



**Ndung'u & 4 others v Langat & 3 others (Civil Application
E117 of 2021) [2022] KECA 63 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 63 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E117 OF 2021
S OLE KANTAI, JW LESSIT & AK MURGOR, JJA
FEBRUARY 4, 2022**

BETWEEN

**HENRY NDUNG'U 1ST APPLICANT
GOTHARD KAMANDE 2ND APPLICANT
CHARLES MUCHARI NGANGA 3RD APPLICANT
MUGUNA JUA KALI ASSOCIATION 4TH APPLICANT
ALL ILLEGAL OCCUPANTS & CLAIMANTS ON L.R. NO. 209/11587/
DANDORA, NAIROBI 5TH APPLICANT**

AND

**ROBERT LANGAT 1ST RESPONDENT
MARY MUCHENDU 2ND RESPONDENT
SAMUEL MWENDA 3RD RESPONDENT
CHRISTIAN HEALTH ASSOCIATION OF KENYA 4TH RESPONDENT**

*(Being an appeal from the Judgment of the Environment and Land Court of Kenya
at Nairobi (Bor, J.) dated 18th February, 2021 in ELC Case No. 1050 of 2014)*

RULING

1. By Motion brought under various provisions of law including rule 5 (2) (b) of the [Court of Appeal Rules](#) we are asked in the main to grant stay of execution of the Judgment delivered on 18th February, 2021 (Bor, J.) in Nairobi Environment and Land Court Case No. 1050 of 2014 pending the hearing and determination of an intended appeal. In grounds in support of the Motion and in a supporting affidavit of Henry Ndungu (the 1st applicant) it is stated that the trial Court found that the respondents were *bona fide* owners of a parcel of land known as L.R. No. 209/11587 Dandora; that the applicants be



evicted from the land; a permanent injunction was issued restraining the applicants from erecting structures, fencing or constructing on the land and the applicants were ordered to pay Ksh.5,000,000 to the respondents as general damages. It is further stated that the applicants and other occupants of the land have been in occupation of the same from 1984 and have developed the said property; they earn their living from businesses they run on the property and have no other place of abode; that the effect of the Judgment is that the applicants and more than 1000 other people will be evicted from the land leading to a humanitarian crisis; that no basis was laid for the award of general damages; that the applicants purchased plots from the suit property innocently and were purchasers without notice of any defect in the title and that stay of execution granted by the trial court has since lapsed. The 1st applicant further says that he is Chairman of Muguna Jua Kali Association (the 4th applicant) and that he and his members purchased plots from land which was originally a sisal plantation; that the objective of the Association was to promote and empower youth economically within Kayole area in Nairobi; that the City Council of Nairobi (now defunct) allotted the suit property to the applicants in 1993 and they met all the requirements set by the said Council; they developed the property including building a sewer at considerable expense; that a Notice of Appeal had been lodged against the Judgment of the trial court and it is intended to raise various grounds of appeal as set out in the affidavit of the 1st applicant.

2. The respondents oppose the Motion through a replying affidavit of the 3rd respondent, Dr. Samuel Mwenda who says that he is the General Secretary/Chief Executive Officer of the 4th respondent (Christian Health Association of Kenya). He says that the application is frivolous and an abuse of the process of the Court and should be struck out but we observe that he does not give particulars of these serious allegations. He says that the intended appeal is not arguable; that the respondents should be allowed to enjoy the fruits of the Judgment; that the applicants are trespassers with no rights over the land; at paragraphs 10-12 (inclusive) of the affidavit:

10. THAT without prejudice to our opposition for grant of stay of execution of the judgment of the Environment and Land Court delivered on 18th February 2021, should this Honourable Court find any reason to grant stay of execution, the same should be granted upon provision of sufficient security for the due performance of the decree arising from the judgment of the Trial Court.
11. THAT the Appellants should deposit Kshs.5,000,000/= being general damages awarded for trespass, in an interest earning account opened in the joint names of the Advocates for the Parties as one of the conditions for stay of execution.
12. THAT, in addition, considering the value and size of the Respondents' land, the Appellants should undertake and be ordered to be depositing Kshs.3,000,000/= per month in court for their continued illegal occupation of the Respondents' parcel of land pending determination of their intended appeal. The said money will be paid to the Respondents should the Appellants' intended Appeal be unsuccessful."

The 3rd respondent prays that we dismiss the Motion.

3. Both sides filed written submissions and lists of authorities which we have perused and we are grateful to the parties for this.
4. The principles that apply in an application of this nature are well settled. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable which



is the same as saying that it is not frivolous. Such an applicant must, in addition, show that the appeal or intended appeal would be rendered nugatory absent stay – See *Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR* – where these principles were well summarized. The Supreme Court of Kenya in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR* identified the public interest as a third consideration on an application by a party for relief pending appeal.

5. It was found in the Judgment intended to be appealed that the respondents were the owners of the subject property. The applicants were ordered to vacate the property or be evicted and they were ordered to pay to the respondents' general damages for trespass. The applicants contend that they have titles to the properties issued to them by the defunct City Council of Nairobi; that they have occupied their parcels of land for many years and have developed the same. It is intended to be argued on appeal that the Judge was wrong to hold that City Council of Nairobi did not own the property which it allocated to the applicants; that the Judge was wrong in holding that the said Council did not follow procedure for allocation of land in terms of the repealed Local Governments Act. We find these to be arguable points; they are not idle points and as has been held by this Court an arguable point on appeal is not one that must succeed – *Damji Pramji Mandaria v Sarah Lee Household and Body Care (K) Limited, Civil Application No. 345 of 2004* (ur).
6. On the nugatory aspect the applicants say that they have occupied the lands from 1984; they reside on the lands and have developed the same and they derive their daily bread from businesses they run on the land. They say that the effect of the Judgment will not only lead to their eviction but that of over 1000 others who are on the land. The 3rd respondent, in the replying affidavit, prays that we order security by deposit of money by the applicants. This request by the respondents is not what we usually do in an application for stay of execution pending appeal. If the applicants are evicted as decreed and the intended appeal succeeds the appeal would be an academic exercise which would not assist the applicants at all.
7. We are satisfied that the applicants deserve the protection of an order under rule 5 (2) (b) of the rules of this Court. The Motion succeeds and is allowed. There will be a stay of execution of the Judgment of the Environment and Land Court delivered on 18th February, 2021 pending hearing and determination of the intended appeal. Costs of the Motion will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

