



**Muthee v Warungu & another (Civil Appeal (Application)
E380 of 2022) [2022] KECA 1142 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1142 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E380 OF 2022
HM OKWENGU, LA ACHODE & PM GACHOKA, JJA
OCTOBER 21, 2022**

BETWEEN

MICHAEL WARUNGU MUTHEE APPLICANT

AND

PETER KAMAU JOSEPH 1ST RESPONDENT

MARGARET WANJIKU WARUNGU 2ND RESPONDENT

*(Being an application for stay of execution against the ruling of the
Environment and Land Court at Thika (B. M. Eboso, J.) delivered on 31st
May 2022 in Environment and Land Court Misc. Application No. 45 of 2020)*

RULING

1. On July 12, 2022, the applicant who is acting in person filed a notice of motion which is expressed to be filed under Order 51 Rule 1, Order 22 of the *Civil Procedure Rules*, Section 1A, 1B, 3, 3A and Section 63(e) of the *Civil Procedure Act*, (Revised Rules 2010) and any other enabling provision of the Laws, seeking the following orders:
 - i. ... Spent
 - ii. ...spent.
 - iii. That there be stay of execution against the Decree issued on 2nd July 2010 in CM Land Case No. 13 of 2010 Joseph Warungu Kariuki -Vs Muthee Kariuki pending the hearing and determination of the appeal filed herein.
 - iv. That costs of this application be costs in the cause.
2. On July 28, 2022, the applicant filed an amended notice of motion and a further affidavit sworn on the same date, seeking the following orders:



- i. Spent
 - ii. That the applicant/appellant be granted leave to amend his notice of motion application dated 12th July 2022 to correct an error on the face of the said application.
 - iii. That the annexed draft of amended notice of motion application be deemed as duly filed and served.
 - iv. That cost of this application be cost in the cause.
3. In the notice of motion, the applicant is seeking to stay the orders of the High Court Misc. in Civil Application No. 45 of 2022 between Michael Warungu Muthee -vs- Margaret Wanjiru Warungu & Peter Kamau Joseph. In that case the applicant had filed an application seeking extension of time to appeal against a judgment in SPM Land Case No. 13 of 2010, Kiambu Law Courts that was delivered on 22nd July 2010.
 4. In the amended notice of motion, the applicant seeks to stay execution of the decree dated July 2, 2010 in the said SPM Land Case, No. 13 of 2010, Kiambu pending the hearing and the determination of the appeal filed in this Court.
 5. For one to navigate through this legal maze of applications and prayers, it is necessary for us to set out briefly the history of this matter.
 6. The dispute relates to land parcel No. Kiambaa/Thindigua/1738 (the suit property). The applicant is a joint administrator of the estate of his late father, Muthee Kariuki who was the respondent in SPM Land Case No. 13 of 2010. The parties in that case were brothers, that is the uncle to the applicant and his father. The dispute was referred to the then land disputes tribunal for hearing and determination. The land disputes tribunal ordered that the applicant's father should share the land equally with his brother, Joseph Warungu Kariuki.
 7. Under the law, prevailing at that time, a dissatisfied party was required to file an appeal to the provincial land committee but that was not done. Subsequently, the decision of land disputes tribunal was adopted by the Magistrate's Court in Kiambu and a decree dated July 22, 2010 was issued. It is asserted by the respondent, a fact that is not denied by the applicant that the parties in that dispute lived on the land until 2013 when both died; the respondent, Joseph Warungu Kariuki on February 22, 2013 and the applicant's father, Muthee Kariuki on September 20, 2013. It is noteworthy that by the time the two of them died, no appeal had been filed and they were residing in the land in dispute.
 8. The applicant later filed an application in Kiambu SPMC Land Case No. 13 of 2010 seeking substitution in respect of the two deceased brothers and substitution orders were granted on April 29, 2020. The applicant then filed a Misc. Application No.45 of 2020 in the Environment and Land Court Thika seeking leave to file an appeal out of time in respect of Land Case No.13 of 2010.
 9. In a considered ruling, the learned judge made the following orders: -
 - i. The applicant as co-administrator had no locus standi to alone initiate proceedings on behalf of the estate of the late Muthee Kariuki.
 - ii. An adoption order made by the Magistrate Court under Section 7 of the repealed land dispute tribunal act was not appealable to the high court.
 - iii. The applicant had not satisfied the criteria upon which the court could exercise jurisdiction to enlarge time.



