



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kihoro v Kigathi & 2 others (Civil Application 89B of 2019)  
[2022] KECA 1187 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1187 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 89B OF 2019  
MK KOOME, MA WARSAME & MSA MAKHANDIA, JJA  
OCTOBER 21, 2022**

**BETWEEN**

**CHARLES WANDUTO KIHORO ..... APPLICANT**

**AND**

**SAMUEL GACHARIA KIGATHI ..... 1<sup>ST</sup> RESPONDENT**

**CHARLES GATHEE MUHORO ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(An Application for stay of execution pending the hearing and determination of an intended appeal arising from the Judgment and Decree of the Environment and Land Court of Kenya (Hon. Bor, J.) dated 4th March, 2019 in Nairobi ELC Case No. 520 of 2007)*

**RULING**

1. Before us is a notice of motion brought under Rule 5(2)(b) of the *Court of Appeal Rules* seeking an order for stay of execution of the judgment and decree of Bor, J. dated March 4, 2019 in ELC No. 520 of 2007 pending the hearing and determination of the intended appeal and an antecedent prayer for costs.
2. As regards the background, the dispute between the parties stems from the allocation of all that piece or parcel of land known as Nairobi/Block63/597 “the suit property”. It would appear that the suit property was allocated to both the applicant and the 1<sup>st</sup> respondent at different times. The applicant then sold the said property to the 2<sup>nd</sup> respondent who in his pleadings claimed to be in actual possession. The 1<sup>st</sup> respondent sued the applicant and the 2<sup>nd</sup> respondent jointly and severally, seeking to be declared the bona fide registered owner of the suit property among other prayers. The trial court agreed with the 1<sup>st</sup> respondent in a judgment delivered on 4<sup>th</sup> March, 2019 which prompted the applicant to lodge a notice of appeal and followed it up with the instant application.



3. The motion is anchored on the grounds contained on its face as well as in the affidavit sworn by the applicant. The applicant avers that he has an arguable appeal with high chances of success and if stay is not granted, the said appeal will be rendered nugatory. On arguability, the applicant has listed the grounds that make the appeal arguable, among them; failure of the trial court to distinguish between a letter of allotment and a lease; failure to apply the impeachability of the first registration under the applicable law at the time and failure to apply the proper standard of proof where fraud is alleged by a party.
4. On nugatory, the applicant contends that due to the effluxion of time and the fact that the 1<sup>st</sup> respondent has never been in possession of the suit property, any execution would render the intended appeal nugatory unless this court intervenes.
5. The motion is supported by the 2<sup>nd</sup> respondent. In his replying affidavit, he deposes that he has been in possession of the suit property since 2001 when he bought the same from the applicant and has caused numerous developments thereon. He states that indeed the applicant had made out a case for the grant of the orders sought. Further, he maintains that the intended appeal is arguable and reiterated the grounds adumbrated above by the applicant.
6. On nugatory aspect, it is his position that if stay is not granted, the 1<sup>st</sup> respondent may deal with the suit property which has his developments thereon in a manner that may defeat the substratum of the appeal. He thus prays that the application be allowed as prayed.
7. The application is opposed by the 1<sup>st</sup> respondent through an undated replying affidavit in which he deposed that the applicant has not met the requisite threshold for the grant of the orders sought. That the grounds raised both in the motion and the supporting affidavit do not raise any arguable issue and further that nothing has been demonstrated to show that failure to grant the prayers sought would render the intended appeal an academic exercise or moot. It is his position that the applicant is not in possession of the suit property thus he will suffer no prejudice if stay is not granted. In the penultimate, he prays that the application be dismissed. There was no response either way from the 3<sup>rd</sup> respondent. Though parties were directed to file their respective written submissions in support of their positions, only the applicant filed. Those submissions merely reiterated and expounded on the grounds and the supporting affidavit, the contents of which we have already set out elsewhere in this ruling and we need not rehash them.
8. We have considered the application, grounds in support thereof, the affidavit and the replying affidavits, the submissions by counsel and the law, and render ourselves as below.
9. The substantive rule of access for the relief sought is Rule 5(2)(b) of the Court of Appeal Rules. The principles that guide the Court in the exercise of its jurisdiction under the above rule are now well settled. In *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR, the guiding principles were summarized as hereunder;
  - “(i) in dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge’s discretion to this court. See *Reuben & 9 Others v Nderitu & Another* (1989) KLR 459;
  - ii. the discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so;



- iii. the Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. See *Halai & Another vs. Thornton & Turpin (1963) Ltd.* (1990) KLR 365;
  - iv. in considering whether an appeal will be rendered nugatory the Court must bear in mind that each case must depend on its facts and peculiar circumstances. See *David Morton Silverstein vs. Atsango Chesoni*, Civil Application No. Nai 189 of 2001;
  - v. an applicant must satisfy the Court on both of the twin principles;
  - vi. in whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. See *Damji Pragji Mandavia vs. 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. See *Joseph Gitahi Gachau & Another vs. 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. See *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. See *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 impunity, the onus shifts to the latter to rebut by evidence the claim. See *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”
10. We have applied the above threshold to the rival positions herein. Our simple role is to determine whether on the facts on record before us the applicant has satisfied the above prerequisites for us to grant him the relief sought.
  11. Starting with the first prerequisite on whether the appeal is arguable, the applicant has in the application set out various grounds upon which the appeal will be predicated upon. In summary, applicant intends to argue inter alia that the trial court erred in finding that the 1<sup>st</sup> respondent had proved ownership of the suit property when ideally he had not; failed to distinguish between a letter of allotment and a lease; and finally, failed to apply the impeachability of first registration.
  12. We are satisfied that the above grounds present an arguable appeal. This is nonetheless with the usual caution that they may not ultimately succeed as in law an arguable appeal need not be one that will ultimately succeed.



13. As regards the nugatory test, we are not satisfied that the appeal will be rendered a mere paper victory if it succeeds. As the Court reiterated in *Stanley Kangethe Kinyanjui vs. Tony Keter & 5 Others* (*supra*) and which we fully adopt:

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.”

14. The applicant has argued that due to the effluxion of time and the fact that the 1<sup>st</sup> respondent has never had possession of the suit property, any execution would render the intended appeal nugatory unless orders of stay of execution are granted. Further, the court having ordered the applicant to indemnify the 2<sup>nd</sup> respondent for loss suffered for the period of 12 years and for the loss of title to the suit property, prejudices him greatly and if the same is not stayed, the applicant’s appeal will be rendered nugatory.

15. While considering the nugatory aspect, we ask ourselves a simple question; who is in possession of the suit property? Is it the applicant, 1<sup>st</sup> or 2<sup>nd</sup> respondent? The 2<sup>nd</sup> respondent seems to be the one who has been in occupation of the suit property after it was sold to him by the applicant but it appears that the applicant still holds onto to the suit property. This being the case we do not see how then the appeal will be rendered nugatory in respect of the applicant. It is therefore our finding that the applicant has not persuaded us on the nugatory aspect. Considering that as a requirement both limbs must be satisfied for a party to succeed, the application fails on this aspect. For these reasons, this application fails and it is accordingly dismissed with costs to the 1<sup>st</sup> respondent.

16. This ruling is delivered under Rule 32(3) of the *Court of Appeal Rules*, 2010 as Koome, J.A (as she then was) has since been elevated to the Supreme Court as Chief Justice and President of that Court.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER, 2022.**

**M. WARSAME**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

