



REPUBLIC OF KENYA



KENYA LAW
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**Kifuso v Kishushe Ranching Co-operative Society Limited (Civil Application
E028 of 2021) [2021] KECA 55 (KLR) (8 October 2021) (Ruling)**

Neutral citation: [2021] KECA 55 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E028 OF 2021
W KARANJA, SG KAIRU & F SICHALE, JJA
OCTOBER 8, 2021**

BETWEEN

NEWTON KIFUSO APPLICANT

AND

KISHUSHE RANCHING CO-OPERATIVE SOCIETY LIMITED RESPONDENT

*(An application seeking stay of execution from the Ruling and Order
of the Environment and Land Court at Mombasa (C. K. Yano,
J.) delivered on 2nd March, 2021 in ELC Case No. 134 of 2019)*

RULING

1. This application revolves around a dispute between the parties whereby Kishushe Ranching Co-Operative Society Limited (hereafter the respondent) filed a suit against Newton Kifuso (the applicant) seeking vacant possession in its favour claiming that the applicant without colour of right entered upon part of Land Reference Number 28984 in Kishushe Adjudication section (the suit land) and began constructing a house thereon. Having been served with the plaint and summons to enter appearance, the applicant filed a memorandum of appearance and a Notice of preliminary objection on grounds that the suit was sub judice ELC NO. 26 of 2019 which was in respect of the same issues.
2. Before the Preliminary objection could be heard, the respondent filed the application dated 27th September, 2019 seeking summary judgment under Order 36 Rule 1 of the *Civil Procedure Rules, 2010* on grounds, inter alia, that there was no defence to the primary suit, and that there were no triable issues that would warrant the suit going to trial on the question of possession, which was admitted. The issues raised in the Preliminary Objection were considered within the application and ultimately, the court found in favour of the respondent, entered summary judgment as prayed and gave the applicant 60 days to vacate the suit land.



3. Aggrieved by the said orders, the applicant filed a Notice of Appeal dated 3rd March, 2020 and, in the meantime, also filed the instant application seeking stay of execution of the impugned orders.
4. The application is premised on grounds, inter alia, that the intended appeal is arguable and that the respondent has commenced steps to execute the resultant decree hence the intended appeal will be rendered nugatory and that the respondent will suffer no prejudice if stay is granted.
5. The application is supported by the applicant's affidavit sworn on 18th March, 2021. Reiterating the grounds of appeal as appears on the face of the application, the applicant avers that sometime in the year 2001, the suit land having been held under the Trust Lands regime, was unlawfully declared as an adjudication section by the District Adjudication Officer after meetings were held with representation from the Community of the Kishushe Adjudication Section; that pursuant to the declaration, the said portion of land was available to all residents of Kishushe Adjudication Section to use, develop and transact on, while awaiting the process of transfer of titles to their respective names.
6. He depones further, that as a result of the fraudulent actions and misrepresentation of the respondent herein, a title deed for the suit land was issued to the respondent on 1st August, 2015 to the exclusion of the residents of Kishushe Adjudication section in utter disregard of Court orders and protests by the residents; that on 29th May, 2018 the applicant purchased a portion of the said property (Plot No. 2478) from one Rofas Masumbuko Samba, a resident of Kishushe Adjudication section and bona fide member of the respondent.
7. The applicant contends that he developed and settled on the said portion of land until sometime mid 2019 when he was evicted by an official of the respondent due to political differences; that on 17th July, 2019 the respondent filed a suit against him seeking, inter alia, orders for eviction. The applicant had raised a preliminary objection that the respondent's suit was filed without the approval of the respondent's members and the same is sub judice ELC 26 of 2019 and prayed for dismissal of the suit, but as stated earlier, the Preliminary objection was not successful.
8. The application is opposed through the replying affidavit of Ellistone Mbela, the respondent's Chairman sworn on 26th April, 2021. The respondent deposes that the applicant's appeal is not arguable as his occupation of the said land is not denied; that the applicant is a trespasser on the suit property as opposed to the other occupants who are members of the respondent and that the applicant has not offered to deposit any security and lastly, that if the court is minded to grant the orders sought, then the applicant should be ordered to deposit 1 million shillings as security for costs. The respondent's counsel has also filed submissions which we have considered along with the application and the rival affidavits.
9. It is trite that for this Court to grant an order of stay of execution, the applicant must demonstrate that its intended appeal is arguable and that if stay is not granted, the intended appeal would be rendered nugatory in the event that the appeal succeeds. (See: *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others*).
10. It is also trite that an applicant must demonstrate both arguability and the nugatory aspect and demonstrating only one of these principles will not suffice. The first issue for consideration is whether the applicant has an arguable appeal. An arguable appeal is one that is not frivolous but raises a bona fide issue deserving determination by this Court and a single bona fide issue would suffice to demonstrate arguability. (See: *Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union*).
11. On the arguability aspect, the applicant has put forth fifteen (15) grounds in the Memorandum of appeal and also relies on the grounds the face of the application.



12. From a cursory look at the Memorandum of appeal, one of the distinctive arguable points that is discernible is for instance, whether the learned Judge erred in failing to consider the respondent's lack of authorization to file the suit under the Co-operatives Act. That in our view is not an idle point. There is also the issue as to whether the applicant was a trespasser on the suit land. In our view, the ends of justice would have been served better had the appellant been given an opportunity to be heard on the issue of whether he had purchased the portion he had settled as he claimed or not. The respondent's claim was not suitable for determination by way of summary judgment. We are, therefore, persuaded that the intended appeal is arguable.
13. On the nugatory aspect, the applicant deposes that the respondent has commenced steps to evict him from the suit land in execution of the ruling, order and/or decision of the trial court, an action that would render the intended appeal nugatory. We hold the view that if the applicant's house is demolished, in the event the appeal succeeds, although he may claim damages from the respondent, that will be a tedious, arduous exercise which can be avoided if the status quo is maintained pending the hearing and determination of the appeal. We also appreciate that the trauma and inconvenience of eviction is irreversible in the event the applicant succeeds in his appeal.
14. From the foregoing, it is evident that the applicant has demonstrated both limbs of arguability and nugatory aspect as required under Rule 5(2)(b) of the Rules of this Court. We allow the application with orders that the appeal be filed and served within 45 days from the date hereof failing which the orders of stay of execution will stand discharged leaving the respondent at liberty to execute. Costs of the application to abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

