



**Kimani & 4 others v Sigona Jua Kali Association & 4 others (Civil Appeal (Application) 315 of 2019) [2022] KECA 1154 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1154 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 315 OF 2019  
HM OKWENGU, J MOHAMMED & S OLE KANTAI, JJA  
OCTOBER 21, 2022**

**BETWEEN**

**JANE WANGECHI KIMANI ..... 1<sup>ST</sup> APPLICANT  
GRACE WAMBUI KAMUIRU ..... 2<sup>ND</sup> APPLICANT  
GRACE WANJIRU MBUGUA ..... 3<sup>RD</sup> APPLICANT  
JOSEPH KIBIRU WACHIRA ..... 4<sup>TH</sup> APPLICANT  
JOHN MUTUA KAMENE ..... 5<sup>TH</sup> APPLICANT**

**AND**

**SIGONA JUA KALI ASSOCIATION ..... 1<sup>ST</sup> RESPONDENT  
COUNTY GOVERNMENT OF KIAMBU ..... 2<sup>ND</sup> RESPONDENT  
LAND CONTROL BOARD ..... 3<sup>RD</sup> RESPONDENT  
REGISTRAR OF LANDS ..... 4<sup>TH</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

*(Being an application for injunction and stay of execution pending appeal from the judgment and decree made by the Environment and Land Court of Kenya at Thika (Mbugua, J.) dated 2nd May, 2019 in E.L.C. Cause No. 131 of 2017)*

**RULING**

**Background**

1. Before us is a notice of motion dated August 9, 2019 by Jane Wangechi Kimani, Grace Wambui Kamuiru, Grace Wanjiru Mbugua, Joseph



Kibiru Wachira and John Mutua Kamene (the applicants). The application is brought under rule 5(2) (b) of the *Court of Appeal Rules* and seeks in the main:

- a) that there be stay of execution of the judgment of the Environment and Land Court (ELC) (Mbugua, J) delivered on May 2, 2019, pending the hearing and determination of Civil Appeal Number 315 of 2019, Nairobi.
- b) that the costs of and incidental to this application be in the cause.

Sigona Jua Kali Association, County Government of Kiambu, Land Control Board, Kiambu, Registrar of Land and the Attorney General are the 1<sup>st</sup> to 5<sup>th</sup> respondents respectively.

2. The application is supported by the affidavit of the 1<sup>st</sup> applicant herein sworn on August 9, 2019. The application is premised inter alia on the grounds that the ELC delivered the impugned judgment on May 2, 2019 disregarding and misinterpreting the law, ordering cancellation of all titles and subdivisions of Sigona/934 (the suit property) and consequently entering judgment in favour of the commissioner of lands who was not a party to the suit; that the applicants have filed an appeal against the impugned judgment (Civil Appeal No 315 of 2019) and the same has been served on all the parties; that the applicants have an arguable appeal with high chances of success; that the appeal will be rendered nugatory if the orders sought are not granted; that the applicants built 31 homes in 2002 which stand to be demolished; and that there is no prejudice to the respondents who wish to put up Jua Kali sheds on the suit property.
3. The application is opposed by the respondents. The 1<sup>st</sup> respondent, through a replying affidavit sworn by John Kamau Ndere (Mr Ndere) deponed that should this court allow the instant application, the court will in effect deny it the fruits of its judgment which in Mr Ndere's view, allowed the 1<sup>st</sup> respondent to take over the suit property. He further deponed that the court found that the transactions that led to the registration of the suit property in the names of the 1<sup>st</sup> applicant were the subject of a corrupt scheme, and therefore the court cannot override that finding. His final submission in opposition to the application is that this application was filed out of time as the Land Registrar at Kiambu, the 2<sup>nd</sup> respondent herein had already complied with the court order given on May 2, 2019, and begun the process of cancellation of the titles as ordered by the trial court.
4. The Attorney General, the 5<sup>th</sup> respondent herein also filed written submissions in which he has urged us not to make definitive or factual findings that may embarrass the court that will determine the main appeal. Counsel urged the court to consider whether the applicants have reached the threshold for the grant of the orders under rule 5(2)(b) of this court's rules, and whether damages would reasonably compensate the aggrieved party.

### **Determination**

5. We have considered the application, replying affidavit, the submissions, the authorities cited and the law. The jurisdiction under rule 5 (2) (b) of this court's rules is discretionary in nature and guided by the interest of justice. 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 appeal succeeds, the appeal will be rendered nugatory.
6. 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.'

7. 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.
8. 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 applicants in order 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.'
9. We have carefully considered the grounds set out in the motion. In our view, it is arguable inter alia whether the learned judge erred by giving orders in favour of the Commissioner of Lands who was not a party to the suit. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the appeal is arguable.
10. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others (supra) this court stated that:
  - ix). The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
  - 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.
11. In determining whether or not an appeal will be rendered nugatory, the court has to consider the conflicting claims of both parties and each case has to be determined on its merits. We find that in the circumstances of the instant application, if the orders sought are not granted, the suit property will revert to the commissioner of lands and the substratum of the appeal will have been lost and the intended appeal shall have been rendered nugatory.
12. We are therefore satisfied that in the circumstances of the instant application the applicant has demonstrated an arguable appeal which will be rendered nugatory, absent stay.
13. In the circumstances, the applicants have satisfied both limbs of the requirements under rule 5(2)(b) of this court's rules. The upshot is that the notice of motion dated August 9, 2019 is allowed. Costs shall abide the outcome of the appeal.



DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022

HANNAH OKWENGU

.....

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**

