



**Theuri v National Land Commission; Ruiru Sports Club (Interested Party) (Civil Application E102 of 2022) [2023] KECA 1473 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1473 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E102 OF 2022  
DK MUSINGA, JM MATIVO & A ALI-ARONI, JJA  
DECEMBER 8, 2023**

**BETWEEN**

**SAMUEL KIMONDO THEURI ..... APPLICANT**

**AND**

**NATIONAL LAND COMMISSION ..... RESPONDENT**

**AND**

**RUIRU SPORTS CLUB ..... INTERESTED PARTY**

*(An application for stay of execution and order of injunction pending the hearing and determination of an appeal from the judgement of the ELC Court of Kenya at Nairobi (E.O. Obaga, J.) dated 26th August, 2019 In ELC PETITION NO. 28 OF 2019)*

**RULING**

1. Before the Court is an application dated the March 28, 2022, by way of notice of motion pursuant to section 3, 3A of the [Appellate Jurisdiction Act](#), rule 5(2) (b) of the [Court of Appeal Rules](#), and Order 42 rule (6) (2) of the [Civil Procedure Rules](#) (which is inapplicable before this Court) seeking orders:
  1. ....
  2. That pending the hearing and determination of the applicant's Appeal No 86 of 2020, from the decision of the Hon. Justice E.O. Obaga delivered on August 26, 2019 in Nairobi ELC Pet. No 28 of 2017 this Court be pleased to order:
    - a. A stay of execution of the Judgement of the Hon. Justice E.O. Obaga delivered on August 26, 2019 in Nairobi ELC Pet. No 28 of 2017.
    - b. A stay of execution of the ruling of the National Land Commission signed for Prof. Mohammed Swazuri, PhD, on 22<sup>nd</sup> August, 2016.



- c. An order of injunction be and is hereby issued, restraining the respondent, its Commissioners, agents, servants and/or nominees from disposing of, subdividing, selling, transferring, mortgaging, paying any compensation for or whatsoever dealing with property known as LR No 122/7, LR No 122/4 or any subdivisions arising from the said parcels of land.
3. That this Honourable Court be pleased to grant any other order that it deems fit and just.
2. The application was supported by the grounds on the face of it and the affidavit of the applicant of even date and a further affidavit dated September 22, 2022.
3. Briefly, the applicant is aggrieved by the decision of the National Land Commission (respondent) that cancelled his title deed in respect of a property known as LR. No122/7 and all its subdivisions, in its decision of August 22, 2022, and the determination by E.O. Obaga, J. dismissing the applicant's application seeking to review the determination of the respondent.
4. The applicant states that he had learnt of the respondent's decision to substitute payment of the compulsory acquisition from him to the interested party, who the respondent found to be the bona fide owner of the said property. He further states that should the judgment be executed the appeal will be rendered nugatory.
5. The application was opposed by way of a replying affidavit of Gabriel Muthwala, a trustee of the interested party, dated April 19, 2022, wherein he deposed that the applicant has never owned the 30 acres of the subject property, neither the 15 acres compulsorily acquired, which is part thereof, as the land was fraudulently excised from the interested party's land by persons who purportedly sold it to the applicant; further, court proceedings do agree with the respondent's decision that the land belongs to the club; that it is not true that the applicant was not represented at the respondent's proceedings as its counsel, one Stephen Gachie, was all along present; that the appeal is frivolous as the impugned judgement did not grant positive orders capable of execution as it merely dismissed the application; that the appeal will not be rendered nugatory as the applicant can always be compensated by way of damages; and further, there is nothing to show that the applicant has the ability to pay the compensation to the interested party should the appeal fail.
6. In his submissions, counsel for the applicant contended that the applicant has an arguable appeal; that the applicant was not notified of the hearing, neither was he represented during the proceedings before the respondent, which matter proceeded despite the case before the ELC Court; that he was therefore prejudiced by the said decision; that there was an admission by the State that the applicant's title was clear; and that the respondent and the interested party abused the court process by filing several suits on the subject property; and on the nugatory aspect, counsel submitted that should the compensation process be finalized, this would completely close the door on the applicant.
7. On the part of the interested party, counsel reiterated that there were no positive orders capable of execution, as the orders in the judgement were negative in nature; that the judge found that the respondent had jurisdiction to review and revoke the title; that neither did the respondent violate the applicant's constitutional right while determining the matter; that the applicant was granted fair administrative action; and that he was represented by counsel and therefore the decision of the respondent cannot be challenged.
8. Counsel further submitted that the intended appeal will not be rendered nugatory if the orders sought are not granted; that in the event of a successful appeal the applicant can be compensated; that in addition, the applicant has not demonstrated that the interested party is not able to compensate him if his appeal succeeds.



9. Rule 5(2) (b) of this Court’s *Rules* provides:
- “(2) 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:
- a. ....
  - b. In any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”
10. In an application under the above captioned rule, an applicant is required to satisfy the Court on two limbs. Firstly, that he has arguable an appeal, one which is not frivolous by any means, but not necessarily one that will succeed. Secondly, that in the event the order sought is not granted the appeal, if successful, will be rendered nugatory.
11. In *Stanley Kangethe Kinyanjui vs. Tony Keter & Others* [2013] KLR, this Court stated:
- “That in dealing with Rule 5(2)(b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court. The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be
- one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”
- In *Multimedia University & Another v Professor Gitile N. Naituli* [2014] eKLR it was stated:
- “When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and secondly, whether the intended appeal will be rendered nugatory if the interim orders sought were denied.
- From the long line of decided cases on Rule 5(2) (b), the common view running through then and the jurisprudence undelaying those decisions was summarized in the case of *Stanley Kangethe Kinyanjui v Tony Keter & Others* [2013] eKLR.”
12. We have carefully considered the application, the supporting affidavit, the further affidavit, the replying affidavits and the annexures thereto, and the submissions and authorities cited by both sides. Without delving into the merit of the intended appeal as that is beyond our mandate for now, we find that the grounds of appeal are arguable.
13. In dismissing the application for review of the respondent’s determination, the trial court made a negative order. Therefore, there are no positive orders capable of execution. It is trite law that negative orders cannot be executed and thus they are not amenable to grant of any stay. See *Western College of Arts and Applied Sciences vs. Oranga & Others* [1976-80] 1 KLR. This finding is sufficient to dispose of the application before us.
14. Even if there was a positive order, which is not the case, this matter revolves around a monetary compensation. Though the sum involved is colossal, it was not demonstrated that the respondent or the interested party for that matter do not have the ability to pay the applicant, should his appeal succeed.



If the appeal were to succeed, it would not be rendered nugatory.

15. We hereby dismiss the application with costs to the respondent and the interested party.

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

**D. K. MUSINGA, (P)**

.....

**JUDGE OF APPEAL**

**ALI-ARONI**

.....

**JUDGE OF APPEAL**

**J. MATIVO**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

