



**Waweru & 3 others v Karanja & another (Civil Application  
E230 of 2022) [2022] KECA 1420 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1420 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E230 OF 2022  
HM OKWENGU, MSA MAKHANDIA & K M'INOTI, JJA  
DECEMBER 16, 2022**

**BETWEEN**

**ALICE NJERI WAWERU ..... 1<sup>ST</sup> APPLICANT  
IBRAHIM MWITHUKIA WAWERU ..... 2<sup>ND</sup> APPLICANT  
MOSES KAMAU WAWERU ..... 3<sup>RD</sup> APPLICANT  
MIRIAM WANGU WAWERU ..... 4<sup>TH</sup> APPLICANT**

**AND**

**FRIDAH MUTHONI KARANJA ..... 1<sup>ST</sup> RESPONDENT  
AYUB KARANJA MWAHUKI ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of execution pending hearing and determination of the appeal against the judgment and decree of the Environment and Land Court at Thika (Gacheru J) dated 2nd February 2022. in ELC Misc Application No. 36 of 2019)*

**RULING**

1. The notice of motion application herein dated May 13, 2022 is brought by the applicants under sections 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 5(b), 42, 43, and 47(1) of the [Court of Appeal Rules](#). It seeks an order for stay of execution of the entire judgment and decree of the Environment and Land Court in Thika ELC Misc Application No 36 of 2019 pending the hearing and determination of the appeal, and, that costs of the application be provided for.
2. The application is supported by an affidavit sworn by the 3<sup>rd</sup> applicant on May 13, 2022. The applicants have also annexed a copy of the impugned judgment delivered on February 2, 2022, a notice of appeal against the said judgment dated February 15, 2022, and a memorandum of appeal dated April 19, 2022. Having lodged the notice of appeal within 14 days of the judgment and decree pursuant to rule 75 of



the *Court of Appeal Rules*, the applicants believe that this court is properly seized of the application. See *Halai & Another v Thornton & Turpin (1963) Ltd*[1990] KLR 365.

3. The background to the application is that the respondents filed an originating summons in the trial court seeking to be declared the owners of 0.5 acres to be excised from land title No Muguga/Jet scheme/587 situate in Kiambu County “the suit property”, which was then registered in the name of Mohamed Waweru Mwithukia, deceased. They averred that they had been in occupation of the suit property for over 30 years; that the deceased became the registered owner in 1987 when the respondents were already on the suit property and had enjoyed quiet, peaceful possession and occupation of the said part of the suit property with the full knowledge of the deceased and by extension the applicants, who become personal representatives and administrators of his estate upon his demise in 2015; and, that they had constructed permanent houses, cultivated crops, reared livestock and several members of their family had been buried on that portion.
4. The applicants state that they have an arguable appeal, having raised substantial grounds, namely that: the trial court failed to take judicial notice of Limuru SPMCC Succession Cause No 115 of 2016 proceedings which in effect devolved the suit property to ten (10) beneficiaries of the deceased, leading to subdivision of the suit property, and making the said title obsolete; that the trial court erred by holding that the deceased had failed to assert his rights to the suit property against the respondents yet there was evidence that the application for revocation of the grant was yet to be determined; and that the claim made after the death of the registered owner was in error and therefore the trial court misapplied the provisions of section 7 of the *Limitations of Actions Act*.
5. The applicants further filed written submissions dated May 20, 2022 in which they maintain that they have made a case for grant of the orders sought. Relying on the case of *Attorney General v Okiya Omtatah Okoit & Another [2019] eKLR*, the applicants urge that they had demonstrated that they had an arguable appeal and that the appeal will be rendered nugatory if the orders sought are not granted. That the respondents had by a letter dated May 9, 2022 requested for documents to facilitate the transfer of the suit property to them in the execution of the decree of the court, thus the appeal will be rendered nugatory if the said execution is allowed to proceed.
6. The respondents in their written submissions conceded the fact that the applicants had an arguable appeal. However, on the nugatory aspect, they submitted that the parcel of land occupied by the applicants is ascertainable. The portion is definite and any demarcation of the boundaries or the said excision will not occasion any irreparable harm or damage to the applicants. The only apprehension by the applicants is that the respondents had commenced the execution of the decree.
7. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction of this court under rule 5(2)(b) of this court’s *rules* is discretionary and guided by the interests of justice. In the exercise of this discretion, 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 the appeal succeeds, the appeal will be rendered nugatory. See the case of *Trust Bank Limited & Another v Investech Bank Limited & 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...”



8. In considering the twin principles set out above, we are cognizant of the fact that to benefit from the discretion of this court, both limbs must be demonstrated to the court's satisfaction.
9. On the first principle, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicants deserving ventilation before this court. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR* 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.”
10. We have carefully considered the grounds set out in the motion. In our view, they are arguable, more so, whether the trial court failed to take judicial notice of Limuru SPMCC Succession Cause 115 of 2016 which in effect devolved suit property to ten beneficiaries thus causing the subdivision of the suit property making the said title obsolete. Indeed, the respondents have conceded that much with regard to the arguability of the appeal. In the event, we are satisfied that the appeal is arguable.
11. On the nugatory aspect, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* 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.”
12. In determining whether or not an appeal will be rendered nugatory, this court has to consider the conflicting claims of both parties and each case has to be determined on its own merits. In the instant application, the applicants are apprehensive that the respondents have started the process of executing the judgment and decree of the trial court as they have received a letter from the respondents' advocates requesting for documents to facilitate the process of subdivision as per the judgment and decree. The respondents have argued that the suit property occupied by them is 0.5 acre to be excised from the larger 5 acres and its boundaries are well known and distinct and that there was nothing that was going to be changed or damaged on the ground hence the execution of the judgment cannot be said to render the appeal nugatory.
13. It is clear to us that the applicants will not lose the suit property they have been occupying if the judgment and decree of the trial court is complied with as they have for several years stayed on the said suit property with the respondents. The boundaries are clear and there will be no damage or change that will be occasioned. In *Reliance Bank Ltd v Norlake Investments Ltd [2002] EA 227*, this court stated:
  - “To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicant's appeal to be heard and determined.”



14. In the circumstances of the instant application, we are not persuaded whatsoever that the applicants have demonstrated an appeal which will be rendered nugatory, absent an order of stay of execution.
15. In the circumstances, the applicants have not 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 May 13, 2022 is dismissed with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER, 2022.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

