



**Thuo & another v Kiarie & 5 others (Civil Application
E449 of 2021) [2022] KECA 944 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 944 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E449 OF 2021
DK MUSINGA, W KARANJA & A MBOGHOLI-MSAGHA, JJA
JULY 22, 2022**

BETWEEN

PETER THUO KAMAU 1ST APPLICANT

GRACE MUTHONI THUO 2ND APPLICANT

AND

SAMUEL KIARIE 1ST RESPONDENT

LUCY WAMAITHA KIARIE 2ND RESPONDENT

FAITH MUTHONI CHURU 3RD RESPONDENT

JOSEPH NDUNGU NJOROGE 4TH RESPONDENT

LUCY WAMBUI WAWERU 5TH RESPONDENT

CHIEF LAND REGISTRAR, NAIROBI 6TH RESPONDENT

(Being an application for stay of execution against the orders of the judgment and decree of the Environment and Land Court (ELC) at Nairobi (L. Komingoi, J.) dated 23rd September, 2021 in ELC Case No. 93 of 2015 (O.S))

RULING

1. In the suit subject of the intended appeal, the applicants herein had moved the Environment and Land Court (ELC) vide Originating Summons dated 9th February, 2015 predicated on section 38 of the *Limitation of Actions Act* and supported by an affidavit sworn by Peter Thuo Kamau (1st applicant). They claimed to have occupied parcel number LR. No. 76/364 (the suit land) in 1979 and had continuously occupied the same peacefully and without any interruption; they had occupied approximately 0.230 ha of the suit land for over 36 years; the period for bringing an action against them had lapsed, hence, they have acquired rights over the suit land by prescription and that the respondents



and the original owner of the suit land knew of their occupation as the same was in open and without secrecy.

They sought for the following reliefs:-

- i. There be a declaration that the applicants herein are the rightful owner of a portion of land measuring approximately 0.230 Ha on parcel no. LR 76/364 (Original 76/32/343).
 - ii. A declaration that the title held by the respondents is extinguished.
 - iii. An order directing the subdivision and excising a portion of land measuring approximately 0.230 Ha currently occupied by the applicants herein;
 - iv. In the alternative and without prejudice to the foregoing, an order that the whole of the suit land being land parcel no. LR no. 76/364 (original number 76/32/343) be registered in the name of the applicants with costs.
1. The claim was resisted by the 1st to 5th respondents, and following a full hearing by way of viva voce evidence, and submissions by the parties, the applicants' claim was dismissed with the court holding that the suit property had now been registered in the name of P.C.E.A Thindigua, therefore, the applicants were to vacate the suit land. The applicants were also condemned to pay costs to the 1st, 3rd and 5th respondents.
 3. Being aggrieved by the said decision, the applicants have moved to this Court expressing their intention to appeal the decision by filing a Notice of Appeal dated 24th September, 2021. In the meantime, they have filed a motion dated 2nd December, 2021 under Rule 5(2)(b) of this *Court's Rules* in which they seek orders to stay of execution of the impugned judgment and orders of injunction restraining the respondents their agents, employees or persons claiming under the respondent, from executing the said judgment pending the hearing and determination of the intended appeal.
 4. The grounds in support as set on the face of the motion are that the applicants are dissatisfied with the judgment of the ELC dismissing the suit; they have an arguable appeal with overwhelming chances of success; and unless stay of execution is granted, the intended appeal shall be rendered nugatory. In addition to the grounds is an affidavit sworn by the 1st applicant who deposes, inter alia, that the respondents had already applied to extract the decree hence execution proceedings were to commence at any time; he does not have any other place to call home, having lived on the land for more than 40 years; if stay is granted the church won't suffer any irreparable damage since they have another piece of land which accommodates the church and another school; he is bound to suffer great loss together with his family if execution takes place considering that he is 85 years old. He prays that it is in the interests of justice the orders sought be granted.
 5. In response to the motion is a replying affidavit by the 1st, 3rd, 4th and 5th respondent's sworn on their behalf by Faith Muthoni Churu, (the 3rd respondent) dated 8th April, 2022. She avers that she was one of the registered trustees of P.C.E.A Thindigua church and the applicants' suit having been dismissed the respondents were entitled to extract a decree and execute it. Further, that the church is entitled to enjoy the fruits of the judgment, having found the applicants had illegally occupied the suit land, hence they shall not suffer any irreparable loss. In addition, the intended appeal is not arguable as averred by the applicants for the reason that the question on ownership of the suit land was determined by the learned Judge and that this particular motion has been overtaken by events by the eviction which had already taken place.
 6. At the virtual hearing of the Notice of motion on 12th April, 2022, the applicants were represented by learned counsel Mr. Mwangi while the respondents were represented by Mr. Njenga. Highlighting



