



**Okul & another v Ondieki & 2 others (Civil Application  
E041 of 2021) [2022] KECA 702 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 702 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E041 OF 2021  
HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA  
JULY 22, 2022**

**BETWEEN**

**EDWARD O OKUL ..... 1<sup>ST</sup> APPELLANT**

**TOM MBOYA OKUL ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HEBISIBAH MORAA ONDIEKI ..... 1<sup>ST</sup> RESPONDENT**

**CHARLES CHAHYA ARADI ..... 2<sup>ND</sup> RESPONDENT**

**STEVE BIKO ARADI ..... 3<sup>RD</sup> RESPONDENT**

*(An application for stay of execution of the judgment and orders  
of the Environment and Land Court at Nakuru (Mutungi, J.)  
delivered on 4th March 2021 In Nakuru ELC Case No. 83 of 2019)*

**RULING**

1. The appellants seek orders staying the execution of the judgment and orders of the Environment and Land Court (ELC) at Nakuru issued on 4<sup>th</sup> March 2021 by the Honourable Justice J. M. Mutungi in Nakuru ELC Case No. 83 of 2019 pending the hearing and determination of the intended appeal.
2. The grounds for the application are set out on the face of the application and may be summarised as follows. In the said judgment, the learned judge held that the respondents herein had acquired title to land parcel Nakuru Municipality Block 1/744 (Langa langa) by virtue of being in adverse possession for a period of 12 years. The judge ordered that, subject to the prohibitory order registered on 26<sup>th</sup> March 1998 (HCCC No. 242 of 1992) being lifted, the Land Registrar shall register the respondents jointly as the owners of the suit parcel in place of Barrack Deya Okul (deceased).



3. The appellants are dissatisfied with the said judgment and have preferred an appeal against the judgment to this Court. However, the respondents are in the process of executing the judgment, and the appellants are therefore apprehensive that if the respondents are not restrained by this honourable Court, they will effect the transfer of the land and thereby reduce the appeal to an academic exercise.
4. It is the appellants case that, in the interest of justice, this Court grants the orders sought to preserve the subject matter pending the hearing and determination of the appeal; that the appeal raises serious and arguable issues of fact and law, which have a high chance of success; that the respondents will not suffer any irreparable harm if the orders sought are granted; and that the appeal risks being rendered nugatory if the orders sought are not granted. The application is supported by an affidavit sworn by the 2<sup>nd</sup> appellant reiterating the grounds as set out in the application.
5. Counsel for the applicants filed written submissions reiterating that the appeal is arguable as can be deduced from the grounds of appeal set out in the memorandum of appeal dated 6<sup>th</sup> May 2021. It is the appellants' case that the Environment and Land Court misapplied the law as it relates to adverse possession; and that the learned judge erred in the analysis of the facts and evidence adduced before him, in entering the litigants' arena and pleading on behalf of the respondents from the bench, and in making findings on matters that were not before him. Counsel submitted that these are arguable issues, which ought to be argued fully before the Court.
6. On the nugatory aspect, Counsel submitted that the respondents intend to execute the judgment by transferring the property from the appellants' father's estate to their names that; the appellants are therefore facing real risk of incurring substantial loss if the orders of stay are not granted; that the appellants, having inherited the land from their father, they will incur more than a financial loss as there is a strong sentimental value attached to the property; and that there is a very high likelihood of the respondents transferring the suit property and disposing it off before the appeal is determined thereby rendering the appeal nugatory. No submissions by the respondents were brought to our attention.
7. As provided 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, an injunction or a stay of any further proceedings 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.
8. 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.”
9. Regarding the consideration of whether the appeal is arguable, this Court in *Stanley Kang'ethe v Tony Keter & 5 others* [2013] eKLR elaborated 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.”

10. The memorandum of appeal annexed to this application reveals a number of grounds on whether the learned judge misapplied the law relating to adverse possession, and whether the learned judge considered matters that were not pleaded by the respondents. These are arguable issues ultimately touching on the ownership of the suit property that ought to be heard and determined on their merits. The application has therefore satisfied the first limb of arguability.
11. On the second limb regarding the nugatory aspect, it was held in Stanley Kang’ethe v Tony Keter & 5 others [supra] that whether or not an appeal will be rendered nugatory depends on whether the status of the subject matter sought to be stayed is reversible if execution were to proceed and the appeal was eventually to succeed; or, if not reversible, whether damages would be an adequate remedy for the party aggrieved. In Reliance Bank Limited v Norlake Investments Ltd [2002]1 EA 227, it was held that this Court is bound to consider the particular circumstances of each case and weigh the consequences of refusal to grant the orders on the applicant against any suffering the respondent might undergo while awaiting the hearing and determination of the appeal.
12. The appellants have sufficiently demonstrated that the balance of convenience favours them over the respondents. Without the stay orders, the respondents could transfer the suit property and dispose of the same, further complicating the process of reversing further dealings with the property should the appellants’ appeal be successful. The application therefore satisfied the second limb of the nugatory aspect.
13. The applicants having satisfied the twin principles, the orders sought are deserving. We therefore allow the application and issue an order of stay of execution of the judgment and orders of ELC issued at Nakuru on 4<sup>th</sup> March 2021, pending the hearing and determination of the appeal. Costs shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY, 2022.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**A.MBOGHOLI MSAGHA**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

