



**Mutabari (Suing for and on behalf of Humility Ministries) & 10 others v Ole Koruta
(Civil Application 194 of 2020) [2022] KECA 978 (KLR) (26 August 2022) (Ruling)**

Neutral citation: [2022] KECA 978 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 194 OF 2020
K M'INOTI, J MOHAMMED & S OLE KANTAI, JJA
AUGUST 26, 2022**

BETWEEN

**RACHAEL MUTABARI (Suing for and on behalf of Humility
Ministries) 1ST APPLICANT
BERNARD NJOGU NJOROGE 2ND APPLICANT
MARY WANJIKU NJUNGE 3RD APPLICANT
PETER M. KARIUKI 4TH APPLICANT
MARTHA WANJIKU 5TH APPLICANT
GIVERN WANJALA 6TH APPLICANT
BILLY JOSEPH LENANA NGAAGI 7TH APPLICANT
LUCY KANYI NJOMO 8TH APPLICANT
DENNIS NJOROGE 9TH APPLICANT
DANIEL KANCHORE 10TH APPLICANT
KAJIADO COUNTY COUNCIL 11TH APPLICANT**

AND

KASAINO OLE KORUTA RESPONDENT

*(Being an application seeking stay of execution from the judgment of the Environment and Land
Court of Kenya at Kajiado (Ochieng, J.) dated 3rd February, 2020 in E.L.C. No. 636 of 2017)*



RULING

Background

1. Before us is a notice of motion dated 1st July, 2020 in which Rachel Mutabiri, (Suing for and on behalf of Humility Ministries), Bernard Njogu Njoroge, Mary Wanjiku Njunge, Peter M. Kariuki, Martha Wanjiku, Givern Wanjala, Billy Joseph Lenana Ngaagi, Lucy Kanyi Njomo, Dennis Njoroge, Daniel Kanchore & Kajiado County Council (the applicants) seek orders in the main: that there be an order of stay of execution of the judgment and decree delivered on 3rd February, 2020 or any part thereof pending the hearing of the intended appeal and/or until further orders of this Court; and that costs of this application be provided for. Kasaine ole Koruta is the respondent herein.
2. The application is premised on Rule 5(2)(b) of the Court of Appeal Rules (this Court's Rules) and brought on the grounds inter alia: that if the order of stay of execution is not granted, the judgment delivered on 3rd February, 2020 shall be executed against the applicant before the intended appeal is heard and determined; that the applicants have an arguable appeal which has high chances of success; that after delivery of the impugned judgment, the applicants filed an application in the Environment and Land Court (ELC) seeking stay of the execution which was declined on 16th June, 2020; that the applicant duly filed a notice of appeal awaiting typed proceedings to facilitate filing of the record of appeal; that if the instant application is not allowed, the applicants shall suffer prejudice; that execution proceedings should be stayed pending the hearing and determination of the intended appeal; that the applicants obtained letters of allotment on or about 2010; and that the applicants bought title number Kajiado/Noonkopir Township/214 (the suit property) for value without notice and cannot be victimized without proper procedure.
3. The application is supported by the affidavit sworn by Wakiaga Peter Semekia, counsel for the applicants who reiterated the grounds on the face of the application.
4. The respondent opposed the application and filed a replying affidavit and deponed that the entire application is frivolous, vexatious and an abuse of the court process; that the title to the suit property was issued to the respondent on 12th September, 2012 after purchasing the property from one Moses Leseni Yiare, the original owner; that this was before the purported and alleged allotments to the applicants herein; that the said Moses Leseni Yiare had been allotted the suit property then being Unsurveyed Industrial Plot No. 91 – Noon Kopir measuring approximately 0.8 Ha in area for a term of 99 years from 1st June, 1995; and that the suit property was surveyed and the certificate of lease thereof issued to Moses Leseni Yiare on 20th April, 2012 before the same was formally transferred to the respondent in the same year.
5. The respondent further deponed that the applicants cannot claim ownership of the suit property as they have not exhibited any title documents to supercede his claim; that it can be concluded that the applicants are trespassers on the suit property having entered the same on or about 2014 or 2015; that a survey was carried out pursuant to an order of the court which confirmed that the applicants had encroached on the suit property; that the certificate of lease issued by the Land Registrar to the respondent should be taken by the court as conclusive evidence that the person named therein is the proprietor of the suit property and is the absolute and indefeasible owner thereof and his title is indefeasible except on the ground of fraud or misrepresentation or being part of a corrupt scheme to which he is proved to be a party; and that the applicants are bound by their pleadings and failed to plead fraud in their plaint.



