



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kipkulei & another v Chief Land Registrar & 8 others (Civil Application  
E100 of 2022) [2023] KECA 1514 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1514 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E100 OF 2022  
F SICHALE, LA ACHODE & WK KORIR, JJA  
DECEMBER 8, 2023**

**BETWEEN**

**BENJAMIN KIPKECH KIPKULEI ..... 1<sup>ST</sup> APPLICANT**

**DAVID KAHURIA MBUGUA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> RESPONDENT**

**WILSON KIGUTU MACHARIA ..... 2<sup>ND</sup> RESPONDENT**

**KIBII BOIYO ..... 3<sup>RD</sup> RESPONDENT**

**LUKE KIPKEMOI CHEMWENO ..... 4<sup>TH</sup> RESPONDENT**

**DAVID KIMAN GACHARU ..... 5<sup>TH</sup> RESPONDENT**

**FRANCIS K CHANWONY ..... 6<sup>TH</sup> RESPONDENT**

**DAVID BIWOT ..... 7<sup>TH</sup> RESPONDENT**

**DAVID BOIYO ..... 8<sup>TH</sup> RESPONDENT**

**DAVID MAINA ..... 9<sup>TH</sup> RESPONDENT**

*(Being an Application for injunction and or stay of orders of the Environment & Land Court  
at Nakuru Njoroge Mwangi J, dated 19th October 2022.in(Nakuru ELC Case No. E12 of 2022)*



## RULING

1. Benjamin Kipkech Kipkulei and David Kahuria Mbugua (the applicants herein), have vide a motion dated 19<sup>th</sup> December 2022, brought pursuant to the provisions of Rules 1 (2), 5 (2) (b) and 47 of the [Court of Appeal Rules](#), sought the following orders;
  - “ a. Spent.
  - b. That there be a stay of order number 1 maintaining the existing *status quo* interpreted to mean the respondents are in lawful occupation.
  - a. That there be an order of temporary injunction prohibiting the respondents from occupying, farming, leasing or utilizing properties LR. No. 20591/17, LR NO. 20591/19, LR NO. 20591/20, LR NO. 20591/21, LR NO. 20591/22, LR 20591/67 and LR NO. 20591/80 pending the hearing and determination of this application.
  - b. That there be an order of temporary injunction prohibiting the respondents from occupying, farming, leasing or utilizing properties LR. No. 20591/17, LR NO. 20591/19, LR NO. 20591/20, LR NO. 20591/21, LR NO. 20591/22, LR 20591/67 and LR NO. 20591/80 pending the hearing and determination of this appeal
  - c. That the costs of and incidental to this application abide the result of the said appeal.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Benjamin Kipkech Kipkulei (the 1<sup>st</sup> applicant) who deposed inter alia that he was the registered proprietor of land parcel number LR. No. 20591/22, LR. 20591/67 and LR 20591/80; that he had moved the Environment and Land Court at Nakuru seeking injunctive reliefs against an invasion championed by the respondents on the suit property on 3<sup>rd</sup> March 2022, which application was declined by the Environment and Land Court on 19<sup>th</sup> October 2022.
3. He further deposed that being dissatisfied with the aforesaid decision, he filed his Notice of Appeal on 26<sup>th</sup> October 2022; and that his appeal raised triable issues.
4. He further contended that following the invasion, he had lost a substantial portion of his animals due to insufficient grazing land that has been unlawfully annexed and occupied by the respondents and that he would stand to lose more animals should the Court not grant an injunction stopping the respondents from utilizing his farms to his prejudice.
5. The motion was opposed in a replying affidavit sworn by Luke Kipkemboi Chemweno (the 4<sup>th</sup> respondent) on 21<sup>st</sup> January 2023, who deposed inter alia that all the issues for determination before granting orders for injunction on status quo were ventilated at the Environment and Land Court (ELC), then the court issued orders of status quo and that the applicant had not challenged his official search extracted from the mother title which casts doubt on the authenticity of his (the applicants) title.
6. When the matter came up for plenary hearing on 24<sup>th</sup> July 2023, Mr. Odhiambo learned counsel appeared for the applicants whereas Mr. Keaton appeared for the 6<sup>th</sup> and 7<sup>th</sup> respondents and held brief for Mr. Rapando for the 2<sup>nd</sup> and 5<sup>th</sup> respondents. It also transpired that the applicants had sought



to withdraw the appeal against the 3<sup>rd</sup> respondent. Mr. Kibii on the other hand appeared for the 4<sup>th</sup> respondent. The 8<sup>th</sup> respondent was represented by the firm of Samba Otieno but there was no appearance on its part despite having been served with a copy of the hearing notice on 17<sup>th</sup> July 2023. It was further intimated to Court that the 9<sup>th</sup> respondent had never participated in the proceedings in the E&LC. The parties sought to rely on their written submissions which they briefly orally highlighted in Court.

