



REPUBLIC OF KENYA



**Kimani v Kamau (Civil Application E264 of 2020)  
[2021] KECA 227 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 227 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E264 OF 2020  
S OLE KANTAI, P NYAMWEYA & JW LESSIT, JJA  
NOVEMBER 5, 2021**

**BETWEEN**

**ALPHONCE KAMAU KIMANI ..... APPLICANT**

**AND**

**JOHN NDIRANGU KAMAU ..... RESPONDENT**

*(Being an application for stay pending the hearing and determination  
of the intended Appeal from the ruling/order of the Hon. Justice  
Okongo) dated at 1st July 2020 in (Nairobi ELC No. 1068 of 2007))*

**RULING**

1. The Applicant, Alphonce Kamau Kimani, has approached this court by way of a Notice of Motion dated 27<sup>th</sup> August 2020. In the motion John Ndirangu Kamau is named as the Respondent. The Applicant's motion was predicated on Rules 5(2)(b), 31 and 42 of the *Court of Appeal Rules, 2010*. He seeks orders for stay of execution of the ruling delivered on 31<sup>st</sup> July 2020 in ELC No. 1068 of 2007 by Hon. Justice Okongo, pending the determination of the intended appeal and leave to file an appeal from the judgement dated 30<sup>th</sup> November, 2003 out of time. In the alternative he seeks an order of status quo pending the intended appeal.
2. Briefly, the dispute herein stems from a judgement dated and delivered on 3<sup>rd</sup> July 2007 in favour of the Respondent against the Applicant's father (now deceased) for Kshs. 700,000.00. The Applicant substituted his father in the suit. On 30<sup>th</sup> December, 2010 the court issued a prohibitory order attaching two parcels of land owned by the Applicant's deceased father being Nyandarua/Gilgil West/388 and Nyandarua/Gilgil West/389 in execution of the decree. Consequently, on 4<sup>th</sup> October 2017 the High Court's deputy registrar granted orders that the properties be sold by public auction pursuant to an application by the Respondent under Order 9 of the *Civil Procedure Rules*. Thereafter, several applications have been filed in respect of the matter culminating in the instant application.



3. The Applicant's motion was supported by his affidavit sworn on 27<sup>th</sup> August 2020. The grounds of the application were that the Applicant intends to appeal against the judgement and he has already given notice to the court and the other parties. He deposed that he was one of the administrators of the estate of the deceased Applicant and that he is in possession of the suit property Gilgil West/388 in Nyandarua County. He stated that he has invested heavily on the same hence if the Respondent, who had served them with a notice of public auction dated 5<sup>th</sup> December, 2019 by Muga Auctioneers and General Merchants is not restrained, he would execute against the property causing the Applicant great loss and damage and rendering him homeless.
4. The Applicant contended that the Respondent approached court in bad faith since he carried out execution of the Applicant's tractor in the year 2007 but concealed the information to the court and that the Respondent failed to account for the proceeds of execution. He attributed the delay in preparing the record of appeal to the fact that he has not been supplied with typed proceedings though he had applied for the same. The Applicant stated that the Respondent seeks to unjustly enrich himself, that the intended appeal is arguable with high chance of success and will be rendered nugatory in the event the Respondent proceeds with execution of the ruling as it involves land in which he resides which is precious to him.
5. He filed two (2) sets of written submissions the first one was dated 14<sup>th</sup> January 2021 while the second one was signed but not dated all in support of the motion. The Applicant relied on the authority of Kisumu Public Service Board and H.E Professor *Anyang Nyong'o -vs-Samuel Okuro & others, Civil Application No. 97 of 2017* submitting that the judges in the above case inter-alia explained that the consideration for grant of stay should not be made very high that incase the Appeal is successful it is rendered nugatory. He also cited the case of *Stanley Kangethe Kinyanjui -vs- Tony Ketter & others (2013)eKLR* in support of his contention that in dealing with rule 5(2)(b) this Court's Rules, the court exercises original and discretionary jurisdiction and that the exercise does not constitute an appeal from the trial judge's discretion to this court.
6. In the second written submissions, the contents of the earlier written submissions were reiterated save that the Applicant contend that there is no evidence of financial ability of the Respondent and therefore if the orders are not granted the suit property will be sold rendering the appeal nugatory.
7. It is noted that the application is not opposed although there is evidence on record by the Deputy Registrar indicating that the Respondent's advocates were served with the hearing notice. However, absence of a response does not lessen the duty placed upon the court to exercise its discretion based on reasons and further, the duty imposed on the court under sections 3A and 3B of the *Appellate Jurisdiction Act* to ensure that the factors considered are in agreement with the overriding objectives in the administration of justice, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.
8. An application seeking leave of the court to file an appeal is made pursuant to Rule 4 of this Court's rules before a single judge, while an application seeking stay of execution is made pursuant to Rule 5(2)(b) of this Court's rules before full bench of the court. That being the case, this court will only determine the application for stay of execution of the ruling of 30<sup>th</sup> July 2020 in ELC NO. 1068 of 2007 while the application for leave to file an appeal from the judgement dated 30<sup>th</sup> November 2003 out of time will be dealt with later by a single judge as aforementioned.
9. The Applicant filed a notice of appeal in respect of the ruling of 30<sup>th</sup> July 2020. The notice of appeal gives this court the jurisdiction to hear and determine the application for stay pending appeal. In the



case cited by the Applicant of Stanley Kangethe Kinyanjui vs Tony Ketter & Others (2013) eKLR the court summarized the jurisprudence in the many decisions on rule 5(2)(b) as follows:

- i. In dealing with Rule 5(2)(b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court.
  - ii. The discretion of this Court under Rule 5(2)(b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
  - iii. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
  - iv. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
  - v. An Applicant must satisfy the Court on both the twin principles.
  - vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
  - 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.
  - 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 whether or not what is sought to be stayed if allowed to happen will be reversible, or if it not reversible whether damages will reasonably compensate the party aggrieved"
10. In our view the intended appeal is not frivolous, there is no rebuttal to the Applicant's assertion that the Respondent had previously carried execution by selling the Applicant's tractor but failed to account for the proceeds of the sale. The proceeds from the sale of his tractor could as well have been more than the amount which was being demanded by the Respondent at the time when it was sold. That execution was not disclosed to the court when the application for execution was made which may be proof of bad faith as the Applicant has urged.
  11. On the nugatory aspect, it is not disputed that unless an order of stay is granted, the suit property will be sold by public auction. Being the Applicant's home and without any evidence on the Respondent's financial ability, we find that the Applicant may lose land which if the appeal succeeds will be beyond the reach of the Applicant, thus will render his appeal nugatory.
  12. Based on the findings above, we have come to the conclusion that the Applicant has established the twin principles required in an application under Rule 5(2)(b) of the Court of Appeal Rules, and order that status quo be maintained pending the hearing and determination of the Applicant's intended appeal. Costs of this motion to be in the intended appeal.
  13. We further order that the Deputy Registrar places the pending application for leave to appeal out of time before a single judge for determination

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF NOVEMBER 2021**



**SANKALE OLE KANTAI**

.....

**JUDGE OF APPEAL**

**PAULINE NYAMWEYA**

.....

**JUDGE OF APPEAL**

**JESSIE LESIIT**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

