



REPUBLIC OF KENYA



**Kiplagat & another v Rono & 65 others (Civil Application
E078 of 2021) [2021] KECA 98 (KLR) (22 October 2021) (Ruling)**

Neutral citation: [2021] KECA 98 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E078 OF 2021
AK MURGOR, HA OMONDI & KI LAIBUTA, JJA
OCTOBER 22, 2021**

BETWEEN

HUDSON KIPTUM KIPLAGAT 1ST APPLICANT

JANE JEPKEMEI 2ND APPLICANT

AND

SAMUEL K. RONO 1ST RESPONDENT

KIPRONO KIMENGISH 2ND RESPONDENT

KIPROTICH ROP 3RD RESPONDENT

CHRISTTINE JEPKOSGEI KIPRONO 4TH RESPONDENT

DANIEL KIPTOO KANGOGO 5TH RESPONDENT

KIPLAGAT CHESUMER 6TH RESPONDENT

JANE TERIKI KAPKONG 7TH RESPONDENT

WILLIAM KIPTUM LAGAT 8TH RESPONDENT

SIOKWEI TAMINING KIPROTICH 9TH RESPONDENT

TECLA JESANG CHIRCHIR 10TH RESPONDENT

ERICK K. KIPRONO 11TH RESPONDENT

DANIEL KIMUTAI CHIRCHIR 12TH RESPONDENT

KIPTANUI C. TAMBEI 13TH RESPONDENT

EMILY CHEPTOO 14TH RESPONDENT

MIRIAM JEMUTAI KOTUT 15TH RESPONDENT

CHEBET KOMEN 16TH RESPONDENT



JACKSON KIPTUM MOSS	17 TH RESPONDENT
KOBILO TABARANO KIPSEREM	18 TH RESPONDENT
SAMUEL KIPROP KIBOWEN	19 TH RESPONDENT
BETHWEL KIPMWETICH CHEROP	20 TH RESPONDENT
KIPROTICH MALAKWEN	21 ST RESPONDENT
WILLIAM KIPSEWERE BIEGO	22 ND RESPONDENT
KABON BARSOSIO	23 RD RESPONDENT
EVERLYNE JEPKOECH KIMAIYO	24 TH RESPONDENT
TABUTANY CHESEREM	25 TH RESPONDENT
TABLELEI TERIKI CHEBIY	26 TH RESPONDENT
JUSTUS K. KUTTO	27 TH RESPONDENT
WILLIAM B. NGELEL	28 TH RESPONDENT
SILAH KIPKEMOI KOSGEI	29 TH RESPONDENT
KIPKOSGEI ARAP KOECH	30 TH RESPONDENT
LAWRENCE B. TANUI	31 ST RESPONDENT
SANIAGO C. KIMAIYO	32 ND RESPONDENT
JOEL KOMEN	33 RD RESPONDENT
PAUL KIPTOO	34 TH RESPONDENT
LABAN KIPROTICH KANGOGO	35 TH RESPONDENT
JOSEPH C. KOSGEI	36 TH RESPONDENT
EMMY CHELIMO	37 TH RESPONDENT
CLEMENT MAIYO	38 TH RESPONDENT
JOSEPH CHEBII	39 TH RESPONDENT
DANIEL KIMUTAI	40 TH RESPONDENT
JOHN K. KIGEN	41 ST RESPONDENT
THOMAS KIMELI ROTICH	42 ND RESPONDENT
JAMES CHEBOI KIPROTICH	43 RD RESPONDENT
SAMUEL KIPLAGAT	44 TH RESPONDENT
KIPTANUI MUSA KAMAME	45 TH RESPONDENT
SAMUEL TUMO	46 TH RESPONDENT
JOHN SAMOEI	47 TH RESPONDENT
STEPHEN CHEBOI	48 TH RESPONDENT



WILLIAM KIPLAGAT	49 TH RESPONDENT
NICHOLAS CHEBAIGEI	50 TH RESPONDENT
REUBEN KEMBOI KIPLAGAT	51 ST RESPONDENT
KIRWA SAMOEI	52 ND RESPONDENT
JOHN K. KIPROTICH	53 RD RESPONDENT
LEAH KIPRONO	54 TH RESPONDENT
JOHN KIPKOECH MASWAI	55 TH RESPONDENT
ALEX KIPLAGAT KORIR	56 TH RESPONDENT
SAMUEL TOROTICH	57 TH RESPONDENT
JANE KEMBOI	58 TH RESPONDENT
MICAH CHEBOI	59 TH RESPONDENT
WILSON KIPTOO	60 TH RESPONDENT
LEAH BUSIENEI	61 ST RESPONDENT
JOHN K. KIGEN	62 ND RESPONDENT
REUBEN KEMBOI KIPLAGAT	63 RD RESPONDENT
REUBEN KEMBOI KIPLAGAT	64 TH RESPONDENT
JOSEPH KITUR	65 TH RESPONDENT
JAMES KIPROTICH CHEBOI	66 TH RESPONDENT

