



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MUSINGA, & GATEMBU, J.J.A.)

CIVIL APPLICATION NO. E208 OF 2020

BETWEEN

DONALD KAWINZI.....APPLICANT

AND

MALI YA MUNGU MUTEI.....1ST RESPONDENT

KATELEMBO ATHIANI MAVUTI FARMING &

RACHING SOCIETY LIMITED.....2ND RESPONDENT

(An application for stay of proceedings and of execution pending the hearing and

determination of an intended appeal from the Judgment and Order of the Environment

and Land Court at Machakos (O. Angote, J.) dated 15th July 2020 in E. L. C. Case No. 193 of 2017.)

RULING OF THE COURT

1. The applicant's Notice of Motion dated 30th July 2020 seeks stay of execution of the judgment of **Angote, J.** delivered on 15th July 2020 in Machakos **ELC Case No. 193 of 2017** pending hearing and determination of an intended appeal.
2. In the said judgment, the learned judge dismissed the applicant's suit, and the applicant, being aggrieved by the said judgment intends to appeal against the same. He has filed a notice of appeal and applied for certified copies of the proceedings and the judgment.
3. Before the trial court, the applicant had sought a declaration that he is the owner of a parcel of land known as **Machakos Block 3/115** (the suit property), having purchased it from the 2nd respondent and is entitled to vacant possession of the same; cancellation of the Title Deed issued to the 1st respondent, and general damages.
4. The applicant believes that his intended appeal has high chances of success; and that he stands to suffer irreparable loss and harm unless the orders sought are granted.
5. The 1st respondent, through his advocates, **M/S Mutimu Kang'atta & Company**, opposed the application. He stated that the intended appeal is not arguable; that the suit property was always registered in the name of the 1st respondent and later his estate; that the judgment sought to be stayed is a negative one since the trial court dismissed the applicant's suit and execution can only be limited to costs of the suit. We were therefore urged to dismiss the application.
6. The 2nd respondent, though served with a hearing notice for the application, did not file any response.
7. We have considered the application, the submissions by the applicant and the 1st respondent as highlighted by their respective learned counsel, **Mr. Onyango** and **Mr. Kang'atta**. For an applicant to succeed in a **rule 5(2)(b)** application, he must demonstrate that the appeal or intended appeal is arguable; and that unless the intended appeal, if successful, shall be rendered nugatory, unless the orders sought are granted.

8. Although the suit property is registered in the name of the 1st respondent, the applicant argued that the trial court did not properly consider the evidence on record regarding membership of the 2nd respondent's society; and that the Title Deed for the suit property was issued fraudulently.

9. Although these arguments were discounted by the applicant, we think they are arguable. An arguable appeal is not one that must succeed, it is an appeal that raises at least one ground that is not frivolous and deserves full consideration by the Court. See **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR**.

We therefore find that the intended appeal is arguable.

10. Turning to the second limb, the applicant has not demonstrated that unless the orders sought are granted, the intended appeal shall be rendered nugatory. For nearly 20 years the suit property has been registered in the name of the 1st respondent, (now deceased), but his legal representative stated in his affidavit that the family has no intention whatsoever of disposing of the suit property.

11. Besides, the orders sought to be stayed are negative. For an application for stay of execution pending appeal to lie, it is settled law that there must be positive orders which may be stayed. See **Western College of Arts and Applied Sciences v E.P. Oranga & 3 Others [1976] KLR 63**.

The applicant's suit before the trial court was dismissed with costs. The only positive order that can be executed is payment of costs. The applicant has not alleged that the 1st respondent is about to execute the order for payment of costs of the suit, and that if execution is levied and the appeal succeeds the 1st respondent will not be capable of repaying the costs.

12. The applicant having failed to satisfy the twin requirements for grant of stay of execution pending appeal, this application is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF APRIL, 2021

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR