



**Wambugu Road Estate Limited & another v Kesharia & another (Civil Application 227 of 2019) [2021] KECA 218 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 218 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 227 OF 2019  
DK MUSINGA & PO KIAGE, JJA  
DECEMBER 3, 2021**

**BETWEEN**

**WAMBUGU ROAD ESTATE LIMITED ..... 1<sup>ST</sup> APPLICANT  
CHANDRAKANT N GOR (SUING IN HIS CAPACITY AS  
THE DULY CONSTITUTED ATTORNEY OF BHUPINDER SINGH  
CHANA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MUKESH KESHARIA ..... 1<sup>ST</sup> RESPONDENT  
DEEPAK JAGJIWAN MARU ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of execution of the Judgment and Orders of the Environment and Land Court at Nairobi (K. Bor, J.) delivered on 1st July 2019 in E.L.C Cause No. 489 of 2012)*

**RULING**

1. The applicant's Notice of Motion dated 18th July 2019 seeks stay of execution of the judgment of the Environment and Land Court (ELC) delivered on 1st July 2019 in ELC No. 489 of 2012 pending hearing and determination of an intended appeal.
2. In the said judgment the trial judge, Bor, J. ordered the 1st applicant to transfer the 2nd applicant's share certificate in the 1st applicant to the 2nd respondent within thirty days from the date of the judgment.
3. Being aggrieved by that decision, the applicants filed a notice of appeal and requested for certified copies of the proceedings and the judgment. The applicants believe that the intended appeal is arguable and if stay of execution is not granted "substantial loss may result", as they may lose the property, which they say belongs to them, but the 1st respondent unlawfully transferred to the 2nd respondent.



4. Although the respondents did not file a replying affidavit or submissions despite service of a hearing notice, I must consider the application on its merit. In the ELC matter, the applicants filed the suit on behalf of one Bhupinder Singh Chana, who was the proprietor of an unexpired leasehold interest in a maisonette (the suit property), which he sold to the 1st respondent. The appellants stated that the lease was subject to the rules imposed by the 1st applicant which allowed the management company to decline to give approval to such transfer.
5. The management company declined to give approval to Bhupinder to transfer his leasehold interest in the suit property but despite the refusal the 1st respondent subsequently sold and transferred the suit property to the 2nd respondent. The 2nd respondent in his defence denied that the lease prohibited the transfer of the suit property without the consent of the management company.
6. After a full trial, the learned judge held that the applicants failed to prove their claim to the suit property and dismissed the suit. She also directed the 1st applicant to transfer Bhupinder's share in the management company to the 2nd respondent within 30 days of the judgment, which was 1st July 2019.
7. In the draft memorandum of appeal, the applicants fault the learned judge for, inter alia, holding that they did not prove their claim to the suit property; for holding that Bhupinder Singh Chana sold the suit property to the 1st respondent who subsequently sold it to the 2nd respondent; and for disregarding the provisions of the Articles of Association of the 1st applicant.
8. It is now well settled that in an application for stay of execution pending appeal an applicant must satisfy this Court that the appeal or intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, will be rendered nugatory. See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.
9. In my view, the intended appeal is arguable. I say so because an arguable appeal is not one that must succeed, it is one that is not frivolous and merits the Court's consideration. However, the applicants have not demonstrated that the appeal shall be rendered nugatory if the orders sought are not granted. The applicant's advocate, Mr. Omwenga, who swore the affidavit in support of the application stated that "the applicants are anxious that unless a stay of execution is granted substantial loss may result to the applicants who are in danger of losing the suit property and being subjected to contempt proceedings, hence risking the applicants' liberty."
10. Those averments by Mr. Omwenga on behalf of his clients were not substantiated at all. Likelihood of suffering substantial loss has never been a ground for grant of an order of stay of execution under rule 5(2) (b) of this Court's Rules. Secondly, there is no prima facie evidence that the suit property belongs to the applicants, who would then argue that they are likely to lose it if they comply with the orders issued by the trial court.
11. The applicants have not satisfied the twin conditions for grant of an order of stay of execution. Consequently, I would dismiss the application with no order as to costs.
12. As Kiage, J.A. agrees, it is so ordered.
13. This ruling is delivered under rule 32(3) of the Court of Appeal Rules, Ouko, (P). (as he then was) having ceased to be a judge of the Court on being elevated to the Supreme Court before signing it.

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

**D. K. MUSINGA, (P).**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

**CONCURRING RULING OF P. O. KIAGE, JA**

I have had the advantage of reading in draft the ruling of my brother MUSINGA, (P). I am in full agreement therewith and have nothing useful to add.

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

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