10. Dissatisfied with the ruling of the High Court, the applicant has now filed the two applications that are now before us. At the hearing, the applicant made oral submissions seeking a stay of the decree in SPMCC NO. 13 of 2010 Joseph Warungu Kariuki vs Kariuki Muthee. He argued that he had filed an appeal that raised arguable grounds and that the learned judge failed to consider the fact that he had a right to lodge an appeal in respect of Land Case No. 13 of 2010, Kiambu. He further argued that the decree is in the process of execution and that if the subdivision takes place the intended appeal will be rendered nugatory.
11. On his part, the respondent through his counsel, Mr. Kiarie Njuguna filed written submission dated August 3, 2022 which he highlighted at the hearing. The respondent submitted that the application is fatally defective, misconceived and incapable of being granted on the ground that the notice of appeal was filed and served out of time.
12. The respondent further submitted that: the applicant is seeking stay of an order declining to extend time and being a negative order there is nothing to stay; that in the amended notice of motion, the applicant is seeking stay of the decree in Chief Magistrates Court, Kiambu dated July 22, 2020 which cannot be stayed in the Court of Appeal; that no appeal is pending in the Environment and Land Court; and that the applicant is a co-administrator and cannot file the case on his own unless the other administrator is dead.
13. We have carefully read the application, the rival affidavits, the annexures, the submissions and authorities cited.
14. As already noted, the application is brought under the wrong provisions of the law namely, the [*Civil Procedure Act*](#) and has not invoked the discretion of this Court in accordance with the Court of Appeal Rules. Even if the Court is generous enough to consider the application under Rules 5 (2) (b) of the [*Court of Appeal Rules*](#), it will soon become apparent why this application can only suffer the fate of dismissal. The principles under Rule 5 (2) (b) are well summarized in this Court's decision in [*Stanley Kangethe Kinyanjui vs Tony Keter and 5 others*](#) Civil Appeal No. 31 of 2012 as follows:
 - 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 [*Ruben & 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. [*Halai & Another – Thornton & Turpin*](#) (1963) Ltd. 1990 KLR 365.
 - iv. In consideration whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. [*David Morton Silverstein v Atsango Chesoni*](#), Civil Application No. Nai 189 of 2001.
 - v. An applicant must satisfy the court on both of the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable grounds of appeal is raised. [*Damji Pragji Mandavia – Sara Lee Households & 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, [*Joseph Gitahi Gachau & Another -Vs Pioneer Holdings \(A\) Ltd and 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 the stage as doing so may embarrass the ultimate hearing of the main appeal. *Damji Pragji*(supra).
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean with worthless, futile or invalid. It also means trifling. *Reliance Bank Limited -vs- Norlake Investment Limited* [2002] 1EA 227 at page 232.
 - x. Whether or not an appeal will be rendered nugatory depends on whether 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 impecunity, the onus shifts to the latter to rebut evidence by the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, (1990) KLR 403.
15. We have considered the orders sought by the applicant and the grounds in the memorandum of appeal. Although we are dealing with an application for stay and we cannot comment on the merit or otherwise of the intended appeal, we are doubtful that the applicant has raised any arguable grounds. It is trite law that a negative order is not capable of being stayed and we note that in High Court Case No. Misc No. 45 of 2020 Michael Waruingi Muthee v. Margaret Wanjiku Muthee, the learned judge declined to extend time for an appeal to be lodged against the decree that was issued on 2nd July 2010 by the magistrate Court. The order of the High Court is a negative order thus there is nothing to be stayed.
 16. Secondly, the order sought in this Court seeking to stay the Magistrate Court’s decision is misconceived as the applicant cannot run directly to this Court to stay a magistrate Court’s decision that was issued on July 2, 2010. As already noted, there is no appeal that is pending in the High Court.
 17. Thirdly, it is clear from the record, and it is not denied by the applicant that after the decree was issued on 2nd July 2010, his father, Muthee Kariuki, did not object to the adoption of the decision of land dispute tribunal nor had he filed an appeal by the time he died on September 20, 2013.
 18. In view of the foregoing, we have no doubt that the applicant has not raised any ground that is arguable and we have no hesitation in holding that the grounds raised are frivolous.
 19. Having found that the applicant has no arguable appeal, it is not necessary for us to consider the second limb of whether, the intended appeal will be rendered nugatory as an applicant has to succeed on the twin limbs.
 20. In view of the foregoing, we hereby dismiss this application with costs to the respondent.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

L. GACHOKA, CIArb, FCIArb



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

