



**Samoei v Samoei (sued on behalf of the Estate of the late Joseph Kisorio Samoei) & 3 others  
(Civil Application E123 of 2023) [2023] KECA 1544 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1544 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E123 OF 2023  
F SICHALE, P NYAMWEYA & WK KORIR, JJA  
DECEMBER 15, 2023**

**BETWEEN**

**KIMWEI ARAP SAMOEI ..... APPLICANT**

**AND**

**SELY JEPCHUMBA SAMOEI (SUED ON BEHALF OF THE ESTATE OF THE  
LATE JOSEPH KISORIO SAMOEI) ..... 1<sup>ST</sup> RESPONDENT**

**DAVID KIMTAI MWEI ..... 2<sup>ND</sup> RESPONDENT**

**JAMES KIMARU SONGOK ..... 3<sup>RD</sup> RESPONDENT**

**WILLIAM SOME SONGOK ..... 4<sup>TH</sup> RESPONDENT**

*(An application for orders of injunction pending the hearing and determination  
of the appeal against the Judgment of the Environment and Land Court at Kitale  
(Mwangi Njoroge J.) delivered on 27th February 2020 in Kitale ELC No. 45 of 2019)*

**RULING**

1. The principles that apply to the application before us for an injunction pending appeal are settled. Under rule 5 (2) (b) of the *Court of Appeal Rules*, an applicant has to satisfy us that he or she has an arguable appeal. Secondly, an applicant has to additionally demonstrate that unless an order of stay is granted, the appeal or intended appeal will be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
2. Kimwei Arap Samoei, the Applicant herein, has in this regard filed a notice of motion application dated May 16, 2023 seeking an order restraining the Respondents from destroying the existing boundaries, demarcating, sub- dividing, selling and/ or evicting the Applicant from the portion of land which he has been utilizing in Kitale Municipality Block 15/ Koitogos/246 (hereinafter “the suit property”) pending the hearing and determination of his intended appeal. The application is supported by



- an affidavit he swore on May 16, 2023, in which he deponed that judgment was entered by the Environment and Land Court (hereinafter “the trial Court”) in Kitale Land Case No 45 of 2019 on February 27, 2020 that the suit property be registered in the name of the late Kipsongok Arap Chepkulei, pending distribution of the same. However, that the Respondents have forcefully taken over the ownership of the entire land, destroyed the existing boundaries and fences by burning them, and are threatening to evict the applicant. The applicant also pointed out that after filing his appeal, he filed an application for stay of execution of the judgment in this Court but at the time of hearing, was informed that the same was overtaken by events as the title had already been transferred to the deceased’s name.
3. The Applicant avers that his appeal is arguable based on the memorandum of appeal filed on the grounds that the trial Court findings on the existence of a resulting trust was not supported by evidence or the law, and that the revocation of the title he obtained in 1993 was done without proof of fraud or misrepresentation contrary to the law. The Applicant claims that he will be greatly prejudiced and his appeal will be rendered nugatory if the order of injunction is not granted as he will be evicted from the suit property which is his childhood home, and he has no other place of abode.
  4. The Respondents opposed the application by way of Replying Affidavit sworn on October 11, 2023 by Selly Jepchumba Samoei, the 1<sup>st</sup> respondent. According to the Respondents, the suit property was transferred to the names of Kipsongok Arap Chepkulei- Deceased as per the orders of the trial Court and after the applicant’s application for stay of execution dated March 24, 2021 was withdrawn on November 10, 2023 before this Court, he was . advised to fast track the hearing of the appeal but he failed to do so. Further, that the suit property is five (5) acres and the Applicant was in occupation of one (1) acre while there were eleven (11) beneficiaries, and granting the injunction would only serve to benefit the applicant to the detriment of the Respondents rights over the land, and no prejudice would be occasioned to the applicant as he was also a beneficiary of the estate of Late Kipsongok Arap Chepkulei. They asserted that none of the eleven (11) beneficiaries had burnt down the Applicant’s fence nor did they have the intention to evict the Applicant from the suit property or dispose of the same.
  5. The application was heard on this Court’s virtual platform on October 17, 2023. learned counsel Mr. Ogutu appeared for the applicant, while learned counsel Mr. Gideon Barongo, appeared for the Respondent. The two counsel highlighted their respective submissions dated October 11, 2023 and October 16, 2023. Mr. Ogutu appeared to have conflated the principles that apply to an interlocutory injunction with those that apply to an injunction pending appeal in his submissions. In this respect, while relying on rule 5(2b) of the Court of Appeal Rules, he cited the decisions among others in *Giella v Cassman Brown* (1973) EA 358 and *Mrao Ltd v First American Bank of Kenya* (2003) on the requirements of establishment of a *prima facie* case with a probability of success, irreparable damage and balance of convenience which do not apply in the present application.
  6. Mr. Ogutu in this respect submitted that the Applicant has demonstrated that at all times material leading to this appeal, he was the one in possession of the suit property, that his permanent residence is on the parcel land and was the previously the registered proprietor. The counsel reiterated that the Respondents were destroying the structures on the land and were threatening to evict the Applicant, and that he was thus at a risk of losing his rights to the property and suffering irreparable loss.
  7. Mr. Barongo on his part submitted that the Applicant had not adduced any cogent evidence that supports the allegations that the Respondents have burnt the suit land’s fence and/ or threatened to evict him, and placed reliance on section 107 and 108 of the Evidence Act that he who alleges must prove. While citing the decisions in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others* (*supra*), and *R.F.S. v J.D.S* [2013] eKLR, Mr. Barongo submitted that the Applicant’s appeal had no arguable point



