (ELC), Nairobi on 16th November 2022 and was directed to file his defence and counterclaim. The suit was fixed for further hearing on 5th July 2023 and on that date, the applicant applied for adjournment as his witness, the



Land Registrar, was not in court. The court allowed the adjournment and extended the summons for further hearing on 27th July 2023.

3. On 27th July 2023, the applicant applied for an adjournment yet again on the ground that the Land Registrar was not in court. The court rejected the application for adjournment and ordered that the applicant's case as the plaintiff in the counterclaim be closed. The court issued further orders for the filing of submissions by the parties.
4. Aggrieved by that order, the applicant applied for leave to appeal, which was granted, and thereafter filed a notice of appeal on 1st August 2023. Pending the hearing and determination of the appeal, the applicant prays for stay of the orders of the trial court issued on 27th July 2023, essentially staying further proceedings therein. The applicant argued that unless we grant an order for stay of proceedings, the hearing in the ELC may be concluded thus rendering the intended appeal an academic exercise. On questioning by the court, the applicant confirmed that indeed the parties have complied with the order for the filling of submissions and the judgment was to be delivered on 27th October 2023.
5. The application is opposed. In a replying affidavit sworn on 15th September 2023, Pankaj Valjea Shah, a director of the 2nd respondent, states as follows: that the order appealed from is a negative order and therefore not capable of being stayed; that the grounds of appeal are not arguable as they are only challenging the exercise of discretion by the Judge; and that the appeal will not be rendered nugatory absent an order for stay.
6. Both parties have filed written submissions which reiterate the grounds in their respective affidavits. In his submissions dated 17th September 2023, the applicant cites the following decisions in support of his case: *Reliance Bank Ltd. v Norlake Investments Ltd.* (2002) 1 EA 227; NBI Civil Application No. E092 of 2021, [*Kenafriic Matches Ltd. v Match Masters Ltd. & another*](#) NBI Civil Application No. E092 of 2021 and [*Trust Bank Ltd. v Investech. Bank Ltd. and 3 others*](#) [2000] eKLR.
7. On its part, the 2nd respondent, in submissions dated 18th September 2023, cites the following: [*Gideon Sitelu Konchellab v Julius Lekakeny Ole Sunkuli & 2 others*](#) [2018] eKLR, and [*Raphael Kakene Muloki & another v Cabinet Secretary of Lands & 2 others*](#) [2021] eKLR.
8. We have carefully considered the application, the affidavits, and the submissions by the parties.
9. Before we address the question of whether the applicant has met the threshold for the grant of the order for stay of proceedings, it is imperative that we first address the question whether the orders sought to be stayed are negative in their nature as argued by the respondents. The question is, did the Judge order any positive action to be taken?
10. We have perused the order issued by the Judge and note that in addition to dismissing the application for adjournment, he made further orders for the filing and exchange of written submissions. To that extent, the order may have been negative in certain aspects but it contained certain directions that the parties had to comply with. In the premises, we reject the argument by the 2nd respondent that the order, at least part of its, is not capable of being stayed.
11. Having held that the order was entirely negative, the next question is whether the applicant has satisfied the twin principles for the grant of stay of proceedings. The parties are walking on a well-trodden path and the principles applicable have crystallized in many decisions of this court. We cite the decision in [*Ann Wanjiku Kibe v Clement Kungu Waibara & IEBC*](#) [2020] eKLR where the court held:

“... for stay of orders to issues, the Applicant must demonstrate that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.”



12. We have looked at the grounds set out in the memorandum of appeal dated 21st August 2023. The question of whether the Judge exercised his discretion properly in denying the adjournment and whether the applicant was denied the right to a fair hearing as enshrined in article 50 of the Constitution are arguable in our view, but as to whether those grounds will succeed, we will leave it to the bench that will be hearing the appeal. As this court has said in several decisions, held, an arguable ground is not one that must necessarily succeed at the hearing.
13. On the nugatory aspect, we note that it was common ground between the parties that the hearing had been concluded and that it was pending judgment. In our view, whichever way the judgment goes, either party has a right of appeal. If the applicant succeeds, this appeal may well be unnecessary and if he loses, he still has an opportunity to challenge the judgment even on the same grounds that are raised in this application. In the premises, we are satisfied that the intended appeal will not be rendered nugatory and therefore, the applicant has not satisfied the second limb for grant of stay of proceedings.
14. In view of the foregoing, we find that this application has no merit and we dismiss it with costs to the 2nd respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2023.

S. Ole KANTAI

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