7. It was submitted for the applicant that where there were competing certificates of title like in the instant case, the Court has a right to assess the materials before it and establish whether the appeal is arguable and that in the instant appeal, the status quo order places in possession persons with dubious title documents.
8. On the nugatory aspect, it was submitted that the heavy losses visited upon the applicant by the 2<sup>nd</sup> to 9<sup>th</sup> respondents were not sustainable; that the applicant had averred that he had lost substantial property and his animals were facing starvation due to lack of grazing grounds; that the applicant was on the verge of bankruptcy and that if the instant motion was not allowed, the appeal would be rendered nugatory.
9. Mr. Keaton on the other hand for 6<sup>th</sup> and 7<sup>th</sup> respondents and holding brief for Mr. Rapando for the 2<sup>nd</sup> and 5<sup>th</sup> respondents relied on the respective parties submissions dated 25<sup>th</sup> January 2023 and 24<sup>th</sup> February 2023 respectively and submitted that there was no iota of arguability of the appeal; that from the Memorandum of Appeal, it was evident that the same was frivolous for the reasons inter alia that Regulation 32 of the Practice Directions and Proceedings in the E&LC, gave the court discretion to issue status quo pending the hearing and determination of the case; that the learned judge did so having been confronted by competing interests; that the respondents had certificates of title viz a viz those of the applicant and that this issue could only be canvassed during the hearing of the substantive suit.
10. On the other hand it was submitted for the 4<sup>th</sup> respondent that the instant application by the applicant was by itself a concession that the 4<sup>th</sup> respondent was in possession of the suit property; that that is why the applicant is seeking the intervention of the Court; that the only major reason given by the applicant was an allegation that the 4<sup>th</sup> respondent relied on dubious documents; that there were competing titles to the suit property; and that the trial court had observed that the competing titles could only be tested during hearing so that the legitimacy of the competing interests could be determined. It was thus submitted that the applicant's attempt to use the Court to issue an injunction at this stage without determining the validity of the titles was jumping the gun.
11. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the 4<sup>th</sup> respondent's replying affidavit, the rival submissions by the parties, the cited authorities and the law.
12. The applicants' motion is brought inter alia under Rule (5) (2)(b) of this [Court's Rules](#). The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay or injunctions are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. An applicant has to satisfy the Court on both limbs. These principles were summarized by



this Court (differently constituted), in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2013] eKLR as follows:

- i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court.
  - v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
  - vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
  - vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
  - viii. An applicant must satisfy the Court on both the twin principles.
  - ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
  - x. 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.
  - xi. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.
  - xii. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
  - xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved."
13. It is common ground that the applicant in the E&LC had sought *inter alia* injunctive orders against the respondents from entering, taking possession, and or interfering with the suit property pending the hearing and determination of the suit. It is also not in dispute that the respondents are currently in occupation of the suit property. It is also not in dispute that both the applicant and the respondents have both produced copies of certificate of title claiming to be the rightful owners of the suit property. Additionally, the issue as to which party has the rightful title to the suit property has not been determined by the trial court and at this stage we cannot ascertain who has the rightful title.
14. The contention by the applicant that the order maintaining the existing status quo is interpreted to mean that the respondents are in lawful occupation is clearly without basis as nowhere in his ruling did the learned judge suggest that that the respondents were in lawful occupation. Indeed, at paragraph 43 of his ruling, he stated as follows;

"In a situation where the competing title issued to any of the parties has not been affirmed as valid by the court, it is not possible to confirm whether or not there is trespass at this interlocutory stage of proceedings without prejudicing the hearing of the main suit. It is plain to see that the issue of whether the plaintiffs and the defendants are the true owners of



the suit lands and whether there is trespass on the part of any of them has to be determined after hearing the evidence of all the parties.” (Emphasis Ours).

15. From the circumstances of this case and given the fact that the issue as to who has the rightful title documents to the suit property is still pending before the trial court, we are unable to make a determination as to whether the applicant’s nor the respondents’ titles are valid.
16. Additionally, we note that that the learned judge also directed that no developments will take place on the suit property pending the hearing and determination of the suit and further issued an inhibition order in respect of the suit property which orders in our view and from the circumstances of this case are intent in preserving the suit property.
17. We do not see how the applicant intended appeal will be rendered nugatory by the *status quo* being maintained.
18. In view of the above and the applicants having failed to satisfy the second limb of whether the intended appeal will be rendered nugatory absent stay, and having expressed doubts as to whether the applicant has an arguable appeal, we find the applicants motion dated 19<sup>th</sup> December 2022 is without merit and the same is hereby dismissed in its entirety with no order as to costs.

**DATED AND DELIVERED AT NAKURU THIS 8<sup>TH</sup> DAY OF DECEMBER, 2023.**

**F. SICHALE**

**JUDGE OF APPEAL**

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**L. ACHODE**

**JUDGE OF APPEAL**

.....

**W. KORIR**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

