



**Musyimi v Maiyani & 2 others (Civil Application E220 of 2020)
[2022] KECA 793 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KECA 793 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E220 OF 2020
K M'INOTI, J MOHAMMED & S OLE KANTAI, JJA
JUNE 24, 2022**

BETWEEN

MARTIN MUEMA MUSYIMI APPLICANT

AND

NAIROBI CITY COUNCIL 1ST RESPONDENT

ESTHER WANGECHI MAIYANI 2ND RESPONDENT

FRANCIS WACHIRA GACHANJA 3RD RESPONDENT

(An application for an order of stay of execution pending the hearing and determination of an intended appeal from the judgment and order of the High Court of Kenya at Nairobi (Bor, J.) dated 13th April, 2021 in HCCC No. 5 of 2020)

RULING

Background

1. Before us is a notice of motion brought under Rules 5(2)(b), 42 and 47 (1)(2)&(3) of the [Court of Appeal Rules](#) dated 24th June, 2021 in which Martin Muema Musyimi (the applicant) seeks orders in the main: that there be an order of stay of execution of the judgment and decree delivered on 13th April, 2021 or any part thereof pending the hearing of the intended appeal and/or until further orders of this Court; and that costs of this application be provided for.
2. Esther Wangechi Maiyani, Nairobi City Council and Francis Wachira Gachanja are the 1st, 2nd & 3rd respondents respectively.
3. The application is supported by the applicant's affidavit in which he reiterated the grounds on the face of the application.



4. A brief background to the application is that the 1st respondent instituted suit in the Chief Magistrate's Court (the trial court) seeking judgment against the applicant and the 2nd respondent for inter alia: a declaration that the 1st respondent was entitled to exclusive and unimpeded right of possession and occupation of the suit property; an order of injunction restraining the applicant and the 2nd respondent by themselves, their employees, servants and/or agents from trespassing, occupying, purporting to sell, erecting structures and/or in any other manner interfering with the 1st respondent's quiet enjoyment and possession of the suit property; an order that the 2nd respondent reverses any allocation of the suit property to the applicant and re-allocates the suit property back to the 1st respondent; and costs of the suit. The trial court found that "the purported re-allocation of the suit property to the 3rd respondent and subsequent sale by the 3rd respondent to the applicant were null and void". The trial court entered judgment for the 1st respondent against the applicant and the 2nd respondent and awarded costs to the 1st respondent. The applicant's claim against the 3rd respondent was dismissed with no order as to costs.
5. Aggrieved by the decision of the trial court, the applicant appealed to the Environment & Land Court (ELC) at Nairobi. The ELC (K. Bor, J.) found that the appeal lacked merit and dismissed it with costs to the 1st respondent.
6. Undeterred, the applicant filed a notice of appeal to this Court and the instant application on the grounds inter alia that: the respondents are likely to move into the suit property and cause damage thereto before the intended appeal is heard and determined; the applicant has invested heavily in the suit property; this Court is constitutionally bound to ensure that the applicant's undoubted right of appeal is not unjustly compromised; and that the applicant has an arguable appeal with high chances of success which will be rendered nugatory, absent an order of stay of execution.
7. The 1st respondent opposed the application and filed a replying affidavit and deponed that the matter was procedurally heard before the Magistrate's Court and in the High Court and every party was granted an opportunity to be heard and present their respective documentary evidence; and that at no point was the applicant denied an opportunity of being heard or to cross-examine the 1st respondent.
8. The 1st respondent further deponed that counsel for the applicant cross-examined her on all the documents adduced including receipts which proved that she was not in arrears of rent or rates in respect of the suit property; and that all the parties were given an opportunity to be heard and to cross-examine any of the witnesses.
9. The 1st respondent further deponed that the applicant has not produced any evidence or proof that he was denied an opportunity to be heard or to cross-examine her or any other witness; that the intended appeal is frivolous and raises no arguable issue; and that the applicant has not demonstrated that he is likely to suffer any irremediable loss if the orders sought are not granted.

