



**Gikunju v Wanjohi (Civil Application E422 of 2021)  
[2022] KECA 660 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 660 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E422 OF 2021  
HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA  
JULY 8, 2022**

**BETWEEN**

**RAPHAEL WANJOHI GIKUNJU ..... APPLICANT**

**AND**

**FATIHIYA AISHA WANJOHI ..... RESPONDENT**

*(An application under Rule 5(2)(b) of the Court of Appeal Rules, for orders of stay of execution of the judgment and decree of the High Court of Kenya at Nairobi, and an order of status quo pending the hearing and determination of the intended appeal arising from the judgment of High Court of Kenya at Nairobi (Family Division) (Machelule, J.) delivered on 11th November 2021 in Matrimonial Cause No. 8 of 2019(OS))*

**RULING**

- [1] By a judgment delivered on 11<sup>th</sup> November 2021 in Matrimonial Cause No. 8 of 2019 the learned Judge (Machelule, J), inter alia declared that Ruiru/Kiu Block 3/2662 and its development, commercial container on plot T.2 and its stalls, and the joint account No. XXXXXXXXXXXX held in Family Bank, were matrimonial property between the applicant and the respondent and that each of them had a 50% stake in each of the properties. The learned judge further ordered that Ruiru/Kiu Block 3 /2662 (suit property) and container on plot T.2 be each valued within 30 days by a valuer agreed on or determined by the court and thereafter sold so that each party gets half of the proceeds.
- [2] The applicant who was aggrieved by that judgment has lodged an appeal before this Court, and has moved the Court by way of a motion, under Rule 5(2)(b) of the [Court of Appeal Rules](#), for orders of stay of execution of the judgment and decree of the High Court, and an order of status quo pending the hearing and determination of the intended appeal.
- [3] The applicant contends that he has an arguable appeal and should be given an opportunity to be heard on the same; and that unless the orders sought are granted, the entire substratum of the appeal would



be destroyed and his appeal thereby rendered nugatory. He maintains that no prejudice will be suffered by the respondent if the said orders are stayed as the properties, subject of the orders, are in the parties' joint names. The applicant also contends that the respondent may not be able to refund the monies if the appeal is decided in favour of the applicant.

- [4] In support of the motion, the applicant has filed written submissions in which he cites various authorities urging the Court to preserve the substratum of the appeal by issuing the orders sought. Relying on his draft memorandum of appeal in which he has listed several grounds, the applicant maintains that he has an arguable appeal and that the impugned decision involves both money and property, and there is a real danger that the property may be sold to a third party to give effect to the impugned judgment, and that the suit property being unique, damages may not adequately compensate him.
- [5] The respondent has opposed the motion through a replying affidavit and written submissions. She contends that the applicant's motion and supporting affidavit are frivolous, vexatious, scandalous and without any legal foundation; that the intended appeal is not arguable as the subject property is registered in the joint names of the applicant and the respondent; that the evidence adduced before the superior court including the applicant's own admission and depositions, affirmed the financial contributions that were made by the respondent; and that the memorandum of appeal does not raise any arguable issues.
- [6] The respondent maintains the applicant's intended appeal will not be rendered nugatory nor has the applicant demonstrated any financial loss that he will suffer. On the contrary, the respondent is the one suffering substantial financial loss as the applicant continues to enjoy the benefit of the properties.
- [7] The respondent denies that she is impecunious, contending that she works at a Wellstar Health System in Georgia in the United States of America, and earns a decent salary which aided her in the financial contribution of the property. She contends that the applicant is not coming to the Court with clean hands, as he is contradicting depositions that he made in the divorce cause.
- [8] In the written submissions, the respondent reiterates that the issues raised in the memorandum of appeal do not present a bona fide arguable ground of appeal, as the applicant is merely seeking re-apportionment of the properties and not to have the same declared not to be matrimonial properties.
- [9] On the nugatory aspect, the respondent submits that she is not seeking to reap what she did not sow, and is only seeking to recover in regard to properties, the portion which she contributed. She urged the Court to dismiss the applicant's motion.
- [10] We have considered the motion before us, the affidavits in support and in reply and the contending submissions. The principles for determination of an application under Rule 5(2)(b) of the *Court of Appeal Rules*, are now well settled. For instance, in *Kenya Airways Limited vs Patrick Waweru Mwangi & Anor* [2016] eKLR, the Court reiterated that:

“The principles that we apply in applications for stay of execution pending appeal are now well settled. An applicant, to be successful, must, firstly, show that the appeal, if filed, or the intended appeal, is arguable which is to say that it is not frivolous. Such an applicant must in addition, show that the appeal, or the intended appeal, if successful, would be rendered nugatory absent stay. These principles have been well enunciated in many judicial pronouncements that have come forth from this Court such as the case of *Githiaka v Nduriri* [2004] 2 KLR 67.”



