



Kagure v Mwangi & another (as Legal Representatives of Mwangi Waweru) (Civil Application E067 of 2021) [2022] KECA 797 (KLR) (10 June 2022) (Ruling)

Neutral citation: [2022] KECA 797 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E067 OF 2021
HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA
JUNE 10, 2022**

BETWEEN

ESTHER KAGURE APPLICANT

AND

HENRY WAWERU MWANGI 1ST RESPONDENT

PETER MAINA MWANGI 2ND RESPONDENT

AS LEGAL REPRESENTATIVES OF MWANGI WAWERU

(An application for stay of execution pending the hearing and determination of an appeal against the judgment of the Environment and Land Court at Nyeri (L.N. Waithaka, J) delivered on 19th December 2018 in NYERI ELC CASE NO. 211 OF 2014)

RULING

1. The applicant seeks a stay of execution of the judgment delivered on 19th December 2018 in Nyeri ELC Case No. 211 of 2014 pending the hearing and determination of her appeal against the judgment namely, Nyeri Civil Appeal No. 46 of 2019.
2. The basis for the application is set out on the face of the application and supported by an affidavit sworn by the applicant on 6th August 2021. The grounds in support of the application in summary are as follows. An eviction order was issued against the applicant following a judgment/decree delivered by Waithaka J in Nyeri ELC Case No. 211 of 2014. The applicant, being aggrieved by the said decision, instituted an appeal against the judgment/decree vide Nyeri Civil Appeal No. 46 of 2019. The applicant sought orders of stay of execution of the judgment/decree by an application dated 23rd March 2019 which was dismissed in a ruling dated 16th June 2021.
3. The respondents have already commenced eviction proceedings against the applicant who faces imminent eviction from her residential house, which is the suit property in the appeal and unless the



orders sought in this application are granted. According to the applicant, the appeal shall be rendered nugatory should execution take place, and that it is in the interest of justice that the court grants the orders sought. She stated that she has lived in the suit property since her childhood; that she has nowhere else to go; and she stands to be rendered homeless and destitute should the execution proceedings take place.

4. In their submissions, Counsel for the applicant submitted that she (applicant) has an arguable appeal as evidenced by the grounds in the memorandum of appeal annexed to the supporting affidavit; that the suit property is the applicant's residential home where she grew up; and that the respondent held the same as a trustee on behalf of the family and cannot purport to evict the applicant since she is also a beneficiary of the estate.
5. According to learned counsel for the applicant, as a person in actual possession and occupation of the land in dispute, the applicant's rights ought to be considered and upheld. That the said eviction is based on proceedings which the applicant was not originally a party to.
6. On the nugatory aspect of the application, Counsel for the applicant submitted that the appeal shall be of no effect whatsoever unless the orders for stay of execution are granted. Counsel relied on the case of *Mugab v Kunga* [1988] KLR at 748 for the proposition that, in cases involving the sensitive issue of land, parties should be allowed to resolve their issues with finality at the Court of Appeal, and that the court has to consider whether the status quo should be maintained pending hearing and determination of the appeal to prevent rendering the appeal nugatory if successful.
7. Counsel submitted that execution would result in a loss that would be irreversible even if the applicant succeeds in the appeal. Granting the orders sought will essentially preserve the status quo by protecting the suit property until the appeal is heard and determined.
8. The respondents filed rival submissions in opposition to the application. The respondents contended that the applicant had served him with submissions on 10th February 2022 despite directions that the submissions be filed and served within 7 working days from 24th January 2022. The respondent adopted his written submissions filed in the appeal in response to the grounds in the application. He contended that the application and the appeal are seeking a determination on the basis of trust while the original suit was in fact based on trespass; that the applicant has her own land held by her deceased brother Kahunyo Waweru and her husband's land and that therefore, there is no determination of trust between the applicant and the respondents.
9. The respondent further submitted that the application is an abuse of the court process, the applicant having filed similar applications, which were dismissed; that the application does not meet the threshold for granting the orders sought; that the applicant has not offered security for costs as provided by law; that the application and the appeal are an afterthought and cannot succeed; and that litigation must come to an end and the winning parties enjoy the fruits of the judgment.
10. Under Rule 5 (2) (b) of the [Court of Appeal Rules](#), this Court exercises unfettered original, independent and discretionary jurisdiction to order a stay of execution in civil proceedings where a notice of appeal has been lodged. The objective of this discretionary power is to preserve the subject matter of the appeal. See [Equity Bank Limited v West Link Mbo Limited](#) [2013] eKLR.
11. Applications seeking the exercise of this Court's discretion under Rule 5 (2) (b) are subjected to a two-pronged test, as stated in [Bob Morgan Systems Ltd & another v Jones](#) [2004] eKLR:

“The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly,



that unless a stay or injunction is granted his appeal or intended appeal, if successful, will be rendered nugatory.”

12. In considering whether an appeal is arguable, this Court in *Stanley Kang’ethe v Tony Keter & 5 others* [2013] eKLR stated as follows:

“vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.

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. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008. 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.”

13. A perusal of the memorandum of appeal reveals that an issue in the appeal will be whether the suit land was held in trust for the deceased’s family or whether the ownership of the suit land had already been properly resolved in favour of the respondents in earlier suits. This is an arguable point deserving of a final determination by this Court. The appeal is therefore arguable.

14. Regarding whether the appeal would be rendered nugatory if stay of execution is not ordered, as per the holding in *Reliance Bank Limited v Norlake Investments Ltd* [2002]1 EA 227, this Court is bound to consider the particular circumstances of each case and weigh the consequences of refusal to grant the orders in favour of the applicant, against any suffering the respondent might undergo while awaiting the hearing and determination of the appeal.

15. In this particular case, the respondents have demonstrated their intention to evict the appellant through their letter of 26th June 2021 annexed to the applicant’s supporting affidavit. The intended fate of the residential house on the suit property is not known once the respondents complete the eviction. The material on record does not provide any basis for the respondents’ alleged assertion that the applicant has other land including that of her husband.

16. Upon consideration of the material placed before us, we are satisfied that the applicant has satisfied the two limbs to merit the orders sought. It is therefore in the interest of justice to grant the orders and maintain the status quo until the appeal is finally heard and determined. It is so ordered.

17. The costs shall abide by the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2022

HANNAH OKWENGU

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA



.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

