



**Jonathan Kiplangat Bor & 523 others v Angata Baragoi Farmers Co-operative Society Limited & 88 others (Civil Application E013 of 2020) [2021] KECA 284 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 284 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E013 OF 2020  
HM OKWENGU, F SICHALE & J MOHAMMED, JJA  
DECEMBER 3, 2021**

**BETWEEN**

**JONATHAN KIPLANGAT BOR & 523 OTHERS ..... APPLICANT**

**AND**

**ANGATA BARAGOI FARMERS CO-OPERATIVE SOCIETY  
LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**DAVID KIPTANUI KORIRAND & 87 OTHERS ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of execution pending the hearing and determination of an appeal against the judgment of the Environment and Land Court at Narok (Kullow, J.) read on 23rd September 2020 in ELC Case No. 370 of 2017 (formerly Kisii ELC No.601 of 2016))*

**RULING**

1. Jonathan Kiplangat Bor & 523 others (the applicants) seek a stay of execution of the judgment delivered on 23rd September, 2020 by the Environment & Land Court (ELC) in Narok (Kullow, J.) and the subsequent decree issued on 28th September, 2020, pending the hearing and determination of Civil Appeal No. E025 of 2020. In the judgment/decreed the learned Judge ordered inter alia that the applicants vacate L.R. No. Transmara/Moyoi 2 (the suit property) within sixty (60) days of delivery of the judgment in default the 1st respondent be at liberty to apply for eviction orders thereof. The applicants also seek orders of injunction prohibiting, barring and preventing the 1st respondent's members from interfering in any way by subdividing, ploughing, selling, leasing or threatening the appellants' enjoyment of the suit property pending the hearing and determination of the appeal; and that costs of this application abide the outcome of the appeal.
2. Angata Baragoi Farmers Co-operative Society Limited and David Kiptanui Korir & 87 Others are the 1st and 2nd respondents respectively.



3. The application is premised inter alia on the grounds: that being dissatisfied with the judgment of the ELC, the applicants lodged an appeal; that the 1st respondent does not exist in law; that the applicants have been residing on the suit property since 1950 pursuant to an arrangement involving Maasai elders and the colonial administration; that the applicants are therefore entitled to the suit property by way of adverse possession; that the purported members of the 1st respondent were not in possession or occupation of the suit property at the time the suit property underwent the adjudication process; that the appeal has every likelihood of success; that the suit property is the applicants' ancestral home and they do not have an alternative home to go to if evicted from the suit property that the applicants and their families heavily rely on the suit property for grazing and food production and if evicted pursuant to the decree, they will suffer great injustice; that should the orders sought not be granted, the appeal will be rendered nugatory and an academic exercise; and that the suit property is situated in an area that is prone to ethnic tensions. The applicants relied on a supporting affidavit sworn by Jonathan Kiplangat Bor reiterating the grounds on the face of the application.
4. The respondents opposed the applicant's motion relying on a replying affidavit sworn by Mutai K. Owen in which it was deponed that in the course of the proceedings the applicants did not tender any evidence of occupation or entitlement to the suit property by way of adverse possession as they contended; and that the only persons who have been in occupation of the suit property were the 2nd respondents.
5. The respondents argued: that it is incumbent upon this Court to facilitate the occupation, possession and use of the suit property by the lawfully registered owners of the suit property by declining to grant the orders sought; that granting the orders sought will only exacerbate offensive activities by the applicants wreaking havoc against the rights of the 1st respondent; that the applicants have failed to demonstrate that the appeal is arguable; that the applicants have not demonstrated that the appeal will be rendered nugatory if the application for stay is not granted; that this Court ought to balance the rights of the applicants against the interests of the 1st respondent; and that the application is devoid of merit and should be dismissed.
6. Mr. Mutai K. Owen, learned counsel acting for the 2nd to 89th respondents swore a replying affidavit in support of the instant application. He deponed that the trial Judge had granted a 90 day stay of execution of the judgment to provide ample opportunity for aggrieved parties to appeal against the judgment; that together with the applicant, the 2nd to 89th respondents lodged an appeal being (Civil Appeal No. E025 of 2020); that the 2nd to 89th respondents are apprehensive that the 1st respondent will swiftly move to execute the judgment resulting in their eviction and which will in turn render the appeal nugatory; and that it is in the interest of peace, justice and fairness that the application be allowed.

#### Submissions by counsel

7. Counsel for the applicants filed written submissions and it was submitted that this Court has unfettered discretion to order a stay of execution under Rule 5(2) (b) of the Court of Appeal Rules. Counsel submitted that the applicants have an arguable appeal in that the trial Judge found that the 1st respondent had a rightful claim over the suit property yet the 1st respondent did not exist in law as an entity at the time the title document was issued. On the nugatory aspect, counsel submitted that in the event the orders sought are not granted, the respondents will move to evict the applicants who have resided in the suit property for over fifty (50) years and the respondents will repossess the suit property, subdivide it, demolish the developments therein and dispose it off to 3rd parties causing immeasurable loss; that since the 1st respondent does not exist in law, it would be difficult to follow up on payment of damages in the event that the appeal succeeds. Counsel cited *Africa Eco-camps Limited v*



*Exclusive African Treasures Limited* [2014] eKLR for the proposition that once the applicant expresses a reasonable fear that the respondent would be unable to pay back the decretal sum, the evidential burden shifts to the respondent to show what resources he has to satisfy the decree should the appeal succeed. Counsel reiterated that the suit involves a large number of people who if evicted will suffer great human rights abuses and violations and strip them of their human dignity.

8. Counsel for the 1st respondent filed written submissions and submitted that the applicant has not exhibited an arguable appeal in that the legality or existence of the 1st respondent having been the subject of a notice of motion and ruling thereof which was not appealed against cannot be re-agitated in an appeal against the main judgment; and that no evidence to support the applicants' claim of adverse possession or occupation was tendered. Counsel relied on *Stanley Kang'ethe v Tony Ketter & 5 others* (*supra*) where this Court pronounced itself on the existence of a bona fide arguable appeal. Counsel submitted that the substratum of the appeal, the suit property shall remain available thus the appeal shall not be rendered nugatory. Counsel submitted that the 1st respondent confirmed that the applicants were not in occupation and in fact the orders of eviction granted only related to the 1st to 88th defendants in the ELC who have not filed any application. Counsel submitted that there is no basis for the applicants to contend that the execution of the judgment and decree will render the appeal nugatory.

#### Determination

9. 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.
10. 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...”
11. 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* (*supra*) 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.”
12. 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 an arguable issue. 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.

13. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought 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.

14. 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 in the circumstances of the instant application, even though the applicants (who number more than one thousand families) can be compensated in damages, they face the risk of being evicted from their home and thus face undue hardship.

15. In the circumstances of the instant application, we are persuaded that the applicant has demonstrated that the appeal if successful would be rendered nugatory if the orders sought are not granted.

16. 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)*.

17. The upshot is that the application dated 24th November, 2020 is allowed. Costs shall abide the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF DECEMBER, 2021**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**

