



REPUBLIC OF KENYA



KENYA LAW
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**Kerika v Kaata (Civil Application E050 of 2020)
[2021] KECA 309 (KLR) (17 December 2021) (Ruling)**

Neutral citation: [2021] KECA 309 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E050 OF 2020
F SICHALE, J MOHAMMED & S OLE KANTAI, JJA
DECEMBER 17, 2021**

BETWEEN

JULIUS KERIKA APPLICANT

AND

WILSON KAATA RESPONDENT

(Being an application for stay of execution of orders, pending the determination of an intended appeal from the judgment of the Environment and Land Court at Makueni (Mbogo, J.) dated 23rd December, 2020 in ELC Cause No. 8 of 2018)

RULING

1. Before us is a notice of motion dated 16th February, 2021 in which Julius Kerika (the applicant) prays for orders in the main; that this Court be pleased to stay the execution of the orders made by the Environment & Land Court (ELC) at Makueni (Mbogo, J.) of 23rd December, 2020 pending the hearing and determination of the intended appeal; and that costs of the instant application be provided for.
2. Wilson Kaata is the respondent herein.
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 if stay of execution is not granted, the intended appeal will be rendered nugatory and the applicant will suffer irreparable damage; that the official search conducted at the land registry confirms that the applicant is the registered proprietor of plot 369 Sultan Hamud (the suit property); that the applicant will suffer substantial prejudice if the orders sought are granted; that the application has been made without any unreasonable delay; and that this application ought to be granted in the interest of justice.

Submissions by Counsel



4. The application was heard by way of written submissions. Messrs Letangule & Company Advocates, learned counsel for the applicant submitted that the suit property was transferred to the applicant in 2002, and that he took possession and paid all the rates and rent due; that if the orders sought are not granted, the applicant will not enjoy peaceful occupation of the suit property; that there has been no undue delay on the applicants part; that the intended appeal is arguable; and that if the orders sought are not granted, the applicant will suffer immeasurable loss that is irreparable while the respondent will not suffer any loss.
5. Messrs Thomas Geoffrey Onchacha & Co Advocates learned counsel for the respondent opposed the application and submitted that the intended appeal does not raise any new issues; that the two courts below considered the rival submissions of both parties and the evidence adduced therein; that the applicant cannot therefore aver that the trial court and the High Court did not consider his submissions in arriving at the two judgments which were both in favour of the respondent; and that the orders sought by the applicant are discretionary and the discretion should be exercised judiciously. Counsel urged us to dismiss the application with costs.

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, there is no contestation as to the ownership of the suit property. 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. We find that from the record, the applicant has been in possession of the suit property for many years and faces the risk of being evicted and thus face undue hardship.
12. In the circumstances of the instant application, we are satisfied that the applicant has demonstrated an arguable appeal which will be rendered nugatory if the orders sought are not granted.
13. From the circumstances of the application before us, we are satisfied that the applicant has satisfied the twin principles for the grant of an injunction pending the hearing and determination of the intended appeal in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in the case of *Stanley Kange'the Kinyanjui* (supra).
14. The upshot is that the application dated 16th February, 2021 is allowed. Costs shall abide by the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

