



**Sangale v Shibiro (Civil Appeal 23 of 2021)
[2021] KECA 148 (KLR) (19 November 2021) (Ruling)**

Neutral citation: [2021] KECA 148 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 23 OF 2021
HM OKWENGU, F SICHALE & MSA MAKHANDIA, JJA
NOVEMBER 19, 2021**

BETWEEN

AYAGA SANGALE APPLICANT

AND

MARY KHASONA SHIBIRO RESPONDENT

(Application for stay of execution of the judgment & decree from the judgment of the Environment and Land Court in Kakamega (Hon. N.A. Matheka, J) delivered on 23rd February, 2021 in ELC No. 501 of 2014)

RULING

1. On 23rd February 2021, the Environment and Land Court (ELC) (N.A. Matheka, J), in Kakamega ELC 501 of 2014, delivered a judgment in which she declared the plaintiff Mary Khasona Shibiro (Mary), as the owner of land parcel number Tiriki/Shamakhokho/1103 (suit property), by virtue of adverse possession, and ordered Ayaga Sangale (Sangale) who was the 2nd defendant in the suit, to transfer the suit property to Mary within 90 days and in default the Deputy Registrar to sign the transfer documents
2. Sangale has filed a notice of appeal and moved this Court by way of a notice of motion dated 8th March, 2021, under Rule 5(2)(b) of the Court Rules for orders of stay of execution of the Judgment and Decree of the ELC pending the hearing and determination of an intended appeal to this Court against the Judgment. Sangale further seeks orders of injunction restraining the Deputy Registrar from signing the transfer documents to effect transfer to Mary pending the hearing and determination of the intended appeal.
3. The application is supported by grounds stated on the face of the motion and an affidavit sworn by Sangale who contends that there is an impending threat of execution against him if the orders sought herein are not granted. Sangale maintains that his intended appeal which raises arguable issues, will be



rendered nugatory if an order of stay of execution is not granted, and that he will also suffer substantial loss as Mary will proceed to execute the decree against him.

4. Sangale has annexed a draft memorandum of appeal in which he has raised 6 grounds in which he faults the findings of the learned Judge that the adverse possession has been satisfied. He further faults the learned Judge for failing to find that the 1st defendant who was a bonafide proprietor of the suit property which he obtained by transmission in 1996, legally transferred the suit property to him.
5. In support of his motion, Sangale has also filed written submissions in which he has cited several authorities in support of his contention that his appeal is arguable, and that the same if successful, will be rendered nugatory if the orders sought are not granted. There was no response from the respondent.
6. The principles applicable in the exercise of the Court's unfettered discretion under Rule 5(2)(b) to grant an order of stay of execution pending appeal is now well settled. To begin with, an applicant has to satisfy the Court that he/she has an arguable appeal. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles were restated and amplified by this Court in *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR*; and *Multimedia University & Another vs. Professor Gitile N. Naituli (2014) eKLR*.
7. The issue we must address is whether the applicant has satisfied the twin principles of arguability and the nugatory aspect to entitle him to the orders sought. As stated in *Kenya Tea Growers Association & Another v Kenya Plantation and Agricultural Workers Union (2012) eKLR*, an arguable appeal is one that is not frivolous but raises a bona fide issue deserving determination by a Court and a single bona fide issue would suffice. The applicant's assertion is that the petition at the High Court raises weighty issues that call for an enlarged bench. Considering the draft memorandum of appeal that the applicant has availed, we are persuaded that the question as to whether the learned Judge determined the subject matter of the suit at an interlocutory stage is sufficient to engage the Court's mind on appeal. We accordingly find that the appeal is arguable.
8. On the second issue regarding the nugatory aspect, whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen would be reversible if the appeal is successful, or if it is not reversible whether damages will reasonably compensate the party aggrieved. In *Reliance Bank (in liquidation) v. Norlake Investments Ltd (2002) 1 EA 227*, this Court held that:

“In determining the second limb of the test, [a court is] bound to consider the conflicting claims of both sides. Where a decree for the payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory.”
9. Sangale has pleaded that if the orders sought are not granted, Mary is likely to execute the order, the effect of which would be transfer of the suit property to the respondent and the eviction of Sangale from the suit property. Should this happen, the respondent will be at liberty to deal with the suit property as she wishes, and may put the suit property out of reach so that even if the applicant were to succeed in the appeal, it would be a futile exercise. We are satisfied that the applicant's fear that his appeal may be rendered nugatory if the orders sought are not granted is justified.
10. In view of the above, we come to the conclusion that the applicant has established the twin requirements of an application under Rule 5(2)(b) of the Court Rules. Accordingly, we find that the motion dated 8th March, 2021 is merited and grant orders in terms of prayers 2 and 3. Costs shall be in the appeal.



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

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

