



REPUBLIC OF KENYA



KENYA LAW
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**Momanyi v Osano (Civil Application E033 of 2022)
[2022] KECA 698 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 698 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E033 OF 2022
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JULY 8, 2022**

BETWEEN

GEOFFREY MOMANYI APPLICANT

AND

PAMELA ONYANGO OSANO RESPONDENT

(An application for stay of eviction from the Ruling of the Environment and Land Court of Kenya at Eldoret (Obaga J.) dated 25th November, 2021 in Eldoret ELC case No. 6 of 2019)

RULING

1. By a motion dated 3rd March, 2022 and brought under Rule 5(2)(b) of the [Rules](#) of this Court, the applicant, Geoffrey Momanyi seeks, in the main, orders as against the respondent;
"2. That this Honourable Court be pleased to grant a restorative injunction and restoration order in favour of the applicant, with regard to Eldoret Municipality/block 5/733, pending the hearing and determination of the intended appeal".
2. The motion is founded on grounds appearing on its face to the effect that; on 2nd March, 2022 the respondent evicted the applicant from Eldoret Municipality/block 5/733 (suit property) following the ruling made by Obaga J. on 25th November 2021. As a result, the applicant's application before this Court for stay of execution pending appeal vide Civil Application No. E169 of 2021 has been overtaken by that eviction.
3. The motion is supported by an affidavit sworn by the applicant on even date, claiming that his eviction was conducted hurriedly by the respondent when she was served with a hearing notice for the stay of execution application which was scheduled to be heard on 8th March, 2022. Consequently, the applicant avers, the only option left for him is to seek orders for restorative injunction and reinstatement of the suit property pending the hearing and determination of the intended appeal. The



- applicant further claims that if orders sought are not granted, his intended appeal will be rendered nugatory.
4. At the hearing of the motion both parties elected to rely on their respective filed submissions without addressing us orally. For the applicant, submissions were made by the law firm of Chemoiyai & Company Advocates, asserting that this Court has jurisdiction to grant restorative injunction pursuant to the decision of Okwengu, Makhandia & Sichale Jj.a In [New Ocean Transport Limited & Another Vs Anwar Mohamed Bayusuf Limited](#) [2014] eKLR. Counsel further submitted that the eviction was done unprocedurally considering that the respondent had already been served with a notice of appeal, and the hearing of the application for stay of execution was just 10 days away when the eviction was undertaken. It was contended that the applicant has a legal lien on the suit property, acquired by bequest from Joeson Muchiri Wachira, and having resided on the property since the year 2004. Moreover, counsel argued that the intended appeal raises “triable issues.”
 5. In response, the firm of Miyianda & Company Advocates briefly gave the history of the matter, submitting that this matter dates back to the judgement of Odeny J., dated 2nd February, 2021 when the learned judge granted the respondent a permanent injunction against the applicant, restraining him from interfering with the suit property and ordering him to give the respondent vacant possession of the suit property within 45 days failing which eviction was to issue. On 2nd March 2021, however, the applicant filed an application seeking a stay of execution of that judgment pending appeal, while on 12th May, 2021 the respondent filed an application seeking an order directing the Officer Commanding Eldoret Central Police Station (OCS) to oversee the eviction of the applicant. On 25th November, 2021 the court issued the impugned ruling dismissing the application for stay by the applicant and allowing the O.C.S to oversee the eviction of the applicant.
 6. In the circumstances, counsel asserted, the eviction was done legally and procedurally, and once eviction has been effected and the suit property reinstated to the respondent, it cannot be restored. It was further argued that for one to seek an order for restoration, he must show and satisfy the court that he owns the property in dispute, which the applicant failed to do. The connection of the parties to the suit property was explained to have arisen by virtue of the fact that the respondent is the legal administrator of the estate of her deceased husband, while the applicant is their former ‘shamba boy’ or farm hand whom they accommodated on the suit property before the demise of the respondent’s husband.
 7. Counsel urged that if the applicant was not able to demonstrate ownership over the suit property, he cannot be expected to put up an arguable appeal that will be rendered nugatory if the Court rejects the application. Accordingly, we were urged to dismiss the application for lack of merit.
 8. The principles upon which this Court grants relief under Rule 5(2)(b) of its [Rules](#) are well settled and they are that to succeed, an applicant must show that he has an arguable appeal and that if the orders sought, be they of stay of execution or injunction are not granted, the said appeal would be rendered nugatory or useless, illusory, academic and of no effect. By an arguable appeal is meant, not one that must necessarily succeed but one that is not trifling, and raises at least one *bona fide* point that calls for a response from the respondent and is worthy of decision by the Court hearing the appeal. See, [Stanley Kangethe Kinyanjui Vs. Tony Ketter & 5 Others](#) [2013] Eklr. [Kieni Plains Co. Ltd & 2 Others Vs. Ecobank Kenya Ltd](#) [2018] eKLR.
 9. Regarding arguability of the appeal, we note that the applicant was evicted pursuant to two valid court orders, first by Odeny J., and a second by Obaga J., ordering the OCS to oversee the eviction of the applicant from the suit property. The eviction was thus lawful and procedural. The applicant’s argument that the eviction was unprocedural because the respondent had already been served with the



notice of appeal and the hearing notice for the application for stay of execution, does not suffice. This Court's Rule 5(2) is clear that the institution of an appeal does not operate as a stay of execution, and neither could the hearing notice for the stay application operate as a stay. We associate ourselves with the holding of this Court in *New Ocean Transport Limited (supra)*, a decision cited, ironically, by the applicant. The learned Judges in that decision expressed themselves thus;

“The applicants were evicted pursuant to a court order and through a legal process. By the time of such eviction, the temporary stay of 14 days issued by the High Court to the applicants had elapsed. There was therefore nothing in law stopping the respondent from enforcing the terms of the court order. Yes the respondent had been served with a letter from the applicants' counsel suggesting that they had filed an application in this Court for stay of execution of the order. However, that per se, did not and could not have amounted to a stay order known in law nor was the letter binding on the respondent. Out of courtesy perhaps the respondent could have opted to suspend the execution of the order. However, the respondent cannot be faulted for not being courteous to the applicants, nor can this Court grant a restorative injunction merely because the respondent ignored the applicants' plea in their letter dated 17th June, 2014.

...

The applicants having been evicted lawfully no basis for a restorative injunction has been laid out. Accordingly, we dismiss the application dated 26th June, 2014 with costs to the respondent”. (Emphasis ours)

10. In the result the applicant's motion fails on the first limb of arguability. Since the requirement is for an applicant to satisfy the Court on *both* the arguability and the nugatory aspects, once the applicant fails on the one, a consideration of the other is of no consequence, even as we observe, and as rightly pointed out by the respondent, that the applicant has not established ownership over the suit property in order to sustain any argument on the nugatory aspect.
11. Ultimately, the application is entirely without merit and is dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF JULY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

