



REPUBLIC OF KENYA



**Kimanthi v Kiiva & 2 others (Civil Application E321 of 2021)
[2021] KECA 283 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 283 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E321 OF 2021
RN NAMBUYE, P NYAMWEYA & JW LESSIT, JJA
DECEMBER 3, 2021**

BETWEEN

JOYCE MUTETHYA KIMANTHI APPLICANT

AND

TIMOTHY KIMANZI KIIVA 1ST RESPONDENT

JOSIAH MALOMBE KIMANZI 2ND RESPONDENT

JOYCE MAVISI MALOMBE 3RD RESPONDENT

(An application for stay of the Judgment of the High Court of Kenya (Hon. O. A. Angote, J.) dated 30th July, 2021 in Machakos ELC Appeal No. 10 of 2017)

RULING

1. Before us is a Notice of Motion dated 7th September, 2021. It is brought under sections 3A and 3B of the *Appellate Jurisdiction Act*, under Rule 5(2)(b), 12, 39 and 47 of the *Court of Appeal Rules*, 2010. It substantively seeks prayers as follows:

“ 4. THAT pending the hearing and determination of the intended appeal, the Honourable Court orders stay of execution of the judgment by Hon. Mr. Justice O. A. Angote delivered on 30th July, 2021 in Machakos ELC Appeal No. 10 of 2017, Joyce Mutethya Kimanzi vs. Timothy Kimanzi Kiiva & Others.

5. THAT pending the hearing and determination of the intended appeal, the respondents, their servants, agents and/or employees or otherwise howsoever be and are hereby restrained by way of injunction from entering, remaining on, cutting trees, cutting fodder, cutting plants constructing on, building on and/or evicting the applicant and/or in any other manner howsoever from interfering with the applicant’s quiet possession, occupation



and enjoyment of land parcels Matinyani/ Kalimani/231, Matinyani/Kalimani/899 and Kyangwithya/ Tungutu/ 1153.

6. THAT the costs of the application abide with the result of the said appeal.”

2. It is supported by grounds on its face, a supporting affidavit sworn by Moses Odawa, the advocate on record for the applicant together with annexures thereto and written submissions dated 24th September, 2021. It has been opposed by a replying affidavit sworn by Josiah Malombe Kimanzi, the 2nd respondent on his own behalf and that of the 1st and 3rd respondents pursuant to attendant authority granted to him by the 1st and 3rd respondents’ written submission dated 16th November, 2021 and bundle of authorities dated the same date of 16th November, 2021.
3. The application was canvassed before us on 17th November, 2021 via the Go-To-Meeting platform through rival pleadings, written submissions and legal authorities in support of each respective parties positions in the presence of learned counsel for the parties herein, without oral highlighting. Upon consideration of the above, we granted interim orders as follows:
 - 1) A temporary order of stay of execution be and is hereby granted staying the execution of the judgment by Hon. Mr. Justice O. A. Angote delivered on 30th July, 2021 in Machakos ELC Appeal No. 10 of 2017, Joyce Mutethya Kimanzi vs. Timothy Kimanzi Kiiva & Others, restraining therespondents, their servants, agents and/or employees or otherwise howsoever from entering, remaining on, cutting trees, cutting fodder, cutting plants, constructing on, building on and/or evicting the applicant and/or in any other manner howsoever from interfering with the applicant quiet possession, occupation and enjoyment of land parcels Matinyani/ Kalimani/231, Matinyani/ Kalimani/899 and Kyangwithya/ Tungutu/1153 pending delivery of the Ruling on 3rd December, 2021.
 - 2) Costs of the application to await the delivery of the ruling on 3rd December, 2021.
4. Cumulatively, it is the applicant’s position that she was dissatisfied with the judgment of O. A. Angote, J. sitting as a first appellate court delivered on 30th July, 2020 in Machakos ELC Appeal No. 10 of 2017, Joyce Mutethya Kimanzi vs. Timothy Kimanzi Kiiva & Others and timeously filed a notice of appeal dated 30th July, 2021 and a letter bespeaking proceedings of the same date. The application under consideration was triggered by the respondents conduct/action of violently and illegally and with the sole view of displacing, dispossessing and evicting the applicant and rendering the intended appeal nugatory proceeded to forcefully trespass into and to invade land parcel numbers Matinyani/ Kalimani/231, Matinyani/Kalimani/899 and Kyangwithya/Tungutu/1153 (hereinafter referred to as the suit properties), harvested applicant’s food crops and fodder, cut hard wood trees and timber, cut applicant’s soft wood trees without any eviction or conversion orders having been issued in their favour. They have also proceeded to dump construction materials, dug trenches and foundation and hurriedly and/or rushed to embark on the construction of what the applicant has termed as illegal and unlicensed structures on the suit properties with a view to occasioning the applicant substantive loss.
5. There is also the intention to keep the applicant off the land and also to frustrate her quiet use and enjoyment of the suit properties. The respondents are also bend on looking for buyers to sell and transfer the suit properties to third parties not only to the detriment of the applicant but also to cause the intended appeal to be rendered an academic exercise. The applicant also asserts that she had hitherto enjoyed protection of her proprietary interest in the suit properties courtesy of an injunctive order granted in her favour by the High Court pending judgment and which lapsed upon the delivery of the High Court judgment. If the relief sought is not granted, she will suffer irreparable loss, asserts the applicant.