(An application under Rule 5(2) (b) of the Court of Appeal Rules for stay of the orders of the Environment and Land Court at Eldoret pending the hearing and determination of an intended appeal from the Ruling of (S. M. Kibunja, J.) given on 12th May, 2021 in Environment and Land Court Case No. 599 of 2012)

RULING

- 1 The Applicants herein, Hudson Kiptum Kiplagat and Jane Chepkemei were aggrieved by the Ruling and Order of Justice S. M. Kibunja given on 12th May 2021 in Environment and Land Court of Kenya at Eldoret Case No. 599 of 2012 by which the learned Judge dismissed three applications dated 18th January 2021, 4th February 2021 and 15th February 2021.
- 2 In the first Notice of Motion dated 18th January 2021, the 34th to the 66th Respondents sought –
 - a. leave for the firm of Limo R. K. and Company Advocates to come on record for them in place of M/s. Kipchirchir Komen and Company Advocates;
 - b. stay of implementation and execution of the judgment delivered on 2nd March 2018 pending the hearing and determination of the intended appeal; and



- c. costs.
- 3 The second Notice of Motion dated 4th February 2021 was filed by the Applicants herein seeking –
 - a. leave to be joined in the substantive suit as co-defendants;
 - b. leave to file defence;
 - c. variation or setting aside of the judgment entered in the substantive suit together with all consequential orders; and
 - d. costs.
- 4 In the 3rd Notice of Motion dated 15th February 2021, the Applicants sought –
 - a. summons to issue for Jarion Gitonga (the then OCS Kaptagat Police Station) and Charles Okwanalo (the then Sub-County Commissioner, Keiyo South) to show cause why they should not be committed to civil jail for a period of up to six months for allegedly disobeying the court order issued on 4th February 2021 by which the superior court had, among other things, ordered that the status quo be maintained pending hearing of the application dated 4th February 2021 inter parties scheduled for 1st March 2021; and
 - b. costs.
- 5 Before us is the Applicants’ Notice of Motion, which was initially dated 17th May 2021 and subsequently amended on 14th July 2021. The application is made on 12 grounds set out on the face of the Motion and is supported by the affidavit of Hudson Kiptum Kiplagat sworn on 14th July 2021. Substantive among the grounds on which the application is made are that –
 - a. the 1st to 33rd Respondents failed to disclose the fact that the two applicants were in occupation of UASIN GISHU KIPKABUS SETTLEMENT SCHEME/1195 and 1208 together with their families, which properties were allegedly among the suit property in the substantive suit and that they were proper parties to the Eldoret ELC No. 599 of 2012 in determination of which they now face imminent eviction;
 - b. the Applicants were not named in the suit before the superior court despite the fact that the prayers sought in the suit directly affected them having been allegedly in occupation of the suit property;
 - c. the Applicants’ inherent rights and fundamental freedoms enshrined in the Constitution have been threatened;
 - d. the Applicants have a genuine interest in the outcome of the suit;
 - e. the Applicants have been condemned to eviction without being accorded a hearing;
 - f. the Applicants have a good defence to the suit;
 - g. the Applicants were at all times unaware of the existence of the suit in the superior court and they stand to suffer irreparably if they are evicted;



- h. the 1st to 33rd Respondents herein shall not suffer any prejudice should the orders sought be granted.

6 Having carefully read the Applicant's Notice of Motion as amended, the 1st Applicant's supporting affidavit sworn on 14th July 2021 (subsequent to that amendment), the 1st Applicant's supplementary affidavit sworn on 14th July 2021 and a further supplementary affidavit sworn on 27th July 2021, the 1st Respondent's replying affidavit sworn on 15th June 2021 prior to the amendment of the Motion, and the draft Memorandum of Appeal dated 17th May 2021, we find that the 9 Grounds on which the intended appeal is preferred are contentious and, accordingly, arguable. In particular, the 1st Respondent contends, among other things, that –

- a. the application before us lacks merit and is an abuse of the Court process;
- b. the Applicants were not party to the Eldoret ELC Case No. 599 of 2012, and were not in occupation of the aforesaid property;
- b. the Applicants are being misused by the defendants/judgment debtors in Eldoret ELC Case No. 599 of 2012 to frustrate the enforcement of the decree issued in that case;
- c. the suit in issue involves 34 parcels of land and the application is designed to stay execution of the decree relating to those parcels of land despite the baseless allegation that the Applicants are in occupation of 2 out of the 34 parcels;
- d. the Applicants have no right to enforce in relation to the suit properties in light of the fact that the decree in the impugned judgment expressly states who are to be evicted therefrom; and
- e. the Applicants have not satisfied the conditions for the grant of the orders sought.

