



REPUBLIC OF KENYA



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

**Nyayo Tea Zones Development Corporation v Kaitany (Civil Application
E005 of 2022) [2022] KECA 1417 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1417 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E005 OF 2022
PO KIAGE, M NGUGI & F TUIYOTT, JJA
DECEMBER 16, 2022**

BETWEEN

NYAYO TEA ZONES DEVELOPMENT CORPORATION APPLICANT

AND

SILVESTER K KAITANY RESPONDENT

(An application for stay of execution of the Judgment and Decree of the Environment and Land Court at Eldoret (Odeny, J) dated 3rd December, 2021 in ELC NO. 120 of 2018)

RULING

1. By its motion dated January 14, 2022 and brought under Rule 5(2)(b) of the [Court of Appeal Rules](#), Nyayo Tea Zones Development Corporation, the applicant, seeks, in the main, the following order;
 3. That this Honourable Court be pleased to order for a stay of execution of the decree of the Environment and Land Court of Kenya at Eldoret made on December 3, 2021 in ELC No 120 of 2018, pending the hearing and determination of the applicant's intended appeal.
2. The motion is founded on grounds on the face of it and is supported by an affidavit sworn by Peter K Korir, the applicant's Managing Director. He averred that, the applicant is a state corporation which was first established vide Gazette Notice No 265 of 1986, which was subsequently revoked and substituted with Gazette Notice No 30 of March 8, 2002; Gazette Notice No. 265 of 1986 mandated the applicant, in consultation with the Chief Conservator of Forests, to create, without excision from the forests, tea growing zones to be known as 'Nyayo Tea Zones' in gazetted forests, in areas where the Kenya Tea Development Authority does not operate.
3. The applicant further deposed that pursuant to the said Gazette Notice, it established tea plantations way back in 1987 in Kaptagat forest which is one of the gazetted forests. On November 7, 2018, however, the respondent sued it claiming that he was the absolute and indefeasible owner of L R No 22209 (IR 82519) (the suit property), which is part of Kaptagat forest. Vide a judgment delivered on



December 3, 2021, Odeny J allowed the respondent's claim. Aggrieved by that decision, the applicant filed a notice of appeal, which gives us jurisdiction to hear and determine the 5 (2) (b) application before us.

4. In a replying affidavit sworn on February 28, 2022, the respondent opposed the application stating that he was the absolute and indefeasible owner of the suit property, having acquired it in exchange of his previous parcel of land in Nyota Farm, Molo, which was declared a catchment area and taken over by the Government of Kenya through the Kenya Forest Services. The applicant therefore has no arguable appeal. The respondent further contended that the applicant had not offered any security for the due performance of the decree and should stay of execution be granted, it should be on condition that the applicant deposits the decretal sum in a joint interest earning account in the names of the advocates of the parties herein.
5. The principles upon which this Court grants relief under Rule 5(2)(b) of its Rules are old hat and have been rehearsed by this Court numerous times. For an applicant to succeed he must show that he has an arguable appeal, and that if the orders sought, be they of stay of execution or injunction, are not granted, the said appeal would be rendered nugatory or useless, illusory, academic and of no effect. For an appeal to be considered arguable, it must raise at least one *bona fide* point that calls for a response from the respondent and is worthy of decision by the Court hearing the appeal. An arguable appeal is not one that must necessarily succeed. See, *Stanley Kangethe Kinyanjui vs Tony Keter & 5 Others* [2013] eKLR and *Kieni Plains Co LTD & 2 Others vs Ecobank Kenya LTD* [2018] eKLR.
6. During the hearing, learned counsel Mr Kimondo Mubea and Mr Marchel appeared for the applicant and the respondent, respectively. With regard to arguability, Mr Mubea reiterated that the suit property was part of Kaptagat Forest, a gazetted forest wherein the applicant had been mandated to create tea plantations known as 'Nyayo Tea Zones' to protect the forest from human encroachment. Therefore, it was not available for alienation and subsequent allocation to the respondent pursuant to the provisions of the Government Lands Act, Cap 280 of the Laws of Kenya (now repealed).
7. On the nugatory aspect, the applicant contended that if an order of stay is not granted, the respondent will proceed to clear the mature tea plantations growing on the suit property and as a result, its object of creating buffer zones to protect and conserve forests will be destroyed. Further, the respondent has no known means of income to compensate it in the event the appeal succeeds.
8. In reply, Mr Marchel posited that the applicant's draft memorandum of appeal does not raise any arguable appeal or points of law. He argued that the applicant had also failed to satisfy the nugatory limb. With respect to the claim that the respondent would not be able to refund the decretal sum if paid to him in satisfaction of the decree, counsel asserted that the burden was upon the applicant to prove that position. It was further urged that should this Court find that the applicant has satisfied the two limbs of arguability and nugatory, it should order for stay of execution on condition that the applicant deposits the full decretal sum in a joint interest earning account in the names of the advocates for the parties within 30 days, and in default, the application be deemed as dismissed with costs to the respondent.
9. After considering the application, the replying affidavit and the submissions by counsel, we find that the applicant's assertion that the suit property was hived off from a gazetted forest reserved for public benefit and therefore not available for alienation or allocation to the respondent for private use is an arguable ground worthy of consideration by this Court in the appeal. On the nugatory aspect, if stay is not granted, the respondent is likely to take possession of the suit property and clear the tea plantations thereon, which would in turn interfere with the applicant's mandate of creating buffer zones to protect and conserve forests thereby affecting the substratum of the intended appeal.



10. Consequently, we find that both limbs have been satisfied. In view of the foregoing competing arguments, and aware that the appeal could upon hearing go either way, and being cognizant that our jurisdiction herein permits us to grant an order of stay of execution on such term as are just, the order that commends itself to us is THAT;

1. There be and is hereby issued a stay of execution of the judgment and decree of the High Court pending the hearing and determination of the intended appeal on the following terms;
 - a. That the applicant shall pay the amount of Kshs 25,000,000 (Twenty Five Million Shillings) being part of the decretal sum into a joint interest earning bank account in the names of counsel for both parties within forty five (45) days of this ruling.
 - b. In default of such payment the stay order shall lapse and the respondent shall be at liberty to execute.
2. Costs shall be in the intended appeal.

Dated and delivered at Kisumu this 16th day of December, 2022

P O KIAGE

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

F TUIYOTT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

