



REPUBLIC OF KENYA



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

**Muhangani & another v Mwadziwe & another (Civil Application  
E019 of 2022) [2022] KECA 1299 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1299 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E019 OF 2022  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
DECEMBER 2, 2022**

**BETWEEN**

**WYCLIFF JIRONGO MUHANGANI ..... 1<sup>ST</sup> APPLICANT**

**FRANCIS MUJUMBA ALUHA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**RAYMOND GONZI MWADZIWE ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPHINE NYEVU MWADZIWE ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of the decree order of the decree and orders  
arising from the Environment and Land Court at Mombasa  
(Matheka, J) delivered on 18th January 2022, in ELC No. 232 of 2011)*

**RULING**

1. This notice of motion application, dated August 2, 2022, brought under section 1A, 1B & 3A of the [Civil Procedure Act](#), order 51 rule 1 of the [Civil Procedure Rules, 2010](#) rule 5(2)(b) of the [Court of Appeal Rules](#), Wycliff Jirongo Muhangani and Francis Mujumba Aluha, seek the following orders:
  1. Moot.
  2. Moot.
  3. That there be an order of stay of execution of the decree and orders arising from the judgment delivered by the Environment and Land Court at Mombasa on January 18, 2022 and all subsequent orders, pending the determination of the application dated April 4, 2022.
  4. That there be an order of stay of execution of the decree and orders arising from the judgment delivered by the Environment and Land Court at Mombasa on January 18, 2022 and all subsequent orders, pending the determination of the applicant's Intended Appeal.



5. Costs.
2. The application is premised on the grounds on the face of the application and in the supporting affidavit sworn by Racheal W Watitu, learned counsel for the applicants. It is contended that the ELC ordered that the applicants vacate the suit property known as Block No 96/19 and give vacant possession thereof within 90 days from the date of the judgment. Further that the ELC ordered the lifting and/or removing of a caution placed on the suit property upon expiry of 90 days from the date of the judgment. Being aggrieved by the judgment of the ELC the applicants' have filed a notice of appeal.
3. The application is opposed. The 1<sup>st</sup> respondent has sworn a replying affidavit dated August 11, 2022. It is deposed that the applicant filed his notice of appeal out of time, and that thus there is no valid appeal pending. It is deposed that the applicants have been in occupation of the respondents' suit property since 1996 and that they have all along delayed the matter. The respondents implored this court to allow them to enjoy the fruits of their judgment.
4. This application was heard virtually on the August 17, 2022 during the court's vacation. Learned counsel Ms Watitu was present for the applicants while learned counsel Ms Yunus was present for the respondents. Ms Watitu relied on their written submissions dated August 2, 2022. Counsel urged that the applicants had a ruling pending in an application where they sought leave to extend time to file notice of appeal, which ruling had been scheduled for October 21, 2022 before Lesiit, JA. Counsel urged us to refer to the draft memorandum of appeal annexed to the supporting affidavit sworn by the 1<sup>st</sup> applicant to find that the appeal is arguable.
5. Ms Yunus for the respondents relied on the replying affidavit sworn by the 1<sup>st</sup> respondent. Counsel urged that they were unable to file submissions as they were served with the applicants' submissions the day before the hearing. In her oral submissions, Ms Yunus urged that the appeal was filed out of time, that the respondents have extracted the decree of the ELC ready for execution, and that the applicants do not stand to suffer any prejudice if the orders sought are not granted.
6. In so far as applications filed under rule 5 (2) (b) of this court's *rules* are concerned, the threshold requirements to be satisfied are amplified in the case of *Republic vs Kenya Anticorruption Commission and 2 others [2009] eKLR* thus;

“The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court that first, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds their results or success could be rendered nugatory”.
7. On arguability of the appeal, the applicants urge that they have been in occupation of the suit property for many years. It is contended that the ELC erred when it found that the applicants frustrated the sale agreement yet there was no notice of completion served upon the applicants, as contracted between the parties by virtue of the 1989 *Law Society Conditions of Sale* which were expressly included as the terms and conditions of the sale in the agreement between the parties, and which conditions made it mandatory for the service of the notice of completion before a sale agreement can be terminated.
8. The respondents on their part deposed that there was no valid appeal as the applicants filed their notice of appeal out of time. That the stipulated time required to file the notice of appeal ran out on January 31, 2022. It was further contended that the application for stay fails to give an explanation for the delay in filing the notice of appeal, that the applicants have not disclosed to this court that they had sought orders for stay in the High Court and the same were denied on July 26, 2022 for lack of merit.



9. In regard to the complaint raised by the respondents that there is no valid appeal, Ms Watitu disclosed at the virtual hearing that an application for extending time to file the notice of appeal was pending a ruling on the October 21, 2022. That ruling was delivered as scheduled and the application to extend time granted. As to the dismissal of similar application before the ELC, nothing stops an applicant to make an application before the Court of Appeal after being declined by the High Court or Courts of Equal Status.
10. As to what satisfies the first principle of arguability this court in this regard held as follows in *Somak Travels Ltd v Gladys Aganyo [2016] eKLR*.

“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”
11. Guided by the above case, we have considered the arguments of the parties in this regard and are satisfied that the applicants have demonstrated that they have an arguable appeal on the issue of whether the sale agreement was frustrated. That is an arguable issue and is not frivolous. The applicants have met the requirement of the first threshold.
12. On the nugatory aspect, the applicants have urged that the respondents have extracted the decree arising from the impugned judgment and that unless the orders for stay are granted the respondents are likely to evict the applicants from the only home they have known, or may transfer the suit property to third parties thus rendering the applicants’ intended appeal nugatory.
13. The 1<sup>st</sup> respondent contended that the 90 days stay that was granted by the ELC was a sufficient timeframe for stay for the applicants to surrender possession to the respondents. It was asserted that the applicants have been in occupation of the 1<sup>st</sup> respondent’s suit property since 1996 when they filed, abandoned and unprosecuted Civil Case No 897 of 1997(OS) in Nairobi which necessitated the 1<sup>st</sup> respondent to file ELC No 232 OF 2011 in Mombasa. As such the 1<sup>st</sup> respondent urged that the application dated August 2, 2022 for orders of stay should be dismissed.
14. It is not contested that the respondents have started the execution process. It is not contested either that eviction is imminent unless the stay order is granted. The test of nugatory is to determine what it is that the applicant seeks to prevent from happening and whether if it happened it could be reversible, or if it is not reversible if the applicant could reasonably be compensated by an award of damages. [See *Stanley Kangethe Kinyanjui v Tonny Keter & others [2013] eKLR*].
15. We find that it is not contested that the applicants are in occupation of the suit property, and therefore they face eviction from the suit property if orders of stay are not granted. If the property changes hands and is sold to third parties, the applicant’s loss may not reasonably be compensated by an award of damages. That, we agree will render the appeal nugatory.
16. In sum, the applicant having satisfied the twin threshold requirements to warrant an order of stay of execution, it is merited, and hence the notice of motion dated August 2, 2022 succeeds and is allowed in terms of prayer 4 of the application. Accordingly, we order a stay of execution of the decree and orders arising from the judgment delivered by the Environment and Land Court at Mombasa on January 18,



2022 and all subsequent orders, pending the determination of the applicant's intended appeal. The costs of this application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT MOMBASA THIS 2ND DAY OF DECEMBER, 2022.**

**S GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**P NYAMWEYA**

.....

**JUDGE OF APPEAL**

**J LESIIT**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

