



**Mbembe v Kamere (Civil Application E355 of 2020)
[2021] KECA 266 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 266 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E355 OF 2020
SG KAIRU, J MOHAMMED & S OLE KANTAI, JJA
DECEMBER 3, 2021**

BETWEEN

MWAURA GITUKUI MBEMBE APPLICANT

AND

SIMON KAMERE RESPONDENT

(Being an application for stay of execution from the judgment of the Environment and Land Court (L. Gacheru, J.) dated 30th July, 2020 in E.L.C. Cause No. 310 of 2017)

RULING

Background

1. Before us is a notice of motion dated 30th September, 2020, in which Mwaura Gitukui Mbembe (the applicant) seeks an order of stay of execution pending appeal of the judgment of the Environment and Land Court (ELC) in Thika (L. Gacheru, J.) dated 30th July, 2020. The application is brought under Rule 5(2)(b) of the *Court of Appeal Rules* (this Court's Rules). Simon Kamere is the respondent herein.
2. The grounds upon which the notice of motion is based are inter alia; that vide a plaint dated 24th June, 2014, the applicant sought that the respondent be ordered to remove the fence erected on Kikuyu/Kikuyu Block1/110 (the suit property). In his statement of claim, the applicant averred that he was the registered owner of the suit property which borders the respondent's parcel of land; and that in January, 2014, the respondent encroached on the suit property by moving or altering the boundary features.
3. In response, the respondent filed a defence and a counterclaim and denied all allegations made in the plaint.



4. The ELC delivered a judgment on 30th July, 2020, in favour of the respondent on the ground that he had acquired the suit property by way of adverse possession having been in occupation of the suit property since 1980.
5. Aggrieved, the applicant filed a notice of appeal and the instant application supported by his affidavit in which he averred that the intended appeal has a high probability of success; the instant application has been filed without undue delay; that there will be no undue hardship occasioned to the respondent herein in view of the fact that there is no substantive use of the land; that the orders sought in the instant application should be granted to safeguard the integrity of the subject matter of the appeal; and that unless this Court grants the orders sought, the intended appeal will be rendered nugatory.

Submissions by Counsel

6. The application was heard by way of written submissions. The applicant submitted that he has an arguable appeal with a high probability of success and that his draft memorandum of appeal raises arguable grounds inter alia: whether in the circumstances of this case, the respondent's claim for adverse possession was proved on a balance of probabilities.
7. On the nugatory aspect, it was the applicant's contention that the effect of the Court's judgment in allowing the respondent's counterclaim was that the respondent would become the registered owner of the suit property and would acquire all the proprietary rights including the right to dispose of the suit property; and that the respondent has already initiated the process of execution. The applicant therefore urged this Court to preserve the subject matter of the appeal pending the hearing and determination of the intended appeal.
8. The respondent opposed the application and contended that the applicant has not demonstrated that he has an arguable appeal; that the appeal is an exercise in futility; that the draft memorandum of appeal has advanced eleven (11) grounds of appeal that are highly speculative; and that the trial Court rightly allowed the counter-claim noting that he has always been legally in possession of the suit property.
- 9) On the nugatory aspect, the respondent submitted that the intended appeal, if successful, would not be rendered nugatory as the applicant could take possession of the suit property; and that the applicant has not placed any material before this Court to demonstrate that the respondent would not be in a position to compensate him by way of damages should the intended appeal succeed.

Determination

- 10) We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.
- 11) 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. This Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR* 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...”

- 12) In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court’s satisfaction.
- 13) On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR* where 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.”
- 14) We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view it is arguable inter alia: whether the learned Judge erred in law and in fact in making a finding of adverse possession in favour of the respondent. 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.
- 15) 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”.
- 16) 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 determined on its merits. We find that in the circumstances of the instant application, the appeal will be rendered nugatory as the applicant contended that the respondent has initiated the process of executing the decree.
- 17) In the circumstances of the instant application, we are persuaded that the applicant has demonstrated an arguable appeal which will be rendered nugatory if the orders sought are not granted.
- 18) 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)*.
- 19) The upshot is that the application dated 30th September, 2020 is allowed. Costs shall abide by the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.



S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

J. MOHAMMED

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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

