



REPUBLIC OF KENYA



**Mukunya v Karanja & 4 others (Civil Application
E072 of 2022) [2022] KECA 745 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 745 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E072 OF 2022
DK MUSINGA, W KARANJA & MSA MAKHANDIA, JJA
MAY 27, 2022**

BETWEEN

BENSON MUGO MUKUNYA APPELLANT

AND

JOSEPH KABUGI KARANJA 1ST RESPONDENT

JOYCE WAMBUI LANGAT 2ND RESPONDENT

MILKA KANENE NDUNGU 3RD RESPONDENT

BENARD LEITICH, LAND REGISTRAR THIKA 4TH RESPONDENT

SAMUEL MAGANA MUIGAI 5TH RESPONDENT

(An application brought under Rule 5(2)(b) and 42 of the Court of Appeal Rules seeking stay of proceedings from the ruling of the Environment and Land Court at Nairobi (Mbugua, J.) dated 10th November 2021 in ELC No. 1289 of 2014)

RULING

- 1 The applicant, Benson Mugo Mukunya filed an application dated 16th March 2022 under Rules 5(2) (b) and 42 of the *Court of Appeal Rules* seeking an order for stay of further proceedings in respect of the Environment & Land Court “ELC” Case Number 1289 of 2014, *Joseph Karanja vs. Benson Mugo Mukunya & Others* pending the hearing and determination of the appeal.
- 2 The application is premised on the grounds that the ELC issued a ruling on 11th November 2021 relating to the application dated 29th October 2019, in which it found the applicant, the 2nd to 5th respondents in contempt of court and issued a notice to show cause why they should not be punished. Further, it issued an order nullifying the sub-division of land parcel, location 16/Kimandi-Wanyaga/755, “the suit property” and subsequent transfer to any third parties of the 3 acres excised



therefrom. Upon delivery of the said ruling the applicant made an oral application for stay of execution of the ruling, which was declined, hence the instant application.

- 3 According to the applicant, the orders affected him and the 2nd to 5th respondents, yet they do not own the suit property thereby making compliance with the orders, difficult if not impossible. The applicant further stated that the appeal was arguable and had great chances of success and it would be rendered nugatory if the orders sought were not granted.
- 4 The application was supported by the affidavit of the applicant in which he merely reiterated and expounded on the grounds in support of the notice of motion afore stated. and hence there is no need to rehash the same here.
- 5 The motion was opposed by the 1st respondent vide his replying affidavit in which he deposed that: the applicant had filed the instant application outside this Court's Rules and it should be struck out for being time barred; the applicant had failed to demonstrate that the application is merited as from the record, he had sued the applicant and the 2nd to 5th respondents to compel them to transfer to him a portion of the suit property; later, the applicant, who is an advocate took over the conduct of the suit in person and on behalf of the 2nd and 3rd respondents; following negotiations parties reached an out of court settlement which culminated in a consent order dated 4th December 2018 that was adopted by court on 20th May 2019; the consent was to the effect that the applicant, the 2nd and 3rd respondents respectively were to transfer to the 1st respondent 3 acres of land that was to be excised from the suit property; whereupon the suit would be marked as settled; the applicant however proceeded to sub-divide the suit property into three portions which he transferred to Thika Credit Traders Limited which action prompted the 1st respondent to file an application for contempt of court that has provoked the current application before this Court; to date the applicant has not made any attempt to purge the contempt; the appeal was in any event, premature as the court had not meted out any punishment to the applicant and finally, that the applicant had not demonstrated that the appeal raised triable issues to warrant the orders sought.
- 6 Parties filed submissions. The applicant's submissions were again a rehash of the grounds on the face of the motion which were also captured in the affidavit, save the reliance on the case of Ismael Kagunji Thande Vs. Finance Kenya Ltd Civil Application No. Nai 107 of 2016 to buttress the submission that the two limbs of arguability and nugatory aspect had to be proved for one to obtain the order of stay of proceedings sought in the instant application, and that he had attained the threshold. The 1st respondent on the other hand submitted that based on the case of [*Stanley Kangethe Kinyanjui Vs. Tony Keter & Others*](#) [2013] eKLR, the applicant had not made out a case with even the remotest chance of success as the application was filed out of time and further that the ruling appealed against was obtained out of a consent order entered into by the parties freely and which still obtains to date.
- 7 On the nugatory aspect, the 1st respondent submitted that as the applicant is yet to have his day in court to explain why he should not be punished for contempt, failure to obtain the order to stay proceedings will not render the appeal nugatory in any way. The law on the grant of orders under Rule 5(2)(b) of this Court's Rules which includes stay of proceedings is well settled as restated by this court in the case of [*Chris Munga Bichage Vs. Richard Nyagaka Tongi & 2 Others*](#) [2013] eKLR in which the Court set out the law as follows: -

“The Law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the succession of



the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”

8 Flowing from the foregoing and considering the 1st limb, on arguability, we have looked at the memorandum of appeal dated 10th March 2022 which raises only one complaint that: -

“That the learned judge erred in law and facts in issuing orders on 10th November 2021 against the appellant herein and which appellant has never owned land location 16/ Kimandi/Wanyanga/775 and which orders the appellant is incapable of complying with.”

9 Being cognizant of the fact that the applicant need only demonstrate one arguable ground and not a multiplicity of them, and further that an arguable ground is not necessarily one that will succeed, we are hesitant to find that the applicant has an arguable appeal based on the above cited ground only. This is so because we believe that the explanation as to whether the applicant owned the suit property or not and the difficulty in complying with the orders can be canvassed in the trial court at the hearing of the notice to show cause. It is also not lost on us that the proceedings were as a result of a consent order freely entered into by the applicant, 2nd and 3rd respondents respectively. The consent order having not been reviewed or set aside, we doubt the appeal could be arguable. To us therefore the first limb has not been demonstrated and or satisfied.

10 Having so found and considering that the applicant needs to demonstrate both limbs of arguability and nugatory aspect before he can get the relief sought, we find it not necessary to address the other limb.

11 Accordingly, the application is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

