



REPUBLIC OF KENYA



KENYA LAW
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**Nairenke & 5 others v Tina & 4 others (Civil Application
E043 of 2023) [2023] KECA 1535 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1535 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E043 OF 2023
MSA MAKHANDIA, FA OCHIENG & WK KORIR, JJA
DECEMBER 15, 2023**

BETWEEN

**DENIS KINYAMAL NAIRENKE 1ST APPLICANT
SIMON LETEIPA 2ND APPLICANT
JOSEPHINE NAISEKU KIMANI 3RD APPLICANT
SIMON R.ILE MASI 4TH APPLICANT
MOSES TALALA SIALO 5TH APPLICANT
DOMINIC KIONGA LOMANAT 6TH APPLICANT**

AND

**SAMSON OLE TINA 1ST RESPONDENT
THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT ... 2ND
RESPONDENT
THE CHIEF LAND REGISTRAR 3RD RESPONDENT
THE DISTRICT LANDS REGISTRAR, TRANSMARA DISTRICT 4TH
RESPONDENT
THE ATTORNEY GENERAL 5TH RESPONDENT**

(Being an application for stay of execution and the implementation of the judgment and decree of the decision of the Environment and Land Court (E&LC) at Kilgoris (Kullow, J.) dated 30th October 2022) in E&LC Petition No. 1 of 2021 (Formerly Narok E&LC Pet No. 14 of 2017)



RULING

1. The applicants have moved this Court *vide* a notice of motion dated May 15, 2023 pursuant to rules 1(2), 5(2)(b), 43, 44, 45, 47, 49 of the [Court of Appeal Rules, 2022](#). Through the application they seek orders of stay of the judgment and decree arising from Petition No. 1 of 2021 in the Environment and Land Court (E&LC) at Kilgoris. The applicants also pray that the costs of the application be provided for.
2. The application is premised on the grounds on its face as well as those deposed in the supporting affidavit of the 1st applicant, Denis Kinyamal Nairenke. It is the applicants' averment that the judgment by the E&LC annulled their titles to Transmara/Ololchani/163, 860, 861, 878 and 879 and conferred them upon the 1st respondent, Samson Ole Tina. The applicants depose that the implementation of the judgment will lead to substantial and irreparable injury as the suit properties can easily be disposed and alienated thus taking them out of this Court's reach hence rendering their appeal nugatory, were it to eventually succeed. The applicants state that they have owned the suit properties since the 1970s and utilized them for grazing, among other activities. The applicants further depose that after the delivery of the judgment, the 1st respondent has encroached on the suit land by bringing unknown persons to survey the land and is in the process of disposing off the land. The applicants also aver that they have an arguable appeal raising issues of law and their application should be allowed so as not to render their intended appeal nugatory.
3. The application is opposed through a replying affidavit sworn on 23rd June 2023 by the 1st respondent. Through the affidavit, he opposes the application on the grounds that the same is mischievous, vexatious and an abuse of the court process hence ought to be struck out; that the applicants' parcels numbers Transmara/Ololchani/163, 860, 861, 878 and 879 are superimposed on his land parcel number Transmara/Ololui/15; that he is not in the process of alienating and selling off the suit property as alleged by the applicants; and, that the applicants have no interest in the suit property hence they do not have the locus standi to ventilate any issues in the intended appeal. The 1st respondent further avers that allowing the present application would be prejudicial to him as the applicants would be accorded undue advantage in violation of his rights as their intended appeal is not arguable. According to the 1st respondent, the intended appeal will not be rendered nugatory as only the disputed portion will be affected and not the entire piece of land. He consequently prays that we dismiss this application for lack of merit.
4. The application came up for hearing on October 2, 2023 when learned counsel Mr. Otieno appeared for the applicants and learned counsel Mr. Wafula represented the 1st respondent. There was no appearance for the 2nd to 5th respondents and neither did they file any documents in respect to this application.
5. Mr. Otieno relied on the submissions dated July 13, 2023 in support of the application. On whether the intended appeal is arguable, counsel referred to the case of [Stanley Kangethe Kinyanjui v Tony Keter](#) [2013] eKLR to point out that an arguable appeal must not necessarily be one that will succeed. Counsel submitted that the intended appeal raises both issues of law and fact and is arguable hence requiring a determination by Court.
6. Counsel also submitted that the intended appeal will be rendered nugatory as the 1st respondent may dispose the suit property if stay orders are not granted. According to him, the orders of stay will help to protect and preserve the substratum of the intended appeal. Counsel relied on the case of [Permanent](#)