[11] We note that that the intended appeal raises an issue concerning distribution of matrimonial property. In *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR, the Court posited:

- “ vi) On whether the appeal is arguable, it is sufficient if a single bonafide 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. *Damji Pragji* (supra).
- ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
- 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.
- xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”

[12] The applicant has raised an issue regarding the learned Judge’s finding on the contribution made by the parties in the acquisition of the matrimonial properties. He faults this finding and the consequent distribution anchored thereon. This raises a bona fide issue that requires ventilation, interrogation and a conclusive finding. It is therefore an arguable ground of appeal, and as stated in the afore cited decision of *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others*, a single arguable ground is sufficient to satisfy the requirement of arguability of the appeal.

[13] With regard to the nugatory aspect, the execution of the High Court Order involves valuation and sale of immovable properties, as well as division of monies held in the joint account at a 50/50 ratio. The question is if the execution were to proceed and the properties valued and sold, and the cash in the Bank distributed, would the situation be reversible if applicant were to succeed on appeal? If not, would damages be an adequate remedy?

[14] In *Yellow Horse Inns Limited & another v A.A. Kawir Transporters Ltd & 4 Others* [2014] eKLR, this Court dealing with a similar situation had this to say:

“Turning to the issue of the intended appeal being rendered nugatory should the applicants succeed on their appeal, it has been argued by the 1<sup>st</sup> respondent that the subject suit properties can be valued and compensated for in terms of money. We have no quarrel with that considering that the subject suit properties are land, and are capable of being valued and compensated for in monetary terms. However, the circumstances displayed herein call for a restraint in making a move in that direction. The reason being that in a situation where ownership and possession is being hotly contested by several claimants, the possibility of



ownership falling prematurely into the hands of a party who may ultimately not be adjudged the rightful owner at the conclusion of the litigation cannot be ruled out. The net result of such a situation arising is that the applicants if ultimately adjudged the lawful and rightful owners may very well have to undergo great expense if not inconvenience to pursue other persons for the recovery of ownership or monetary value. In the result, we find the second limb, namely, that the intended appeal may be rendered nugatory if the orders sought are not granted in the event that the applicants succeed in it also made out.” (Emphasis added)

- [15] Obviously if the properties in dispute were to be disposed of, they would be in the hands of a third party and it would be difficult to reverse the situation. The properties involved include immovable property, that is registered in the joint names of the parties, but the applicant claims that he is the one who purchased the properties without any contribution from the respondent. Therefore, as far as the applicant is concerned the issue is not simply distribution of the property but ownership. In light of that claim, even with valuation, damages would not be an adequate compensation if he were to succeed in his appeal. Consequently, the applicant has satisfied us that his appeal may be rendered nugatory.
- [16] The respondent has deposed that she has been denied access to the properties in dispute, and that she is not enjoying any benefit from the properties whereas the applicant continues to enjoy rent proceeds from the property. These averments that were made by the respondent were not challenged by the applicant by way of a further affidavit.
- [17] We are alive to the need for the Court to balance the rights of a successful party in an impugned decision, with the rights of an unsuccessful party who intends to appeal. In this regard, we are in agreement with the High Court decision in *RWW vs EKW* [2019] eKLR that:
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should waive this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”
- [18] In the above premises, although the applicant has satisfied the twin requirements of Rule 5(2)(b) of the *Court of Appeal Rules*, we find it necessary to avert the prejudice to the respondent and protect the interest of both parties, by issuing a conditional order of stay.
- [19] Consequently, we issue an order of stay of execution of the orders issued by the High Court on 11<sup>th</sup> November, 2021 on the following conditions:
- (i) That the applicant shall take appropriate action to have the record of appeal filed within 90 days from the date hereof in order to facilitate the expeditious disposal of the appeal.
  - (ii) That the applicant shall ensure that all monies collected as monthly rent from the disputed premises with effect from 1<sup>st</sup> July, 2022 shall be deposited in the joint account held by the parties, that is, account No. 0440000407 in Family Bank, and proper account, and evidence of such deposit shall be availed to the respondent’s advocate monthly, within 7 days of such deposit.
  - (iii) Should the applicant fail to comply with any of the above conditions, the respondent shall be at liberty to apply for discharge of the order of stay of execution.

It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY, 2022.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

DR. I. K. LAIBUTA

.....

JUDGE OF APPEAL

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

*Signed*

DEPUTY REGISTRAR

