



**Masai & another v Masai & another (Civil Application 148 of 2020)
[2021] KECA 170 (KLR) (19 November 2021) (Ruling)**

Neutral citation: [2021] KECA 170 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 148 OF 2020
HM OKWENGU, MA WARSAME & J MOHAMMED, JJA
NOVEMBER 19, 2021**

BETWEEN

JACKSON SIRKEN MASAI AKA JACKSON MASAI 1ST APPLICANT

JACKSON MNANGAT YARALIMA 2ND APPLICANT

AND

MARY JACKSON MASAI 1ST RESPONDENT

CCOUNTY LAND REGISTRAR, WEST POKOK 2ND RESPONDENT

(An application for stay of execution pending lodgment, hearing and determination of the ruling of the Environment and Land Court of Kenya at Kitale (Njoroge, J.) dated 1st December, 2020 in ELC Cause No. 31 of 2020)

RULING

Background

- 1) Before us is a notice of motion dated 9th December, 2020 in which Jackson Sirken Masai aka Jackson Masai (the 1st applicant) and Jackson Mnangat Yaralima (the 2nd applicant) pray for orders in the main: that this Court be pleased to stay orders of Njoroge, J. dated 1st December, 2020 in Kitale ELC Case No. 31 of 2020 pending the hearing and determination of the intended appeal; and that costs of this application be in the cause.
- 2) Mary Jackson Masai, and The County Land Registrar, West Pokot are the 1st and 2nd respondents respectively.
- 3) The application is brought under Rule 5(2) (b) of the *Court of Appeal Rules* (this Court's Rules) and is premised inter alia on the grounds that: the 2nd applicant is the registered owner of Title Number West Pokot Keringet A/370 (the suit property) having purchased it from the 1st applicant; that the 2nd applicant is in possession of the suit property; that the Environment and Land Court (ELC) in



its ruling dated 28th July, 2020 granted the 1st respondent possession of the suit property while she does not reside therein; that granting the 1st respondent possession of the suit property while the 1st respondent does not reside therein, will result in the eviction of the 2nd applicant from the suit property before the suit is heard and determined; that the orders granting the 1st respondent possession of the suit property will intimidate and oppress the 2nd applicant and amounts to infringement of his right to own property under Article 40 of the Constitution; that if the orders sought are not granted, the 1st respondent will interfere with the suit property thereby making the intended nugatory; that the 1st respondent will move to evict, remove or interfere with the 2nd applicant's quiet possession of the suit property before the intended appeal is heard and determined; that unless restrained by an order of stay of execution, the 1st respondent will effect dealings in the suit property to third parties thereby defeating the applicant's intended appeal rendering it nugatory; that the grant the orders sought will cause no prejudice to the 1st respondent as she has never been in possession of the suit property; that the intended appeal is arguable; and that it is in the interest of justice that the orders sought are granted

Submissions by counsel

- 4) Messrs Lowasikou & Company Advocates counsel for the applicants submitted that they have filed a notice of appeal against the ruling dated 1st December, 2020.
- 5) Messrs Walter Wanyonyi & Company Advocates, counsel for the respondents submitted that the instant application has no merit; that it is not clear which orders the applicants seek as there is reference made to 2 rulings; that the instant application is an afterthought and is an abuse of the court process; that the application has been overtaken by events; and that the 1st respondent is in possession of the suit property.

Determination*

- 6) We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction of this Court under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice.
- 7) The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled as was observed by this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR* where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

- 8) On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR* this Court described an arguable appeal in the following terms:

“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.



- 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.”
- 9) We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, the ownership of the suit property is arguable. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
- 10) On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* (supra) this Court stated that:
- “ ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- 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.
- 11) In determining whether or not an appeal will be rendered nugatory the Court has to consider the conflicting claims of both parties and each case has to be considered on its merits. A cursory perusal of the pleadings herein does not show that the intended appeal will be rendered nugatory if the orders sought are not granted. In the impugned decision, the learned Judge simply dismissed the applicants’ application to review his decision of 28th July, 2020. As such, there is nothing to stay.
- 12) This Court in *Raphael Kakene Muloki & another v Cabinet Secretary of Lands and 2 Others [2021] eKLR* cited with approval the decision of Makhandia, J. (as he then was) in *Raymond M. Omboga v Austin Pyan Maranga Kisii HCCA No 15 of 2020* where the learned Judge stated as follows:
- “The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”
- 13) By parity of reasoning, from the circumstances of this case, it is our considered opinion that there is nothing to stay and the intended appeal will not be rendered nugatory, and this limb has not been established.
- 14) As the applicant has to establish both the arguability and the nugatory aspect, it means that the applicant has failed to establish the twin limbs to grant orders under Rule 5(2)(b) of the Court of Appeal Rules.
- 15) The upshot is that the application dated 9th December, 2020 is without merit and the same is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF NOVEMBER, 2021.



HANNAH OKWENGU

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