- Secretary Ministry of Roads & another v Fleur Investment Ltd* [2014] eKLR to submit that whether an appeal may be rendered nugatory can only be determined by considering the circumstances each particular case. Counsel consequently urged us to allow the application asserting that if the orders sought are not granted the applicants shall stand to suffer irreparably.
7. On his part, Mr. Wafula relied on the submissions dated June 23, 2023. On whether the applicants' intended appeal raises arguable points, counsel submitted that the exhibited memorandum of appeal does not raise any arguable issue but is frivolous, vexatious and is only being deployed to defeat the realization of the judgment of the E&LC. Counsel further submitted that the issues raised in the said memorandum of appeal were extensively addressed by the trial court. Counsel relied on the cases of *Stanley Kangethe Kinyanjui v Tony Keter & 5 others* (*supra*) and *Meso Multipurpose Society Ltd v Luore Nyoiro Co. Ltd & 2 others* [2020] eKLR to buttress the submission that orders of stay will not be granted where the intended appeal is not arguable.
 8. As to whether the intended appeal will be rendered nugatory if an order of stay is not granted, counsel relied on the decision in *National Credit Bank Ltd v Aquinas Francis Wasile another*, NAI CACA No. 238 of 2015 to submit that it was incumbent upon the applicants to establish that the intended appeal will be rendered nugatory. Counsel urged that in the present case, the applicants had not established this ingredient as no tangible evidence was tendered in support of the averment that the appeal will be rendered nugatory if the application is not allowed. Counsel also relied on the case of *Kenya Shell Ltd v Benjamin Karuga Kibiru & another*, Nai CACA No. 97 of 1986 to urge that in the absence of evidence to prove the nugatory aspect, the application should not be allowed. In conclusion, Counsel urged us to dismiss the application.
 9. We have carefully considered the motion, the supporting affidavit, the replying affidavit, the submissions by the parties and the applicable law. This being an application brought pursuant to rule 5(2)(b) of the *Court of Appeal Rules* it is incumbent upon the applicants to establish that they have an arguable appeal but not one which must necessarily succeed; and, that unless the order of stay is granted the intended appeal stands the risk of being rendered nugatory. The underlying principles guiding the exercise of the discretion of this Court to grant an order of stay pending appeal have been expounded in a plethora of cases including that of *Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 others* (*supra*).
 10. Our mandate at this juncture does not include a consideration of the merits of the pending appeal but just to have a bird's eye view of the grounds of appeal in order to decide if the applicants' intended appeal is arguable. As was held in *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others* (*supra*), all we are required to do is to merely assess whether the issues raised in the memorandum of appeal are not frivolous and deserve to be argued fully before the Court. In the annexed memorandum of appeal, the applicants raise 8 grounds among them being that the trial judge misapprehended the doctrine of *res judicata* and failed to apprehend the evidentiary material placed before him. In our view, the grounds in the memorandum of appeal are not frivolous and warrants this Court's attention. Without saying more, we reach the conclusion that the intended appeal is arguable.
 11. The next question is whether the appeal will be rendered nugatory if the orders sought are not granted. Again, in *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others* (*supra*), it was stated that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed, if allowed to happen, is reversible. If the act intended to be stayed is not reversible then the Court will be called upon to consider whether the aggrieved party will reasonably be compensated by damages.
 12. According to the applicants, they are apprehensive that the 1st respondent will alienate the suit property if the orders sought are not granted. They also aver that the 1st respondent has brought in surveyors and potential buyers to the suit property following the delivery of the judgment by the trial court. On his



part, the 1st respondent has relied on the decision in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR to urge that the applicant ought to have tendered concrete evidence to support their allegation of the possibility of the appeal being rendered nugatory. In the cited decision, Hancox, JA stated that:

“As I said I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

13. Platt Ag JA on his part held as follows:

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”

14. Gachuhi Ag JA emphasized that:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay.”

15. The cited excerpts highlight the requirements to be met before a judgment is stayed as well as the objectives for staying a judgment pending appeal. The learned judges also alluded to the circumstances under which it can be said that an appeal is likely to be rendered nugatory if execution is not stayed. It is therefore clear that before an order of stay is granted an applicant should point to the Court the loss likely to be suffered if stay is not granted.

16. In the instant application, we note that the titles to the suit property are still registered in the names of the applicants. On the other hand, in the absence of stay, the 1st respondent will be at liberty to alienate the land or alternatively put it into some other use incompatible with the applicants' interests. Such a move would ordinarily trifle the implementation of the judgment of this Court were the pending appeal to succeed. If, however, the appeal were to be dismissed, the 1st respondent will still be at liberty to execute the judgment of the E&LC without any hinderance. He will therefore not have suffered any loss as he has not been utilizing the suit property. Additionally, any loss suffered by the 1st respondent arising from failure to access and utilize the disputed property can always be compensated by damages.

17. In the end, we find that the applicants have demonstrated the twin principles for grant of stay of judgment pending appeal. Furthermore, we also find that based on the facts of this case, there would be no prejudice or injustice to be suffered by the 1st respondent if the stay orders are issued.

18. Consequently, the application dated May 15, 2023 has merit and is allowed so that an order is hereby issued staying the execution of the judgment and decree in Kilgoris E&LC Petition No. 1 of 2021



pending the hearing and determination of the applicants' intended appeal. The costs of the application shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