- his submissions, Mr. Mwangi faulted the ELC for erroneously finding that the applicant had failed to attach the Title Deed of the suit property to the Originating Summons (OS) thus dismissing the summons, when indeed the applicant has a title deed to the said property. In any event, submitted counsel, the courts have ruled that failure to annex a Title Deed to an OS is not fatal.
7. Counsel further urged that although the applicants had entered the suit land originally with the permission of the registered owner, such permission lapsed after twelve years, thus rendering their subsequent stay on the land hostile. On those two grounds, counsel urged us to find the appeal arguable. In support of this position, counsel relied on the decisions in *Transouth Conveyors Ltd v. Kenya Revenue Authority & Another* [2007] eKLR and *Retreat Villas Ltdv. Equatorial Bank Ltd & 2 Others* [2007] eKLR.
 9. On the nugatory aspect, counsel reiterated his written submissions and added that the respondents had already threatened to execute the decree and had started demolishing the applicants' buildings with the intention of constructing a school on the suit premises. Counsel further submitted that the subject matter in the suit would change user from agricultural to a school and this would defeat the appeal in the event that it was successful. To buttress the argument, the decisions in *Meso Multipurpose Society Ltd v. Luore Nyoiro Company Ltd & 2 Others* [2020] eKLR and *George Otieno Gache & Another v. Judith Akinyi Bonyo & 5 Others* [2017] eKLR were cited. Counsel urged us to allow the application
 9. Opposing the motion on behalf of the respondents, Mr. Njenga relied on his submissions and added that the respondents had failed to demonstrate both arguability and the nugatory aspect. He urged that the appeal was not arguable. Further, that on the intended appeal being rendered nugatory, we were called upon to find that the substratum of the intended appeal, being the suit land had already changed hands in addition to the eviction process having been completed. There was therefore nothing to stay in the circumstances and the application should be dismissed with costs.
 10. We have considered the motion, the rival affidavits and submissions of the parties. The principles upon which we exercise our jurisdiction under Rule 5(2)(b) of the *Court of Appeal Rules* are well settled. An applicant must demonstrate that he has an arguable appeal and in the absence of stay orders, in the event the intended appeal succeeds, then it shall be rendered nugatory. See *Dhiman v. Shah* [2008] KLR 165. The orders of stay or injunction are meant to preserve the substratum of the appeal pending the hearing and determination as was pronounced by this Court in *National Bank of Kenya Limited v. Leonard G. Kamweti* [2015] eKLR.
 9. As correctly urged by the applicants, an arguable appeal does not have to have a multitude of arguable grounds, nor does it need to be one that will necessarily succeed. The applicants have raised seven grounds of appeal which include the issues in regard to adverse possession and ownership of the suit land. They allege that by the time the church was purchasing the suit land they were already in occupation, a ground strongly opposed by the respondents who averred that the last surviving joint owner of the suit land had transferred the same to the church. These, in our considered view, are arguable points that merit to be addressed by the Court on appeal.
 10. Turning to the nugatory aspect, the applicants must show that what is being sought to be stayed if allowed to happen, is reversible. See *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others*, [2013] eKLR. It is not denied that the respondents have embarked on demolition of the applicants' houses even before the appeal is heard. It is also not denied that the applicants have lived on the said property for over 40 years and one of the applicants is a sickly octogenarian. We hold the view that evicting such a person into the cold, with the attendant risks to his life and health are irreparable and irreversible in the event the Court finds in his favour on appeal.



9. We are persuaded that the applicants have demonstrated both limbs of arguability and the nugatory aspect. Accordingly, this application succeeds. We allow it and grant orders restraining the respondents and anybody claiming under them from taking possession of the suit land or evicting the applicants pending the hearing and determination of the appeal. We order that the record of appeal be filed and served within 60 days from the date of this Ruling, failing which the said orders will stand vacated. We order that costs of the application be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