6. The respondent further urged this Court to dismiss the application with costs as the applicants have not proved that they will suffer any prejudice if the orders sought are not granted; that he will suffer prejudice if the orders sought are granted as he will be kept away from enjoying the fruits of the judgment as he has proved that the applicants are trespassers with no legal right capable of being infringed.
7. The respondent further deponed that the applicants have not demonstrated that the intended appeal will be rendered nugatory if the orders sought are not granted, on the basis that the structures built on the suit property are illegal; that the respondent is prejudiced by the applicants' acts on the suit property due to their continued presence on the suit property; and that the applicants should be evicted from the suit property in the interest of substantive justice.

Submissions by Counsel

8. The parties filed their written submissions and the same were highlighted orally in court by their counsel. Learned counsel Mr. Wakiaga represented the applicants while learned counsel Mr. Botany Mathias Mwamuye represented the respondent.
9. Mr. Wakiaga submitted that the applicants are likely to suffer loss if stay of execution is not granted as they have lived on the suit property for over 12 years and most of the applicants are elderly; that the applicants have an arguable appeal as they own the suit properties and that they paid land rates and land rent to the County Government of Kajiado in 2021; and that if stay is not granted, the intended appeal will be rendered nugatory. As such, they prayed that the stay be granted.
10. Mr. Botany submitted that they filed a replying affidavit and a Preliminary Objection against Mr. Wakiaga swearing an affidavit on behalf of his clients. Counsel submitted that the applicants do not have title to claim ownership of the suit property; and that the issues raised by the applicants were determined in the ELC and the application for stay was dismissed thereat. Counsel urged us to dismiss the application.

Determination

11. We have considered the application, the supporting affidavit, the Preliminary Objection, the replying affidavit, the submissions filed on behalf of both parties, the authorities cited and the law.
12. The respondent filed a Preliminary Objection on the grounds that the supporting affidavit filed by the applicant's advocate, Wakiaga Peter Semekia, offends the mandatory provisions of Rule 8 of the *Advocates (Practice), 1966* and Order 19, Rule 3 (1) of the *Civil Procedure Rules, 2010* since it is not confined to such facts as the deponent being an Advocate is able of his knowledge to prove. In response, it was submitted on behalf of the applicants that the *Advocates Practice Rules* 1966 was repealed by the Advocates Practice Rules 2012; in regard to Civil Procedure Rules it was submitted that the provision does not prohibit counsel from deponing the issues he is conversant with.
13. Order 19 Rule 3 (1) of the *Civil Procedure Rules, 2010* provides as follows:

“affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof”



14. In *Kamlesh Mansukhlal Damji Pattni v Nasir Ibrahim Ali & 2 others* [2005] eKLR this Court pronounced itself as follows:

“Muite is of course right in his concession that advocates should not swear affidavits on behalf of their clients when their clients are readily available to do so. It accords with the spirit of the best evidence rule and, in view of the provisions of order XVIII r 2, with common sense. It would otherwise be embarrassing to apply those provisions to an advocate who may have to relinquish his role as one, to become a witness. There is otherwise no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information.” [Emphasis supplied].

15. In the premises, we find that nothing prohibits the applicants’ advocate from swearing an affidavit on their behalf as long as he can prove the facts deponed. Mr. Wakiaga submitted that he has personal knowledge of the facts leading to this suit. In the circumstances, we dismiss the Preliminary Objection.
16. On the application for stay of execution, the jurisdiction under Rule 5(2)(b) of this Court’s Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.
17. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court’s Rules are well settled as was observed by this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

18. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court’s satisfaction. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant to warrant ventilation before this Court. See *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR (Civil Application No. Nai. 31 of 2012) where this Court described an arguable appeal in the following terms:

- 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.
- 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.”

19. We have carefully considered the grounds set out in the motion. The applicants claim ownership of the suit property by virtue of letters of allotment in their possession. From the record, the respondent



claims ownership of the suit property and is in possession of the Certificate of Lease in respect of the suit property. Section 26 of the [Land Registration Act](#) stipulates that a Certificate of Lease is prima facie proof that the person named therein is the proprietor unless it is proved that he obtained the same through fraud, illegally or unprocedurally. From the record, there is no indication that the respondent acquired the Certificate of Lease illegally. Without saying more lest we embarrass the Bench that will be seized of the main appeal, we are not satisfied that the intended appeal is arguable.

20. In the circumstances of the instant application, the applicants have failed to demonstrate that they have an arguable appeal. As the applicants have to establish both the arguability and the nugatory aspects in an application under Rule 5(2)(b), we need not delve into the issue of whether the intended appeal will be rendered nugatory, absent stay.
21. Accordingly, the applicants have failed to establish the twin limbs for consideration in an application under Rule 5(2)(b) of this Court's Rules. The upshot is that the application dated 1st July, 2020 is without merit and the same is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

K. M'INOTI

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

