



Nyanjui & another (Suing on their own behalf and as legal representatives of Arthur Nyanjui Gichui) v Gitau (Civil Application E044 of 2022) [2022] KECA 1382 (KLR) (15 December 2022) (Ruling)

Neutral citation: [2022] KECA 1382 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E044 OF 2022
FA OCHIENG, LA ACHODE & WK KORIR, JJA
DECEMBER 15, 2022**

BETWEEN

JOYCE WANJIRU NYANJUI 1ST APPLICANT

SARAH WAMBUI NYANJUI 2ND APPLICANT

**SUING ON THEIR OWN BEHALF AND AS LEGAL REPRESENTATIVES OF
ARTHUR NYANJUI GICHUI**

AND

JOSEPH CHEGE GITAU RESPONDENT

(An application for stay of execution of the implementation of the decree dated October 14, 2020 and the subsequent orders from the judgment of the Environment and Land Court at Nakuru (D O Ohungo, J) dated September 24, 2020 in ELC Case No 103 of 2012)

RULING

1. Before us is an application vide notice of motion dated July 25, 2022. The application is made pursuant to rules 5(2)(b), 41, 42 and 43(1) of the [Court of Appeal Rules, 2010](#) and is supported by an affidavit of the applicants' advocate, Koome Gitonga, sworn on the date of the application. The applicants, Joyce Wanjiru Nyanjui and Sarah Wambui Nyanjui (suing on their own behalf and as the legal representatives of Arthur Nyanjui Gichui), pray that this court be pleased to stay the terms of judgment/decree dated September 24, 2020 by D O Ohungo, J in ELC Case no 103 of 2012 pending the hearing and determination of this application; that this court be pleased to stay the terms of judgment/decree dated September 24, 2020 by D O Ohungo, J in Nakuru ELC Case no 103 of 2020 as well as any other consequential orders pending the hearing and determination of the appeal; and that the costs of the application be provided for.



2. This application is pegged on the grounds on its face and the supporting affidavit. The applicants' case is that they have filed an appeal against the judgment/decree and the subsequent order of the Environment and Land Court in Nakuru ELC Case no 103 of 2012; that an eviction order has been issued against the applicants; that the applicants have an arguable appeal with good prospects of success; that if the orders for stay are not granted pending the hearing of this application and the appeal, the applicants will stand to suffer substantial loss; and, that if the decree issued by the Environment and Land Court is executed, the appeal will be rendered nugatory.
3. The application is opposed through a replying affidavit sworn on October 13, 2022 by the respondent, Joseph Chege Gitau. In summary, the respondent opposes the motion on the grounds that the applicants had applied for stay before the trial court whereby they were granted a conditional order for stay; that the applicants have not filed any appeal against that conditional order of stay; that the applicants are yet to satisfy the conditions of the said order of stay; and, that the application is therefore an abuse of the court process. The respondent also avers that he is the registered owner of the suit land, LR no Subukia/Subukia Block 12/372 (Arash) since April 7, 2003 having purchased the property in 1990. That from the time of purchase, the applicants have been leasing out the land without developing it. The respondent finally avers that in the circumstances, the appeal cannot be rendered nugatory if the orders of the trial court are not stayed and that the appeal by the applicants is not arguable. The respondent urges this court to dismiss the application for lack of merit and award him costs.
4. The applicants filed a further affidavit sworn by Joyce Nyanjui on October 19, 2022. Through the affidavit she avers that the suit parcel is used for agricultural purposes which is the source of the applicants' livelihood. Further, that the respondent in his replying affidavit has not tendered evidence to support his allegation that the appeal is not arguable and that this application is an abuse of the court process.
5. The application was canvassed by way of written submissions.

The appellant identified one issue for determination, namely, whether the judgement of the trial court and the subsequent orders should be stayed pending the hearing and determination of the appeal. On this issue, the advocate for the applicants relied on the case of *Butt vs Rent Restriction Tribunal* [1979] eKLR on the factors to be considered by the court in determining whether to grant or refuse stay of execution pending appeal.

Reliance was also placed on the case of *RWW vs. EKW* [2019] eKLR, where the court considered the purpose of an order for stay of execution pending appeal. The applicants further submitted that they have filed an appeal no E003 of 2021 against the judgment in Nakuru ELC no 103 of 2012. They contend that stay of execution of the judgement of the trial court and subsequent orders should be granted as the appeal has high chances of success. It is their submission that the order of stay of execution will help to preserve the subject matter in dispute hence preventing the appeal from being rendered nugatory. They urge the Court to allow their application without any conditions as they stand to suffer substantial loss should the application be declined.
6. The advocate for the respondent similarly filed his written submissions in this application. The respondent submits that in dealing with an application under rule 5 (2) (b) of the Court of Appeal Rules, this court has unfettered discretion to determine whether the applicant has an arguable appeal and whether the intended appeal will be rendered nugatory if interim orders are denied. It is the respondent's position that the appeal by the applicants cannot be rendered nugatory since the judgment of the trial court is reversible and, in the alternative, damages would be reasonable compensation. He relies on the case of *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR as delineating the factors to be considered in determining an application for stay pending appeal.



On whether the appeal is arguable, the respondent submits that the Memorandum of Appeal annexed by the applicants contains generalized grounds of appeal that do not give rise to any arguable issue. The respondent also reaffirms that he has been the registered owner of the suit land since April 7, 2003. The respondent takes issue with the fact that the affidavit in support of the application has been sworn by the applicants' advocate stating that counsel is not well suited to depose on contested matters of fact, as in the present case. In summary, the respondent submits that the eviction of the applicants is not irreversible and that if the appeal succeeds, the applicants can be brought back to the suit land. He urged this court to dismiss the application with costs to him.

