



**Nkama Group Ranch & 3 others v Nakaya (Civil Application  
E416 of 2020) [2022] KECA 98 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 98 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E416 OF 2020  
MSA MAKHANDIA, J MOHAMMED & KI LAIBUTA, JJA  
FEBRUARY 4, 2022**

**BETWEEN**

**NKAMA GROUP RANCH ..... 1<sup>ST</sup> APPLICANT  
KEREMBU OLE KAATA ..... 2<sup>ND</sup> APPLICANT  
WILLIAM NOONKILETI OLE KAYIAA ..... 3<sup>RD</sup> APPLICANT  
TURERE OLE KAATA ..... 4<sup>TH</sup> APPLICANT**

**AND**

**JEREMIAH OLE RISA NAKAYA ALIAS TOIRE OLE RISA ..... RESPONDENT**

*(eing an application for stay of execution and stay of further proceedings pending hearing and determination of an appeal from the judgment of the Environment & Land Court of Kenya at Kajiado (Christine Ochieng, J.) dated 29th May, 2020 in ELC No. 667 of 2017)*

**RULING**

1. This is a notice of motion dated 10th May, 2021 filed by Nkama Group Ranch, Kerembu Ole Kaata, William Noonkileti Ole Kayiaa and Turere Ole Kaata (the applicants), under Rules 2, 5 (2) (b), 42 and 47 of the *Court of Appeal Rules* (this Court's Rules), against the decision of the Environment & Land Court (ELC) at Kajiado (Ochieng, J.) delivered on 29th May, 2020.
2. The application seeks orders in the main:
  - a) That this Court be pleased to order a stay of execution of the orders made in the judgment delivered on 29th May, 2020 in Kajiado ELC No. 667 of 2017 and any other consequential proceedings or orders arising from the said judgment in Kajiado ELC Misc. Application No. E001 of 2020, pending the hearing and determination of the appeal against the said judgment.
  - b) That the costs of this application be provided for.



3. The application is premised inter alia on the grounds: that in the impugned judgment, the ELC issued a mandatory injunction compelling the applicants to register Jeremiah Ole Risa Nakaya alias Toire Ole Risa (the respondent) as a member of the 1st applicant and give him land like any other member and awarded costs of the suit to the respondent; that aggrieved by the said judgment, the applicants have filed a notice of appeal and the instant application; that the applicants have an arguable appeal with overwhelming chances of success inter alia whether the trial Judge considered the express terms of the consent order and decree entered and issued in Nairobi HCCC No. 447 of 1994.
4. The notice of motion is supported by the 3rd applicant's affidavit in which he avers inter alia: that the applicants have an arguable case on appeal with overwhelming chances of success; that despite the notice of appeal, the respondent has proceeded to execute the decree and the certificate of costs issued in ELC No. 667 of 2017; that the applicants are apprehensive that they may be cited for contempt of court on account of orders issued in Kajiado ELC No. 667 of 2017 and their assets attached and sold; and that unless the orders for stay of execution sought in the instant application are granted, the intended appeal will be rendered nugatory and the applicants stand to suffer great hardship. The applicants urged this Court to allow the application therefor.
5. The respondent opposed the application through a replying affidavit in which he avers inter alia: that there was inordinate delay in filing the instant application and there is no explanation offered for the delay given that the judgment was delivered on 29th May, 2020; that the instant application was filed solely to frustrate execution of the certificate of costs taxed by the Deputy Registrar; that the applicants can de-register and re-allocate the land issued to the respondent if they are successful in their appeal; that the allegation that the respondent's means are unknown does not satisfy the threshold that the respondent will be unable to refund the decretal sum once the same is paid to him; that it is upon the applicants to prove that the respondent is unlikely to refund the decretal sum once the same is paid to him; and that the applicants have not furnished this Court with any evidence that the respondent would not be in a position to indemnify the applicants in the event that the intended appeal succeeds.

