



REPUBLIC OF KENYA



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Mbugua & 85 others v Ministry of Lands & 59 others (Civil Appeal (Application) E019 of 2021) [2022] KECA 1372 (KLR) (15 December 2022) (Ruling)

Neutral citation: [2022] KECA 1372 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E019 OF 2021
FA OCHIENG, LA ACHODE & WK KORIR, JJA
DECEMBER 15, 2022**

BETWEEN

PAUL NDIRANGU MBUGUA & 85 OTHERS APPELLANT

AND

THE MINISTRY OF LANDS & 59 OTHERS RESPONDENT

(Being an application for stay of execution of the Judgment and Decree of the Environment and Lands Court at Nakuru by Hon. Ohungo J. delivered on 25th February 2021) in ELC Case No. 338 of 2014 as consolidated with ELC. Case No. 334 of 2014)

RULING

1. Vide a notice of motion application dated April 1, 2021, brought under Sections 3A and 3B of the *Appellate Jurisdictions Act*, Rule 5(2)(b) of the *Court of Appeal Rules* and all other enabling provisions, the applicants are seeking orders of stay of execution of the entire judgment and orders delivered by Ohungo J on February 25, 2021, in Nakuru ELC Case No. 338 of 2014 (as consolidated with Nakuru ELC Case No. 334 of 2014) *Paul Ndirangu Mbugua and 85 others v The Ministry of Lands and 59 Others*, pending hearing and determination of the intended appeal.
2. The application is premised on the grounds that the applicants are aggrieved by the entire Judgment and orders of the court in Nakuru ELC 338 of 2014 and intend to appeal. The applicants assert that the intended appeal is meritorious and that it would be rendered nugatory and they would suffer irreparable harm if the stay is not granted.
3. The application is supported by an affidavit sworn by Paul Ndirangu Mbugua on his own behalf and on behalf of all the other applicants on April 1, 2021. Paul Ndirangu deposes that in 1994 the applicants who were then internally displaced persons were settled in the Moi Ndabi Scheme Phase 1 by the government, which then issued them with allotment letters and green cards. Each applicant was allotted approximately 2.5 acres. He further deposes that following the el-nino floods in 1997, the



- Ministry of Lands allotted an additional 2.5 acres to each applicant on higher grounds in 2006 as an equitable measure to put them at par with other members of the community.
4. Paul Ndirangu avers that in the year 2009, the 1st respondent through the Directorate of Land Adjudication and Settlement and other officials, allocated the applicant's initial plots in Moi Ndabi Settlement Scheme Phase 1 to the 4th to 60th respondents. As a result, the applicants instituted Nakuru ELC case No. 338 of 2014 seeking a declaration that they were entitled to the exclusive and unimpeded right of possession and occupation of the impugned parcel of land and an injunction restraining the respondents from occupying the impugned property. The respondents in turn filed Nakuru ELC case No. 334 of 2014 seeking a permanent injunction against the applicants to bar them from subdividing and further developing the land comprised in the initial Moi Ndabi Settlement Scheme and also to stop the eviction of the respondents.
 5. Paul Ndirangu further deposes that the applicants' appeal has a high chance of success because the Judge erred in law and fact and did not base his findings on the evidence produced before the court. The applicant avers that the respondents failed to produce evidence to show that the applicants' allotments had been canceled, or that the applicants had requested for reallocation. He contends that the judge erroneously found that the applicants failed to produce evidence of payments for the impugned property, even though no payment was required of the applicants in the two allocations. He faults the judge for holding that the 4th to 60th respondents had obtained title deeds over the initial plots in the impugned parcel of land.
 6. On the nugatory aspect the deponent avers that the appeal will be rendered nugatory if the orders sought are not granted, because the applicants will be evicted from the impugned parcel of land and their homes and means of livelihood will be destroyed. Further that they will be rendered homeless and the graves of their loved ones will be destroyed hence, the applicants will be severely prejudiced and will suffer irreparable harm if the orders sought are not granted.
 7. In rebuttal, Francis Ngugi Githua, the 4th respondent, swore a replying affidavit on his own behalf and on behalf of the 5th to 60th respondents on October 17, 2022. He avers that the applicants' application is frivolous, vexatious and an abuse of the court process as it is only meant to delay the realization of the judgment that is in favor of the respondents since the court had considered all the necessary evidence before entering judgment in accordance with the law.
 8. It is the respondents' contention that they had sought and successfully obtained eviction orders on June 14, 2021, following the judgment dated February 25, 2021 through an application dated April 14, 2021, which the applicants did not challenge. They also contend that the applicants had not applied for a stay of those orders pending the intended appeal.
 9. Further, they depose that the applicants have failed to file a record of appeal within the set statutory limits and as such, there is no appeal before the court and this court has no jurisdiction to entertain this application. It is their assertion that the applicants have not demonstrated that the appeal is arguable or that it would be rendered nugatory if the stay orders are not granted. They pray that the application be dismissed with costs.
 10. The application was canvassed by way of written submissions. The applicants filed submissions dated October 24, 2022 through their advocate Patricks Law Associates, in which they urge that the applicants are entitled to file an application under Rule 5(2)(b) of the *Court of Appeal Rules* upon lodging a notice of appeal and that it is not necessary for an appeal to be subsisting. To buttress this position, counsel cites the case of *Safaricom Limited v Ocean View Beach Hotel Limited and 2 others*,



