



**Ndichu (As administrator of the Estate of Peninah Wambui Kinuthia)
& another v Kibutha & 4 others (Civil Appeal (Application)
E683 of 2021) [2022] KECA 1399 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1399 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E683 OF 2021
DK MUSINGA, HA OMONDI & PM GACHOKA, JJA
DECEMBER 16, 2022**

BETWEEN

**STEPHEN KINUTHIA NDICHU (AS ADMINISTRATOR OF THE ESTATE OF
PENINAH WAMBUI KINUTHIA) 1ST APPLICANT
PAULINE WANGUI KARIUKI 2ND APPLICANT**

AND

**JANE NJERI KIBUTHA 1ST RESPONDENT
GLADYS NJAMBI KABI 2ND RESPONDENT
ELIZABETH THABA KARURA 3RD RESPONDENT
AGNES WAIRIMU KARANJA 4TH RESPONDENT
REBECCA WANJIRU KARURA 5TH RESPONDENT**

*(Being an application for stay of execution from the judgment of the
Environment and Land Court at Nairobi (L. Komingoi, J.) dated 22nd
July 2021 in Environment and Land Court Civil Case No. 594 of 2010)*

RULING

1. Before us is a notice of motion expressed to be brought under sections 3A and 3B of the [Appellate Jurisdiction Act](#), Rules 1(2), 5(2)(b), 41, 42 and 47 of the *Court of Appeal Rules*. The application seeks the following orders:

“ 1.



2. That this Honourable Court be pleased to order there be a stay of execution of the Judgment of the Environment and Land Court at Nairobi delivered in Civil Case Number 594 of 2010 on the July 22, 2021 pending the hearing and determination of the appeal filed in the Court of Appeal at Nairobi as Civil Appeal Number E683 of 2021.
3. That this Honourable Court be pleased to issue an order of injunction enjoining the respondents by themselves, their servants, agents, employees or any other persons acting under their instructions from selling, alienating or transferring any interest or in any way dealing with any interest in Land Title Githunguri/Kimathi 966 pending the hearing and final determination of the Civil Appeal Number E683 of 2021 and that this order of injunction be registered as an order of inhibition at the Kiambu County Lands Registry in the register to Land Title Githunguri/Kimathi 966.
4.
5.”

2. By way of background, the late Elizabeth Thara Karanja had two daughters namely, Hannah Karura Kimunya (also deceased) and Peninah Wambui Kinuthia. The deceased, Elizabeth Thara Karanja owned a parcel of land No. Githunguri/Kimathi/588 which she subdivided into two parcels, No. Githunguri/Kimathi/965 and Githunguri/Kimathi 966. She transferred land parcel No. Githunguri/Kimathi 966 to Hannah Karura Kimunya and parcel of land No. Githunguri/Kimathi/965 to Peninah Wambui Kinuthia.
3. From the record, the relationship between the two sisters, Hannah Karura Kimunya and Peninah Wambui Kinuthia was not cordial, but that is not relevant for the purposes of this application. The fact that is relevant, is that Hannah Karura Kimunya had no children of her own. She adopted the 1st, 3rd and 5th respondents, who were children of her cousin by the name Elizabeth Wambui Kabue. The deceased, Hannah Karura Kimunya, also invited the 2nd respondent to stay with her to assist in daily chores and farming activities. The 4th respondent is also a relative of the deceased. In her lifetime, the deceased Hannah Karura Kimunya transferred her land parcel No. Githunguri/Kimathi 966 to all the respondents and that transfer was the bone of contention in the trial court and in this Court.
4. On December 3, 2010, the respondents sued the applicants in ELC Case No. 594 of 2010 (Nairobi), seeking a permanent injunction to restrain them from interfering with their parcel of land, Githunguri/Kimathi 966. The main claim against the applicants in the trial court was that, they were trespassing on the respondents’ land by pruning coffee and planting trees. Upon hearing the suit, L. Komingoi, J. held as follows:

“ 42. It is on record evidence that the deceased was suffering from cancer of the throat. No evidence has been tendered by the 1st and 4th defendants to the effect that she was of unsound mind or that the disease had affected her mental faculties. The defendant ought to have tendered evidence of her incapacity to transact due to illness. When cross-examined by the plaintiffs’ counsel the 1st defendant (DwI) admitted that the deceased told her “she wishes to leave the land with people who work for her”. The 1st defendant interpreted this to mean the land would be left for her. However, going by the evidence tendered by the



plaintiffs it was obvious that the deceased was referring to the plaintiffs. From the foregoing I find that the transfer to the plaintiffs was not fraudulent.

47. The 1st defendant in her counterclaim prays that she be declared the sole legitimate and rightful beneficial owner of the suit property. That this being an ancestral land the deceased held the suit property in trust for her hence could not be transferred to the plaintiffs.
48. It is not in dispute that the 1st defendant has her own suit land being LR No Githunguri/Kimathi/965. She told the court that she has given the same to her children and now owns no land. As stated earlier the deceased was the absolute owner of the suit property. She had a right to do what she wished with it. The suit property ceased to be ancestral land the moment it was subdivided from the mother title Githunguri/Kimathi/588. The 1st defendant got her own portion and chose to give it to her children.
49. I find that the deceased did not hold the suit property in her trust. In the case of *Twalib Hatayan & Another vs Said Saggat Ahmet Al Heidy & others* (2015] eKLR the Court of Appeal examined and stated the law of trust as follows:

“According to the *Black’s Law Dictionary*, 9th Edition; a trust is defined as

“1. The right enforceable solely in equity to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).” under the *Trustee Act*,

A constructive trust is an equitable remedy imposed by the Court against one who has acquired property by wrong doing.....