Submissions by counsel

10. The application was heard by way of written submissions with oral highlights. Counsel for the applicant, Messrs. Osoro Juma & Co Advocates submitted that the applicant purchased the suit property from the 3rd respondent following repossession and re-allocation of the property by the 2nd respondent on grounds that the 1st respondent had defaulted in paying monthly rates. Counsel further submitted that the applicant took possession of the suit property and developed it.
11. Counsel further submitted that the learned Judge fell into error by ignoring the minutes of the 2nd respondent whereby the suit property together with 44 other plots were repossessed for failure to pay rates and the 1st respondent failed to demonstrate evidence of payment from the year 2000 to 2010.



- Counsel further submitted that if the orders sought are not granted, the intended appeal, if successful, will be rendered nugatory since the applicant has developed the suit property and will therefore be severely prejudiced, if the orders sought are not granted.
12. Learned counsel for the 1st respondent, Messrs J. K. Gachie & Co. Advocates opposed the application and submitted that the instant applicant is frivolous; that in his record of appeal filed in the ELC, the applicant failed to include documents including receipts which were part of the 1st respondent's exhibits in the trial court; and that the learned Judge ordered the applicant to avail the missing exhibits.
 13. Counsel further submitted that no party was denied an opportunity to cross-examine any witness and due process was followed; that the intended appeal is not arguable and should be dismissed with costs.
 14. Learned counsel for the 2nd respondent, Messrs Morara Onsongo & Co Advocates supported the application and submitted that the orders sought should be granted on grounds inter alia that the applicant is in possession of the suit property and has extensively developed it; he has let the suit property to third parties who are not parties in this case; that the 2nd respondent legally and procedurally repossessed and re-allocated the suit property to the 3rd respondent who sold it to the applicant; and that there is an extracted decree and proof of intention to execute by the 1st respondent.
 15. Counsel further submitted that the impugned judgment resulted in a positive order in favour of the respondents which was capable of execution and is capable of being stayed; that the draft memorandum of appeal discloses multiple arguable grounds and the applicant has demonstrated that substantial loss is likely to be suffered if the 1st respondent proceeds with execution which will render the intended appeal nugatory.
 16. The 3rd respondent who was acting in person supported the application and submitted that he purchased the suit property after the 2nd respondent repossessed it due to non-payment of rates by the 1st respondent; that he was issued with the requisite title documents in respect of the suit property and that he subsequently sold it to the applicant; and that upon repossession, the 1st respondent should have appealed to the 2nd respondent's Director of Housing but she failed to do so. The 3rd respondent urged us to allow the application.

Determination

17. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction of this Court under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice.
18. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled as was observed by this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
19. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation



before this Court. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR this Court described an arguable appeal in the following terms:

- “vii). 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.
- viii). In considering an application brought under Rule 5 (2)(b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

20. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, it is arguable inter alia whether the auction conducted by the 2nd respondent was lawful. 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.

21. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (supra) this Court stated that:

- “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

22. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be considered on its merits. In the impugned decision, the learned Judge simply dismissed the applicant’s appeal against the decision of the trial court which made a finding that the repossession and re-allocation of the suit property was unlawful. What was issued by the ELC was therefore in the nature of a negative order incapable of execution and as such there is nothing to stay. We emphasize that the applicant has applied for an order of execution rather than for an injunction.

23. This Court in *Raphael Kakene Muloki & another v Cabinet Secretary of Lands and 2 Others* [2021] eKLR cited with approval the decision of Makhandia, J. (as he then was) in *Raymond M. Omboga v Austin Pyan Maranga Kisii HCCA No 15 of 2020* where the learned Judge stated as follows:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”

24. By parity of reasoning, from the circumstances of this case, it is our considered opinion that there is nothing to stay and the intended appeal will not be rendered nugatory, absent stay and this limb has therefore not been established.



- 25. As the applicant has to establish both the arguability and the nugatory aspects, the applicant has therefore failed to establish the twin limbs for consideration in an application under Rule 5(2)(b) of the Court of Appeal Rules.
- 26. The upshot is that the application dated 24th June, 2021 is without merit and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

K. M'INOTI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

