



REPUBLIC OF KENYA



**Bukamu & another v Nangila (Civil Appeal E158 of 2021)
[2022] KECA 504 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 504 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E158 OF 2021
PO KIAGE, M NGUGI & F TUIYOTT, JJA
APRIL 28, 2022**

BETWEEN

MARTIN BUKAMU 1ST APPLICANT

EDWARD BARASA 2ND APPLICANT

AND

EVERLINE NANGILA RESPONDENT

*(Being an application for stay of execution of the judgment of the
High Court of Kenya at Kitale (Mwangi Njoroge, J) dated 9th
September, 2021 in Kitale Environment & Land Case No 49 of 2016)*

RULING

1. In the application dated 22nd November, 2021, the applicants seek stay of execution of the judgment of the Kitale Environment and land Court (ELC) in Kitale ELC Case No. 49 of 2016 pending the hearing and determination of their appeal. The application is brought under Rules 1(2), 5(2) (b) and 47 of the [Court of Appeal Rules](#) and Article 159 (2)(d) of [The Constitution](#) of Kenya, 2010.
2. The applicants state in the grounds in support of their application that they have been in possession of their respective parcels of land for over thirty years now. If the orders sought are not granted and they are evicted, they will suffer substantial loss and damage and their intended appeal shall be rendered nugatory.
3. The background to this application is that by a plaint dated 7th March, 2016, the respondent had instituted a suit before the ELC seeking, *inter alia*, orders of eviction of the applicants from her property, Kwanza/Kwanza/Tonyoto/190. She also prayed for general damages for illegal trespass, as well as the costs of the suit.



4. In their joint statement of defence dated 12th April, 2016, the applicants denied the respondent's claim and averred that they are the legal owners of the suit property. They asserted that they had purchased it for value and had been in occupation thereof for a period of 27 years. They further averred that the respondent had unlawfully caused the suit land to be registered in her name.
5. In its decision, the ELC found that the respondent had established her claim on a balance of probabilities against the applicants. The court directed the County Surveyor, Trans Nzoia County, to visit the suit land and demarcate the boundaries of the suit property. The respondent was awarded unimpeded and quiet possession of the suit land and the applicants were ordered to remove themselves and their property from the suit property failing which they would be forcibly evicted. They were also ordered to pay the respondent Kshs. 20,000 for trespass as well as the costs of the suit.
6. Aggrieved by the decision of the ELC, the applicants filed a notice of appeal dated 20th September, 2021 and a draft Memorandum of Appeal. They also filed an application before the ELC dated 27th September, 2021 seeking stay of execution of the court's judgment pending the determination of the intended appeal. In its ruling dated 11th November 2021, the ELC granted the applicants stay of execution conditional upon their depositing the sum of Kshs. 500,000 in a joint interest earning account between the advocates of the parties within 45 days of the order. The applicants did not meet this condition but instead approached this Court with the application now before us.
7. In their submissions dated 26th November, 2021, the applicants submit that they had filed an application before the ELC for stay of execution and had obtained the orders referred to above. They argue that this condition is punitive and amounts to denying them the stay orders, hence the present application. They further submit that they reside on land parcel numbers 186 and 193, Tonyoto Farm respectively and have lived there since 1986 and 1987 together with their families. They risk being evicted from the suit land unless the orders sought are granted. Their annexed draft Memorandum of Appeal raises substantial issues of law and unless the orders sought are granted, the intended appeal shall be rendered nugatory.
8. In her submissions in response dated 2nd December, 2021, the respondent observes that the applicants had filed an application seeking stay and had obtained conditional orders issued on 11th November 2021. She submits that the grant of stay orders is discretionary and the ELC had exercised discretion in imposing conditions to be fulfilled by the applicants. The applicants have not appealed against the said orders but have instead filed the present application. In her view, if the applicants are dissatisfied with the ruling of 11th November, 2021, they ought to have appealed against it. The application now before us lacks merit and should be dismissed with costs.
9. The applicants have invoked this Court's jurisdiction under Rule 5(2)(b) of the Court's Rules. The exercise of jurisdiction under this Rule is discretionary and requires that a party satisfies the Court on two limbs. First, that it has an arguable appeal and secondly, that its appeal, if successful, will be rendered nugatory should the order it seeks not be granted- see [*Stanley Kangethe Kinyanjui vs. Tony Ketter & Others*](#) (supra).
10. In its decision in [*Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others*](#) [2021] eKLR this Court stated that:

“The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay of execution or injunction 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. These principles were summarized by this Court (differently constituted), in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others (2013) eKLR.

11. In Stanley Kang'ethe *Kinyanjui vs Tony Ketter & 5 others*, the Court had stated that:

“On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. 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.”

12. In their application and submissions, the applicants have not deigned to identify and point out the arguable issue in their intended appeal. They refer the Court to the Memorandum of Appeal annexed to the affidavit in support of the application. We have considered the said undated Memorandum of Appeal which contains five grounds. They allege, inter alia, that the trial court erred: in not appreciating that they own land parcel numbers 186 and 193 on land parcel number Kwanza/Kwanza/Tonyoto/190; when he ignored their evidence that the Registry Index Map does not reflect the position on the ground and has errors that require rectification; and in holding that they had encroached on parcel number Kwanza/Kwanza/Tonyoto/190.

13. It may turn out, upon the hearing of the applicants' appeal, that the trial court did err as argued by the applicants in their grounds of appeal, and to that extent, they have satisfied the first limb under Rule 5(2)(b). The question is whether they have satisfied the second limb- that their appeal will be rendered nugatory. In this regard, they submit that should the orders not be granted, they risk being evicted from the suit land.

14. The applicants have argued that they have been in occupation of the suit land, with their families, since 1986 and 1987. Should they be evicted before the hearing of their appeal, which we have found raises arguable issues, it would be rendered nugatory.

15. We note that the trial court had granted the applicants conditional stay of execution pending their appeal to this Court. The applicants have argued, however, that the terms granted in the said order are punitive and amount to denying them the stay orders.

16. A party may, under Order 42 Rule 6 (1) of the *Civil Procedure Rules*, apply to the trial court for orders of stay pending appeal to this Court. The same order, however, also grants this Court the discretion, in an application being made to it, to consider such application and to make such order as may seem just. In this case, the trial court had granted orders of stay on condition that the applicants deposit a sum of Kshs. 500,000 in an interest-earning account in the names of the Advocates for the parties. While we agree that a conditional stay is appropriate, we take the view that the amount ordered is too high in the circumstances. We accordingly grant the applicants stay of execution pending appeal, conditional upon their depositing a sum of Kshs. 100,000 in a joint interest earning bank account in the names of the respective Advocates for the parties. The said amount shall be deposited within thirty (30) days hereof failing which the stay orders shall lapse.

17. Each party shall bear its own costs of this application.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL, 2022.

P.O. KIAGE

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JUDGE OF APPEAL



MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

