



**Toya v Ziro (Suing through Christine Ziro Mwatela vide Power of Attorney) (Civil Application E002 of 2022) [2022] KECA 992 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 992 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E002 OF 2022  
AK MURGOR, P NYAMWEYA & JW LESSIT, JJA  
SEPTEMBER 23, 2022**

**BETWEEN**

**JOHNSON KAVIHA TOYA ..... APPLICANT**

**AND**

**JOSEPHAT KAZUNGU ZIRO ..... RESPONDENT**

**SUING THROUGH CHRISTINE ZIRO MWATELA VIDE POWER OF  
ATTORNEY**

*(An application for stay of execution of the judgment and the decree thereto of the Environment and Land Court at Malindi (Olola J.) on 30th July 2021 in Malindi ELC Case No. 8 of 2007)*

**RULING**

**THE COURT**

1. Johnson Kaviha Toya (the applicant) seeks orders of stay of execution of the decree of the Environment and Land Court (ELC) dated July 30, 2022, pending the hearing and determination of the intended appeal against the ruling delivered on November 30, 2021 in Malindi Land Case No 8 of 2007, and the costs of the application. The prayers are in a Notice of Motion application dated February 3, 2022 principally brought pursuant to rule 5(2)(b) of the *Court of Appeal Rules*, and supported by an affidavit sworn on even date by the applicant, who also annexed a copy of the judgment and ruling delivered in Malindi Land Case No 8 of 2007 on July 30, 2021 and 30<sup>th</sup> November 2021 respectively; and a Notice of Appeal against the said ruling dated 6<sup>th</sup> November 2020 (sic) and lodged on December 14, 2021.
2. The applicant's case is that the ELC in the judgment delivered on July 30, 2022 ordered him to, within forty-five days, vacate the parcel of land known as LR No. 950 (Original M/4/64) hereinafter "the suit property", and in default he would be evicted therefrom. The Applicant's advocates thereupon filed an application in the ELC dated August 19, 2021, seeking among other orders that the said judgment be set aside on account of the fact that the Applicant was not heard in his defence. However, the ELC



- dismissed the said application in the impugned ruling delivered on November 30, 2021. Further, that a subsequent application dated December 15, 2021 seeking a stay of execution of the said judgment was held by the ELC to be in abuse of the Court process and the Applicant was directed to seek a remedy before this court.
3. The Applicant avers that the period within which he was to vacate from the suit property having expired, and the stay orders granted by the ELC on August 23, 2021 having been vacated by dint of the ruling delivered on November 30, 2021, he is likely to be evicted anytime if the decree dated July 30, 2021 is not stayed.
  4. In response, Christine Ziro Mwatela, who holds a power of attorney from the Josphat Kazungu Ziro, the 1<sup>st</sup> Respondent herein, filed a replying affidavit sworn on March 14, 2022 in opposition of the application. The deponent averred that the 1<sup>st</sup> respondent filed a suit in the ELC in 2007 against the applicant, seeking orders of vacant possession of the suit property, an eviction order and loss of rent at the rate of Kshs 15,000/- from February 21, 2007, after purchasing the suit property from the 2<sup>nd</sup> respondent in a statutory sale. Further, that it was not disputed by the applicant that he owed the 2<sup>nd</sup> respondent monies for which the suit property was offered as security. That the suit proceeded to hearing, the respondent closed their case, and the defence hearing was set for October 5, 2020 on which date the applicant was not present in Court. The defence thereupon closed its case, and the matter was slated for mention on 5th November 2020 when parties were directed to file submissions, but by 20th January 2021 the applicant had not filed their submissions, and the matter was subsequently reserved for judgment which was delivered on July 30, 2021.
  5. According to the deponent, the 1<sup>st</sup> respondent had demonstrated that no arguable ground had been raised in the appeal, and that the trial judge exercised her discretion judiciously having found that there was inordinate delay by the applicant, no reasons for the delay were given, and that the right to be heard should not create injustice and prejudice to others. In addition, the applicant has failed to demonstrate in what way the appeal would be rendered nugatory, or what irreparable loss and prejudice he stands to suffer that damages cannot compensate, particularly as the suit property was offered in a commercial transaction as security, and its loss through an auction, in the event of default, was anticipated, which loss was in any event quantifiable. Further that the 1<sup>st</sup> Respondent had not benefited from his investment since 2007, and the ELC ordered payment of loss of monthly rent of Kshs 10,000/- from 2007 which the Applicant had not offered to pay.
  6. We heard the application through the virtual court platform on May 17, 2022, and learned counsel Mr. Tamimi Lewa appeared for the applicant, while Ms. Mango, learned counsel for the respondents, was also in attendance. The learned counsel each relied on their respective submissions that they lodged with this court's registry on April 26, 2022 and May 11, 2022 respectively.
  7. The principles applicable in the exercise of the court's unfettered discretion under Rule 5(2) (b) to grant an order of stay are well settled. An applicant has to satisfy two requirements. Firstly, that he or she has an arguable appeal. Secondly, that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this court in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR. In addition, this court exercises original jurisdiction under Rule 5(2)(b) as held in *Ruben & 9 others vs Nderitu & another* (1989) KLR 459.
  8. On the first limb of arguability, the applicant's counsel submitted that the Applicant has since filed an appeal in this Court against the ruling delivered by the ELC on November 30, 2021, being Malindi Civil Appeal No. E011 of 2022, and the central ground in the said appeal is whether the ELC was justified in not exercising its discretion given the circumstances, in that, the Applicant was denied an opportunity to be heard in his defence. The holding in the case of *Dennis Mogambi Mang'are vs*