#### Submissions by Counsel

6. The application was argued by way of written submissions. Messer's Iseme, Kamau & Maema Advocates filed written submissions on behalf of the applicants while Messer's Meritad Law Africa LLP Advocates filed submissions on behalf of the respondent.
7. The applicants through their counsel submitted that the appeal is arguable as evidenced by the draft memorandum of appeal attached to the application; and that the impugned ruling endorsed an illegality which is against public policy which the applicants intend to challenge on appeal.
8. As to whether the appeal will be rendered nugatory unless the orders sought are granted, the applicants submitted that unless stayed, the respondent will proceed to execute the decree and certificate of costs issued by the ELC; and that should execution proceed, the substratum and integrity of the appeal would will be lost.
9. The respondent through his counsel submitted that the question whether the appeal will be rendered nugatory or not depends on whether what is sought to be stayed if allowed to happen is reversible, or if it's not reversible whether the damages will reasonably compensate the party aggrieved. Counsel submitted that any registration of land is reversible since the applicants can de-register the respondent and re-allocate the land if they are successful in their appeal.
10. Counsel further submitted that the fact that the process of execution has been set in motion, or is likely to be put in motion, by itself, does not amount to substantial loss; that for the reason that the applicants have failed to furnish security for the due performance of the impugned judgment and



the Certificate of Costs pending the hearing and determination of the appeal, the respondent will be irreparably prejudiced should the instant application be allowed.

#### Determination

11. We have considered the application, the affidavits, the submissions by counsel, the authorities cited and the law. The jurisdiction of this Court in applications such as the one before us is donated by Rule 5 (2) (b) of this Court's Rules. The jurisdiction is original and discretionary.
12. In *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR* this Court stated inter alia:

“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 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.”
13. In *Teachers Service Commission vs Kenya National Union of Teachers, Sup. Ct. Appl. No. 16 of 2015*, the Supreme Court considered the nature and scope of the jurisdiction under this provision, and stated as follows:

“It is clear to us that Rule 5 (2)(b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years...

Rule 5 (2) (b) of the Court of Appeal Rules of 2010 is derived from Article 164 (3) of the Constitution. It illuminates the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal.”
14. In *Dennis Mogambi Mang'are V. Attorney General & 3 Others Civil Application No Nai 265 of 2011*, this Court stated as follows:

“An arguable appeal is not one that must necessarily succeed; it is simply one that is deserving of the court's consideration.”
15. On the first limb, we have perused the draft memorandum of appeal and find that the applicant's appeal is not frivolous as it raises arguable points, inter alia, whether the learned Judge took into account the express terms of a Consent Order and decree entered and issued in Nairobi HCCC No. 447 of 1994 on 28th October, 2003 which anchored the respondent's claim and thereby made determinations that were inconsistent with the express terms of the consent. As stated in *Wasike V Swala [1984] 591*, an arguable appeal is not one that must necessarily succeed but one which merits consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
16. On the nugatory aspect, as this Court held in *Reliance Bank Limited v. Norlake Investments Ltd [2002]1 EA 227*, the factors which render an appeal nugatory are to be considered within the



circumstances of each particular case and in doing so, the Court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the Court stated as follows:-

“To refuse to grant an order of stay to the applicant would be out of proportion to any suffering the respondent might undergo while waiting for the applicant’s appeal to be heard and determined.”

17. In the instant application, the applicants aver that the respondent has proceeded to execute the decree and the certificate of costs and the applicants are therefore apprehensive that they may be cited for contempt of court and their assets attached and sold in execution of the decree. Further, that the registration and any subsequent allocation of land to the respondent forms the substratum of the appeal and if execution proceeds, the substratum of the appeal will be lost and will occasion the applicants’ undue hardship. The applicants further aver that they stand to suffer substantial loss of Kshs. 4,928,835.00 together with auctioneer’s charges pursuant to an illegal award of costs since the respondent has no known means of refunding any part of the amount, if paid.
18. In response, the respondent stated that it is upon the applicant to prove that he is unlikely to make good the sum of the certificate of cost once the same is paid over to him. As this Court stated in *International Laboratory for Research on Animal Diseases vs. Kinyua, [1990] KLR 403* where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. In that regard, the respondent has failed to demonstrate that he has the ability to reimburse the decretal amount in the event that the intended appeal succeeds, absent stay.
19. In the circumstances, the applicant has satisfied both limbs for grant of relief under Rule 5(2)(b) of this Court’s Rules. The upshot is that the notice of motion dated 10th May, 2021 is allowed. Costs in the appeal.

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

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