Nairobi COA Civil App. No, 327 of 2009. Counsel urges that the said notice of appeal having not been struck out the court has the power to hear and determine this application.

11. Secondly, placing reliance on the *Safaricom Limited case* (*supra*), it is counsel's submission that the applicants have an arguable appeal that raises triable issues with a high probability of success. Lastly, it is the applicants' submission that their appeal will be rendered nugatory if the orders sought are not granted because the applicants risk being evicted from their homes, having their homes destroyed, losing their means of livelihood, being homeless and the graves of their loved ones being destroyed.
12. In response, Odhiambo Opar Counsel for the 4th to 60th respondents filed written submissions dated October 25, 2022. He relies on the case of *Reliance Bank Ltd (in Liquidation) v Norlake Investments Ltd*, Civil Appeal No Nairobi 93/02, to urge that the applicants have no arguable appeal. Counsel contends that the draft memorandum of appeal relied upon by the applicants was addressed in the judgment dated February 25, 2021 at paragraphs 10 to 25. He submits that because the grounds raised have already been addressed, the intended appeal is frivolous and meant only to prolong litigation and deny the respondent the fruits of judgment.
13. On whether the appeal would be rendered nugatory if the orders sought are not granted, Counsel states that the orders of the superior court granted on June 14, 2021, have never been challenged nor stayed and therefore, that the applicants would suffer no prejudice if the orders sought are not granted. He asserts that the applicants have not satisfied the conditions under Rule 5(2)(b) for stay of execution to be granted.
14. Before delving into the analysis, it is noted that the 1st to 3rd respondents have neither filed a reply to this application, nor have they filed submissions.
15. The issue for determination before this court is whether the applicants have satisfied the conditions for this court to grant them the orders of stay of execution, against the judgment and decree of the court dated February 25, 2021. The premise for stay of execution is Rule 5(2)(b) which provides that:

5(2) Subject to the provisions of sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may

 - a)
 - b) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74, order a stay of execution, an injunction, or a stay of further proceedings on such terms as the court may think just.
16. The unfettered discretion to grant an order for stay of execution is predicated on principles that are now well-settled. First, an applicant must prove that they have an arguable appeal. That is, the intended appeal should not be frivolous or an abuse of the court. Secondly, an application should demonstrate that unless the order for stay of execution is granted the intended appeal would be rendered nugatory. This court in *Multimedia University & Another v Professor Gitile N. Naituli* [2014] eKLR, restated these principles as follows:

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2)(b), the common vein running through them and the jurisprudence underlying those decisions was



summarized in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR 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.
 - v. The discretion of this Court under Rule 5(2)
 - (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
 - v. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
 - vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
 - viii. An applicant must satisfy the Court on both the twin principles.
 - ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
 - x. 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.
 - xi. 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.
 - xii. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved."
17. On the first principle as to whether the appeal is arguable, we have considered whether the applicants have raised any *bona fide* arguable ground to warrant ventilation before this court. As noted in the above precedent, "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." Additionally, in considering the application brought under Rule 5(2) (b), we were careful not to make definitive or final findings of either fact, or law at this stage as doing so might embarrass the ultimate hearing of the main appeal.
18. We have carefully considered the grounds set out in both this application and the memorandum of appeal. In our view, the appeal is arguable on grounds inter alia, as to whether the learned judge erred in holding that the allotments to the applicants in the impugned property were lawfully canceled. We bear in mind that whether an appeal is arguable is not predicated on whether the intended appeal will ultimately succeed, but whether it is deserving of the court's consideration. Further that it is sufficient if a single bona fide arguable ground of appeal is raised. Accordingly, and without delving into the substantive issues of appeal, we are satisfied that the intended appeal is arguable.
19. On whether the intended appeal would be rendered nugatory if the orders sought are not granted, the term nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid, but it



also means trifling. Further, whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved. (See *Stanley Kangethe Kinyanjui (Supra)*, and *Reliance Bank Limited v Norlake Investments Ltd (Supra)*.)

20. The respondents contend that the applicants have not challenged the subsequent order of the court dated June 14, 2021, in which the court issued an eviction order against the applicants from the property known as Moi Ndabi Settlement Scheme Phase 1 and instructed an auctioneer or court bailiff to carry out the eviction with the help of OCS Kongoni Police Station. We have gone through the ex-parte application leading to this order and interestingly, it was filed after the current application, specifically on April 14, 2021.
21. In our view, the respondent moved for *ex-parte* orders following this application to defeat the objects hereto. The respondents have not indicated that they were not timely served with the application. Their only contention is that there are execution orders that have not also been challenged. In the premise, the respondents' contention on failure to challenge the subsequent execution orders cannot stand.
22. That being said, the court turns to the applicants' assertions that damages would not be adequate compensation because they risk losing their means of livelihood, being rendered homeless, and the graves of their loved ones and their homes being destroyed. A perusal of the impugned judgment reveals that it was made in favor of the respondents. It restrains the applicants from further developing the impugned property and goes further to evict them therefrom.
23. The respondents have not rebutted the claims that the applicants have actually built their homes and made other developments on the impugned property. In the circumstances, it is our view that the appeal will be rendered nugatory if the status quo of the possession prior to the judgment dated February 25, 2021 is disturbed before the determination of the applicants' appeal.
24. Following the above analysis, we are satisfied that the applicants have met the threshold contemplated under Rule 5(2)(b) of the *Court of Appeal Rules*. Consequently, the notice of motion dated April 1, 2021 is found to have merit and is allowed with the following orders:
 - i. An order be and is hereby granted for stay of execution of the entire judgment and orders of the court in Nakuru ELC Case No. 338 of 2014 (as consolidated with Nakuru ELC Case No. 334 of 2014) *Paul Ndirangu Mbugua and 85 others v The Ministry of Lands and 59 Others*, delivered by Hon. Justice D.O. Ohungo on February 25, 2021.
 - ii. An order be and is hereby granted for stay of the orders issued in Nakuru ELC Case No. 338 of 2014 (as consolidated with Nakuru ELC Case No. 334 of 2014) *Paul Ndirangu Mbugua and 85 others v The Ministry of Lands and 59 Others*, delivered by Hon. Justice D.O. Ohungo on September 23, 2021.
 - iii. Costs shall be in the cause

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2022

F. OCHIENG

JUDGE OF APPEAL

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L. ACHODE

JUDGE OF APPEAL

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W. KORIR

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

