



REPUBLIC OF KENYA



KENYA LAW
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**Emmanuel v Mungai (Civil Application E046 of 2021)
[2022] KECA 898 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KECA 898 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E046 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 13, 2022**

BETWEEN

CECILIA KADZO EMMANUEL APPLICANT

AND

MIRIAM CHEA MUNGAI RESPONDENT

(Being an Application for stay of execution against the decision and orders of the Environment and Land Court at Malindi delivered on 29th October 2019 by Hon. J. N. Olola Jin (Malindi ELC no 140 of 2013))

RULING

1. The Applicant herein seeks orders of stay of execution, and/or an injunction restraining the Respondent from execution of the judgment in Malindi ELC Case No. 140 of 2013, in an application brought by way of a Notice of Motion dated 28th May 2021 pursuant to rule 5 (2) (b) of the [Court of Appeal Rules](#), 2010. The said application is supported by an affidavit sworn on 28th May 2021 by the Applicant. The Applicant's case is that the said judgment that was delivered on October 29, 2019 dismissed her suit and granted orders in favour of the Respondent, and being dissatisfied with the Court's decision, she filed a Notice of Appeal dated October 29, 2019 and lodged it on November 5, 2019. She further sought to stay execution through an application in the Environment and Land Court (ELC) which was dismissed in a ruling delivered on January 29, 2021, which necessitated the present application.
2. The Applicant avers that the subject matter is a parcel of land situate in Kilifi, and the appeal will be rendered nugatory if orders of stay of execution and/ or injunction are not granted, because the Respondent will have dealt with the suit property in a manner prejudicial to the Applicant's interest and recovering the same will be time consuming and have financial implications if not possible. Further, that the Respondent will not suffer any prejudice if the orders sought are granted. The Applicant annexed the Notice of Appeal dated October 29, 2019 and lodged on November 5, 2019, the impugned



judgment and the Ruling delivered on January 29, 2021 by Olola J. Having lodged the notice of appeal within 14 days of the judgment pursuant to Rule 75 of the *Court of Appeal Rules*, this court is properly seized of the application, as prescribed by Rule 5 (2)(b) and held in *Halai & Another vs Thornton & Turpin (1963) Ltd.*(1990) KLR 365.

3. In response, the Respondent filed a replying affidavit sworn on 11th February 2022, wherein she stated that the intended appeal would not be rendered nugatory since the impugned judgment made a finding of fact that there were two distinct properties owned by both parties, namely Plot No 490 belonging to the Applicant and LR No. 5054/328 belonging to the Respondent who holds a title that was upheld by the trial Court. Further the Applicant did not disclose or demonstrate the basis upon which she had an arguable appeal either in the body of the application or in her supporting affidavit, and has raised a claim of adverse possession that was not canvassed in the ELC. Lastly, that the Applicant has engaged her in litigation that had denied her use of the suit property for 10 years.
4. When the matter came up for hearing on February 23, 2022, learned counsel Mr. Odhiambo appeared for the Applicant, while Ms. Elizabeth Mukuna holding brief for Mr. Peter Kimani, learned counsel for the Respondent was also present. Mr. Odhiambo orally highlighted his written submissions dated January 28, 2022, and submitted that the appeal was arguable as the issue of title whether the Respondent was allocated the plot for which she was issued a Certificate of title is to be determined on appeal. In addition, that the Applicant had claimed adverse possession in the event that the land belonged to the respondent. Counsel submitted that the balance of convenience tilted in favour of the applicant since she had been in possession and use. Further that should the orders not be granted, the Respondent would evict the Applicants and use the land as they saw fit.
5. Ms. Mukuna, on her part while also highlighting written submissions dated February 16, 2022, reiterated on the aspect of arguability that there were two distinct properties owned separately by each of the parties, thus there was no need to preserve the properties pending the hearing of an appeal, and that adverse possession was not canvassed at the High Court and never proven. Further, that the respondent has had possession of her property since 1987, and the claim of the appeal being rendered nugatory by reason of the Respondent exercising user rights over her property was devoid of merit. Finally, on the balance of convenience, that it would be unfair for the Court to indulge the Applicant to continue inhibiting the Respondent's use of her property through unending litigation.
6. The principles applicable in the exercise of the Court's unfettered discretion under Rule 5(2) (b) to grant an order of stay are well settled. Firstly, an Applicant has to satisfy that he or she has an arguable appeal. Secondly, the applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR.
7. On the limb of arguability, it was pointed out by the Respondent that the application and its supporting affidavit does not indicate any arguable grounds of appeal, which are instead alluded to in the submissions. This Court in this regard held as follows in *Somak Travels Ltd vs Gladys Aganyo* [2016] eKLR

“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this Court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the



omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”

8. The applicants in this respect are aggrieved by the findings of the ELC on the location of the land over which title was issued to the Respondent and any findings made on their adverse possession. Whether these grounds will succeed is a matter that will have to be determined at a later stage, and it is sufficient at this stage that they are not frivolous grounds.
9. On the second limb of the appeal being rendered nugatory, each party claims to be in occupation of the suit property, and it is notable in this regard that the trial Court in its judgment did order that the Applicant had 45 days from October 24, 2019 (the date of the judgement) to remove her structures from LR 5054/328 and upon failure, the same were to be removed at her cost. It is our view that the prejudice the Applicants may suffer if the stay is not granted may be irreparable if the structures are still situated on the said land. The threshold for a grant of a stay of execution has therefore been met by the Applicant. However, it is also notable that the Respondent has title to the subject land. In the circumstances we order as follows:
 1. An order be and is hereby granted preserving the status quo obtaining as at the date of this ruling with regard to the structures on the properties known as LR No. 5054/328, pending the hearing and determination of the Applicant’s intended appeal.
 2. The costs of the Notice of Motion dated 28th May 2021 shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MAY 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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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