7. We have carefully considered the application before us, the submissions by learned counsel for both parties as well as the cited authorities. This court, in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR, highlighted the various considerations in dealing with such an application. It held that:

“From the long line of decided cases (although none was cited by counsel, perhaps due to their notoriety) on rule 5(2) (b) aforesaid, the common vein running through them and the jurisprudence underlying these decisions can today be summarized 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 v Thornton & Turpin (1963) Ltd.* (1990) KLR 365.
- iv. In considering 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 ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & 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 v Pioneer Holdings (A) Ltd & 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 that 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 worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.



- 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.
 - 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 by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”
8. We are guided by the criteria set above. It is not in contention that Civil Appeal No 3 of 2021 has already been lodged by the applicants. This application is premised on rule 5(2)(b) of the Court of Appeal Rules, 2010. In *Safaricom Limited vs Ocean View Beach Hotel Limited & 2 others* [2010] eKLR, this court construed the purpose and reach of the provision as follows:
- “It is clear from all the provisions of rule 5 that their basic aim is to provide an interim relief where the superior court has determined a matter and the party against whom the determination is made has either appealed or intends to appeal. If there is no appeal or no intention to appeal, this Court would have no jurisdiction to meddle in a decision made by the superior court.”
9. The principles for grant of stay under Rule 5(2)(b) are well settled. The applicant is required to show that he or she has an arguable appeal, and secondly, that if the order of stay is not granted, the appeal is bound to be rendered nugatory. This Court in *Attorney General & another vs Eunice Makori & another* [2021] eKLR expounded on these principles as follows:
- “Undoubtedly, this court has unfettered discretion under rule 5(2) (b) to grant an order of stay. The principles guiding the exercise of such discretion are well settled. Firstly, an applicant has to demonstrate that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory.”
10. It is on the basis of the stated principles that we will consider the application before us. The first issue is whether the applicants’ appeal is arguable. In addressing this issue, we must reiterate that an arguable appeal must not be one that will succeed but ought not to be frivolous or an effort in futility. In addressing this limb, this court is expected to address its mind to the grounds of appeal in light of the judgment the applicant seeks to impugn. In the application before us, the applicant has annexed their memorandum of appeal which raises 15 grounds of appeal. On the face of it, the memorandum of appeal raises grounds that would require this court’s evaluation. However, for the same to be qualified as arguable, the judgment giving rise to the grievances contained in the memorandum of appeal ought to be before this court. We note that the judgment, decree or orders which are the subject of the appeal are not before this court. The applicants simply rely on the averments by their advocate. It is our view that the failure to exhibit the judgement, decree or order which is the subject of the appeal defeats the applicant’s application on the ground that they have failed to persuade us that they have an arguable appeal. This court can only determine whether the appeal is arguable by considering the decision to be appealed against the grounds of appeal. This position was echoed by this court in *Attorney General & another vs Eunice Makori & another* [2021] eKLR, where it was stated that:
- “These principles construe that an applicant must bring to the court’s attention the subject matter of the intended appeal which he/she wishes to preserve through orders for stay and



the grounds upon which he/she intends to challenge the impugned decision. Therefore, having noted that the impugned decision is not on record, it is apparent that this alone stands against the applicant’s motion as there is no basis for this Court to exercise its discretion.”

11. The second issue is whether the applicant has satisfied this court that the appeal will be rendered nugatory if the orders of stay are not granted. In determining whether an appeal may be rendered nugatory, this court ought to consider whether or not what is sought to be stayed is reversible. If what is sought to be stayed is irreversible, the court will then consider whether damages can compensate the party seeking stay. If the thing sought to be stayed is irreversible and damages cannot reasonably compensate the applicant, then the appeal may be rendered nugatory. The meaning of the term nugatory was considered by this Court in *Permanent Secretary Ministry of Roads & another vs Fleur Investments Limited* [2014] eKLR where it stated that:

“In *Reliance Bank Limited V Norlake Investments Ltd* [2002] 1 E A 227, this court held that:

“..... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law.”

12. In the application before us, we note that LR no Subukia/Subukia Block 12/372 (Arash) is registered in the name of the respondent. The applicants have been utilizing the same parcel for farming which they claim is their source of livelihood. In our view, the applicants have not demonstrated how the appeal will be rendered nugatory. The loss alluded to by the applicants in this application is the loss of seasonal yields after every harvest which can be compensated by damages. In this regard, we are persuaded by the respondent’s submission that if the applicants succeed in their appeal, the possession of the land can be easily handed over to them. We also note that damages can adequately compensate the applicants for any loss of income from agricultural produce.
13. Further, we note that upon an application for stay by the applicants before the Environment and Land Court, the applicants were issued with conditional orders of stay. Even though the applicants are before us as a matter of right, they ought to have disclosed the orders obtained from the trial court and address this Court as to why they have failed to satisfy the conditions set therein. Disclosure is an element of good faith which is necessary in applications where a party is asking the court to exercise discretion in his or her favour.
14. As was stated in *Stanley Kangethe Kinyanjui (supra)*, the onus is on an applicant to satisfy the two limbs before orders of stay can be granted. As we have already demonstrated, the applicants herein have not satisfied the dual limbs to warrant the issuance of an order of stay in their favour. This application is therefore ripe for dismissal and as such the application dated July 25, 2020 is hereby dismissed.
15. As for the issue of costs, we are mindful of the principle that costs follow the event unless the court shall for good reason otherwise order. In this case, no good reason has been advanced to warrant departure from the general principle guiding the award of costs. In that regard, the respondent shall have the costs of the application from the applicants.

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

F OCHIENG

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JUDGE OF APPEAL

L ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