since this matter had been properly determined before the trial Court and the registration of the suit land had since been transferred to the names of the late Kipsongok Arap Chepkulei.

8. On whether this appeal would be rendered nugatory if the interim orders are not granted, counsel placed reliance on this Court's definition of a nugatory appeal in the case of *in re Estate of Harish Chandra Hindocha (deceased)* [2021] eKLR to submit that the Applicant and Respondents were all beneficiaries of the estate of the late Kipsongok Arap Chepkulei and the Applicant was in possession of one (1) acre of the five (5) acres of the suit land, and the Respondents also have a right to use the suit property. Further, that the Applicant being a beneficiary would still enjoy a share of the estate just like the Respondents, and any use by the beneficiaries can be reversed if his appeal succeeds.
9. We need to point out that the threshold for an arguable appeal is a low one, it is not necessarily one which must succeed, but one which is not frivolous and merits to be argued fully. Further, that it is sufficient if the appeals raises only one triable issue. In this application the Applicant has challenged the legal basis of the trial Court's finding of a resulting trust, and of the revocation of his title. In our view the Applicant merits an opportunity to expound on his concerns in this respect. We therefore find that he has an arguable appeal.
10. On the nugatory aspect, it was held in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others (supra)* that whether or not an appeal will be rendered nugatory depends on whether or not what is ought to be stayed or injuncted, if allowed to happen is reversible; or if not reversible whether the damages will reasonably compensate the party aggrieved. We also refer to the observations made in *Reliance Bank Limited v Norlake Investment Limited* (2002) 1 EA 227 that factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the Court is bound to consider the conflicting claims of both sides.
11. The Applicant has stated that he will suffer irreparable loss since he was at the risk of losing his structures, and being evicted from the suit property. The respondents have disputed destroying any structures or fences on the suit property, and allege that the title to the suit property has since been transferred to the name of Kipsongok Arap Chepkulei, who is deceased, and and that they are all beneficiaries of his estate. It is our view that there is no risk of any interference with the title to the suit property in the circumstances other than through a court sanctioned process, of which the Applicant, being a beneficiary of the deceased will be a necessary party. In addition, any changes of boundaries to the suit property or in its occupation are reversible if the Applicant's appeal succeeds, and any prejudice suffered by the Applicant in this regard can also be adequately compensated in damages. We therefore find that the second threshold as to whether the appeal will be rendered nugatory has not been met.
12. The result is that the applicant's notice of motion application dated May 16, 2023 is found to be unmerited and is accordingly dismissed. As this is a dispute between family members there shall be no order as to the costs of the application.
13. It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 15<sup>TH</sup> DAY OF DECEMBER, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