7 In their written submissions dated 14th July 2021 and made in support of the Applicants' application, counsel for the Applicants, M/s. Limo R. K. and Company, address themselves to evidential matters forming the background of the dispute between the parties hereto. No submissions have been made on the Respondents' case.

8 In their Further Amended Plaint dated 30th October 2014 and filed in Eldoret ELC Case No. 599 of 2012, the 1st to 33rd Respondents herein prayed for, among other relief –

- a. orders for the eviction of 34th to 66th Respondents (the defendants in the said suit) from the 34 parcels of land therein specified;
- co. a permanent injunction restraining the 34th to 66th Respondents from dealing in any manner whatsoever with the said properties; and
- d. costs of the suit.

9 The 34th to 66th Respondents defended the suit and filed a counterclaim alleging, among other things, that the 1st to 33rd Respondents had fraudulently obtained registration of the "unlawfully subdivided parcels of land from the parent parcel UASIN GISHU KIPKABUS SETTLEMENT SCHEME/848. The suit proceeded to hearing and judgment delivered on 2nd March 2018 in favour of the 1st to 33rd Respondents. A decree was issued on 26th April 2018 and eviction orders given on 3rd December 2020



directing that the same be executed by the Keiyo South Sub-County Commissioner and the OCS Kaptagat Police Station. Then followed the three Motions mentioned in paragraphs 2, 3 and 4 above, all of which were dismissed.

10. Aggrieved by the Ruling and Order of the superior court given on 12th May 2021 dismissing the three applications aforesaid, the Applicants (being the proposed 34th and 35th defendants sought to be joined in the suit previously determined by the superior court) instituted the intended appeal vide their Notice of Appeal dated 12th May 2021, and hence the application before us to stay execution of the decree and eviction orders in Eldoret ELC No. 599 of 2012 pending the hearing and determination of the intended appeal.
11. Having considered the Applicant's Amended Notice of Motion dated 14th July 2021, the affidavit in support thereof, the supplementary and further affidavits of the 1st Applicant, the replying affidavit of the 1st Respondent, and the written submissions of counsel for the Applicants, we form the view that the Applicants' Motion stands or falls on two main grounds:
 - a. whether the appeal is arguable, which is to say, it is not frivolous; and
 - b. whether the appeal, if successful, would be rendered nugatory if stay was not granted.
12. The principles that apply in applications pursuant to Rule 5(2) (b) of the *Court of Appeal Rules* for stay of execution or of further proceedings pending appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed. These principles have been enunciated in, among others, the following judicial pronouncements of this Court to which we now turn.
13. On the first limb of this twin principle, the Court in *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR held that, for stay orders to issue, the Applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.
14. From the grounds on which the Applicants' Motion is founded, the affidavits in support and the written submissions of counsel for the Applicants, we find that the grounds advanced by the Appellants in support of their intended appeal as specified in paragraph 5, and contested by the 1st to 33rd Respondents on the grounds specified in paragraph 6, of our Ruling are arguable. Whether the appeal will succeed or not is not for us to judge. That is a matter for determination at the hearing of the appeal.
15. That brings us to the second limb of the twin principle – whether the appeal, if successful, would be rendered nugatory in the event that stay is not granted. To our mind, the absence of stay would pave way to execution of the eviction orders and possible destruction of homesteads and livelihoods, an eventuality that would be onerous, if not impossible, to undo. Indeed, that would, in our considered view, render the appeal, if successful, nugatory.
17. The term “nugatory” was defined in *Reliance Bank Ltd Norlake Investments Ltd* (2002) 1 EA p.227 at p.232 thus: “it does not only mean worthless, futile or invalid. It also means trifling.” The Court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. We are persuaded that the circumstances of the case before



us call for stay of execution of the eviction orders of the superior court. Otherwise, the appeal from the impugned Ruling, if successful, would be worthless or futile.

18. The decision in *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR sheds more light on this limb. The Court held at paragraph 9 that “on the 2nd limb of nugatory aspect, whether or not an appeal will be rendered nugatory depends on whether 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.” In our view, the evictions that would ensue would, in the absence of stay, be difficult to reverse. Neither would it be practical to suppose that the aggrieved parties would be compensated by an award of damages.
19. Having considered the Applicant’s Notice of Motion dated 14th July 2021, the affidavits in support thereof, the 1st Respondent’s replying affidavit, the written submissions of counsel for the Applicants, we find that the applicants have satisfied the two limbs of the requirements in an application for stay of execution of the trial court’s orders pending appeal. Accordingly, we allow the motion and hereby order that all further proceedings in execution of the decree in Eldoret ELC Case No 599 of 2012 be and are hereby stayed pending hearing and determination of the intended appeal. Costs shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021

A. K. MURGOR

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JUDGE OF APPEAL

H. OMONDI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