Attorney General & 3 others, Civil Application No Nai. 265 of 2011 that an arguable appeal is not the one that must necessarily succeed; but one that is deserving of the court's consideration, was relied upon by the counsel to submit that the applicant's appeal was arguable.

9. The Respondents' counsel on the other hand submitted that the applicant has to satisfy both limbs for stay of execution to be granted, and while citing the decisions in Stanley Kang'ethe Kinyanjui vs Tony Ketter and 5 others (*supra*) and Aquinas Wasike v Absa Bank, Regent Auctioneers, Titus Koley (2021) eKLR, reiterated that the 1<sup>st</sup> Respondent had demonstrated that no arguable ground of appeal had been raised by the Applicant.
10. The applicant is in this respect aggrieved by the exercise of discretion by the ELC in reaching the impugned ruling of November 30, 2021, and has filed an appeal against the said ruling. However, we note that the Applicant is not seeking to stay execution of the ruling of November 30, 2021, but the judgment of July 30, 2021. This Court's jurisdiction to stay the said judgment is contingent on a Notice of Appeal have been filed against the said judgment within 14 days of the date of its delivery, pursuant to the then Rule 75 of the Court of Appeal Rules of 2010 (now Rule 77 of the 2022 Rules).
11. This requirement is prescribed by Rule 5 (2)(b) and was confirmed by this court in Halai & another v Thornton & Turpin (1963) Ltd. (1990) KLR 365. The Applicant did not exhibit any such notice of appeal against the judgment delivered on July 30, 2021, and has therefore neither demonstrated an arguable appeal, but also incompetently filed the instant application, in so far as it seeks orders of stay of execution against a judgment not appealed against. Also see the decision by this court in Nguruman Ltd v Shompole Group Ranch & another [2014] eKLR in this respect.
12. Considering that the applicant has not demonstrated an arguable appeal in relation to the orders granted in the judgment delivered on July 30, 2021 that he seeks to stay, and that an applicant has to satisfy both limbs for stay of execution, we need not go into the arguments made on the nugatory aspects of the said orders. The required threshold for the orders of stay of execution sought by the Applicant has therefore not been met, and the Notice of Motion application dated February 3, 2022 is accordingly dismissed with costs to the 1<sup>st</sup> respondent.
13. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2022.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**