..... A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee.....

This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell’s Equity 29th Edn, Sweet & Maxwell p.175).”

53. Accordingly, judgment is entered for the plaintiffs as against the defendants as follows:
 - a. That an order of permanent injunction is hereby issued restraining the defendants, their servants, agents, employees or any other persons acting under their instructions from trespassing, selling, alienating, wasting, damaging or in any other manner interfering with the plaintiff’s quiet enjoyment of their proprietary rights over the plaintiffs’ land parcel known as Githunguri/Kimathi 966.
 - b. That cost of the suit is awarded to the plaintiffs.”



5. Aggrieved by the judgment of the learned Judge, the applicants filed an appeal and the instant application. The applicants have filed written submissions dated March 28, 2022 reiterating the averments in the supporting affidavit of Stephen Kinuthia Ndichu and the points of law on the applicable principles, in an application under Rule 5 (2) (b) of the *Court of Appeal Rules*. On their part, the respondents, though duly served, did not file any submissions.
6. When the application was called out for hearing, the applicant’s advocate, Mr. Mwangi, highlighted his written submissions. The respondent’s advocate, Mr. K. Njoroge, though duly served, did not attend.
7. To succeed in an application made under Rule 5 (2) (b), an applicant must satisfy the twin principles that are enumerated in many decisions of this Court, namely:
 - i. An applicant must demonstrate that they have an arguable appeal; and
 - ii. That the intended appeal or appeal, if successful, will be rendered nugatory if the execution of the decree, order or proceedings is not stayed.
8. On the first limb of the twin principles, this Court held in *David Morton Silversein .vs. Atsango Chesoni* [2002] eKLR that for an order of stay to issue, the applicant must first demonstrate that the appeal or intended appeal is arguable, that is, it is not frivolous, and that the appeal or intended appeal, if successful, would in the absence of stay be rendered nugatory. [See also *Reliable Bank Ltd. (in liquidation) vs. Norlake Investments* [2002] 1 EA 227, *Nation Newspapers Limited vs. Peter Baraza Rabando*, CA No.1 [2007] eKLR and *Republic vs. Kenya Anti-Corruption Commission & 2 others* [2009] eKLR 31.
9. On sufficiency of the grounds to warrant a grant of the stay of the orders sought, this Court in *Transouth Conveyors Limited vs. Kenya Revenue Authority & Another* [2007] eKLR, observed that a single issue will suffice and an applicant need not establish a multiplicity of arguable issues. Neither is the applicant required to show that the ground would succeed. It only needs to be an issue that raises a serious question of law worthy of consideration of the Court, or one in respect of which a reasonable argument can be put forward in support (see *Retreat Villas Limited vs. Equatorial Commercial Bank Limited & 2 others* CA No. 40 of 2006).
10. On the first principle, as to whether or not the appeal is arguable, the applicants have annexed a memorandum of appeal raising a number of grounds, which we need not recite but which can be summarized as follows: that the learned judge erred in holding that L. R. Githunguri/Kimathi 966 was not transferred to the respondents fraudulently; that the judge erred by holding that the deceased Hannah Karura Kimunya was of sound mind when she transferred the property to the respondents; failing to properly evaluate the evidence; and shifting the burden of proof to the applicants.
11. It is now a well-settled principle of law, that an “arguable” appeal is not one that must necessarily succeed but one which ought to be argued fully before the Court. (See *Kenya Commercial Bank limited vs. Nicholas Ombija* [2009] eKLR. However, in instances where the grounds are on the face frivolous, the Court will not hesitate to express its doubts on the arguability of the grounds.
12. In the instant application, it is not in doubt that the respondents are the registered owners of land parcel No. Githunguri/Kimathi 966, which was transferred to them by the late Hannah Karura Kimunya in her lifetime, and that was the basis for granting an injunction against the applicants. The only claim by the applicants, is that the late Hannah Karura Kimunya, who was their aunt held the land in trust for them as she had no children. Allegations of fraud were dismissed by the High Court. Noting that the land was transferred to the respondents by Hannah Karura Kimunya in her lifetime, we are doubtful of the arguability of the intended appeal.



13. Even if we were to consider the second principle of whether the appeal will be rendered nugatory, we note that the land in dispute LR Githunguri/Kimathi 966 was transferred and registered in the names of the respondents on December 29, 2009 by the late Hannah Karura Kimunya, who later died on January 6, 2010. The only issue raised by the applicants in their submissions is that the suit property may be sold, transferred, or dealt with in a manner aimed at defeating the appeal. We also note that in the supporting affidavit of Stephen Kinuthia Ndichu, (the 1st applicant) sworn on March 22, 2022, there is no averment that the land is being sold or alienated.
14. It is instructive that the judgment was in the nature of an injunction restraining the applicants from trespassing, wasting, damaging, selling or in any way interfering with the respondents' quiet possession of the land. At this stage, the applicants have not demonstrated how the appeal will be rendered nugatory if the order for injunction that was issued against them by the trial court is not stayed. Indeed, we note that the granting of an order for stay or injunction as prayed by the applicants would amount to allowing the applicants to do the things that they were enjoined from doing by the trial court.
15. It is therefore clear that this application fails to meet the twin principles for the grant of the prayers that are sought under Rule 5(2)(b) of the *Rules* of this Court.
16. Accordingly, we dismiss the application with no orders as to costs as the respondents did not file any response to the application.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

D. K. MUSINGA, (P).

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

