



**Okiro v Gatatha Farmers Co. Ltd & another (Civil Application
92 of 2018) [2021] KECA 281 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 281 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION 92 OF 2018
PO KIAGE, K M'INOTI & M NGUGI, JJA
DECEMBER 3, 2021**

BETWEEN

OTIENO OKIRO APPLICANT

AND

GATATHA FARMERS CO. LTD 1ST RESPONDENT

KAITET TEA ESTATE (1977) LTD 2ND RESPONDENT

*(An application for stay of execution pending the hearing and determination
of an intended appeal from the judgment and decree of the High Court of
Kenya at Kitale (Njoroge, J.) dated 30th May 2018 in ELC NO. 57 OF 2011)*

RULING

1. The applicant, Otieno Okiro, prays in his motion on notice dated 1st August 2021 and taken out principally under rule 5(2)(b) of the Rules of this Court for an order of stay of execution of the decision of the High Court at Kitale (Njoroge, J.) dated 30th May 2018 pending the hearing and determination of an appeal against that decision. By the said judgment, the High Court found that the 1st respondent, Gatatha Framers Co. Ltd., was the rightful owner of the parcels of land known as LR Nos. 5709, 5710/2, 5711, 6137 and 8190 (the suit property) situate at Endebes, and issued a permanent injunction restraining the applicant and two others from trespassing or encroaching on the suit property.
2. In the affidavit in support of the motion, the applicant averred that on 12th November 2018, he filed in this Court an application for stay of execution of the High Court judgment, that by consent the said application was compromised, and that the parties agreed to maintain the status quo pending the hearing and determination of his appeal. He added that while the appeal was still pending for hearing, the 1st respondent served upon him on 29th July 2021, a notice to vacate the suit premises within three months, failing which he would be evicted. Apparently it is that notice which prompted the applicant to file this second application for stay of execution of the same judgment.



3. In his written submissions the applicant elaborated on the background we have adverted to above and reiterated that although his first application for stay of execution was compromised on the terms set out above, the respondent has served him with a notice to vacate the suit premises where he has lived for over 60 years and has built houses and planted crops and trees.
4. The applicant submitted that his appeal was arguable because the trial court made findings that were not supported by evidence and that the court further erred by entertaining the respondent's suit while the applicant's two co-defendants were dead. He relied on the ruling of this Court in *Central Bank of Kenya Deposit Protection Fund v. Uburu Highway Development Ltd & Others*, CA No 95 of 1999 and submitted that the issues he intended to raise on appeal were not frivolous and deserved to be fully considered by this Court. He further cited the ruling in *Megvel Cartons Ltd v. Diesel Care Limited & 2 others* [2018] eKLR and submitted that since he was in possession of the suit property, the appeal would be rendered nugatory if it succeeded in the absence of an order of stay of execution.
5. The 1st respondent filed neither a replying affidavit, nor submissions. The 2nd respondent, however, describing itself as "an interested party" filed a replying affidavit in opposition to the application. In the affidavit, sworn by Peter Kipng'eno Kotut, the 2nd respondent averred that to the best of its information, the applicant's application of 12th November 2018 was still pending and that the current application was an abuse of the process of the court. In the 2nd respondent's view, the appeal was frivolous and merely calculated to delay justice because the applicant was not in possession of the suit property but was only leasing the same to third parties. The 2nd respondent also maintained that the applicant had failed to show how the intended appeal, if successful, would be rendered nugatory, complaining that the litigation over the suit property had gone on since 2011.
6. We have carefully considered the application and the submissions by the applicant and the 2nd respondent. It is axiomatic that a party who has filed a notice of appeal and satisfies the Court that his appeal or intended appeal is arguable and further that the appeal will be rendered nugatory if it succeeds in the absence of an order of stay of execution, is entitled to an order of stay of execution. (See *Gitbunguri v. Jimba Credit Corporation Ltd (No. 2)* [1988] KLR 838 and *J. K. Industries Ltd. v. Kenya Commercial Bank Ltd.* [1982 – 88] KAR 1088).
7. In the circumstances of this application, we do not intend to belabour the question whether the applicant has demonstrated that he has an arguable appeal which stands to be rendered nugatory. This is simply because, from the applicant's own averments, he had already filed in this Court a similar application to the present one for stay of execution of the same judgment, which was compromised and the parties agreed to maintain the *status quo* pending the hearing and determination of the appeal. If that is the case, the applicant's remedy in the event of apprehended breach of the *status quo*, is to enforce the compromise, not to file a new application for stay of execution of the same judgment. We are persuaded that in light of the applicant's own express and unequivocal averments, this application is an abuse of the process of the court and is utterly bereft of merit.
8. The application is hereby dismissed with costs to the 2nd respondent. It is so ordered.

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

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