6. Turning to the prerequisite for granting relief under Rule 5(2)(b) of this Court's Rules, the applicant asserts that she has met the threshold for this Court's exercise of its discretionary mandate in her favour. With regard to satisfaction of the first prerequisite of demonstration of existence of an arguable appeal, the applicant relies on the memorandum of appeal annexed to the application. She intends to raise seven (7) grounds of appeal to fault the first appellate court Judge for erring in law: by finding that the 1st respondent was the exclusive and absolute owner of the suit properties; in failing to find that the applicant had sufficiently established that she was entitled to be registered as a joint owner of the suit properties under constructive trust; failing to find that the respondent did not have valid sale agreements or valid land control board consents to transfer the suit properties as they were at all times under caution rendering any agreement, sale and conveyance to be void under the Law of Contract Act and the Land Control Act; failed to properly appreciate the 1st respondent's admission of fraud perpetrated against her by the 1st respondent and his second wife; failing to find that no land control board consent had been obtained for the impugned transaction, upholding the trial court's finding that the applicant's co-wife was entitled to the suit properties in the absence of any pleadings or counterclaim to that effect and, lastly upholding the trial court's finding that existence of a consent judgment in respect to land parcel number Kyangwithya/ Tungutu/1153 ousted the court's jurisdiction.
7. On satisfaction of the second prerequisite, the applicant asserts that there is threat of disposal of the suit properties to third parties which if allowed to occur will render the intended appeal nugatory as the suit properties form the substratum of the intended appeal.
8. In rebuttal, the respondents cumulatively submit that the 2nd and 3rd respondents are the lawfully registered proprietors of one of the suit properties namely, Matinyani/Kalimani/231, Matinyani/Kalimani/ 899 as of right having purchased the same for valuable consideration; granting the relief sought will deny them the enjoyment of the fruits of the judgment granted in their favour; and, also that it will be against public policy to issue an injunction against a bona fide purchaser for value.
9. The respondents further denied each and every wrongful acts attributed to them by the applicant in both the grounds and the contents of the supporting affidavit, and contend that the applicant's application is without merit, and that the same should be dismissed for applicant's failure to demonstrate the substantial loss that she stands to suffer if the relief sought is declined.
10. To buttress the above submission, the respondents have cited the case of *Chris Munga N. Bichage vs. Richard Nyagaka Tongi & 2 Others [2013] eKLR* on the threshold for granting stay pending appeal to this Court namely, demonstration that the intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory; the case of *Mohammed Salim t/a Choice Butchery vs. Nasserpuria Memon Jamat [2013] eKLR* for the holding/proposition that the right of appeal must be balanced against an equally weighty right that of the successful party to enjoy the fruits of the judgment delivered in his/her favour.
11. Second, that there must be a just cause for depriving the successful party of that right; and lastly, the case of *Alexander Mwangi Kihara vs. Wambui Kihara Mburu & Another [2021] eKLR* for the holding/proposition that where the successful party has demonstrated that he/she is the registered owner of property as a purchaser for value, Article 40(1) of the *Constitution* guarantees protection of the right to own property of any description, individually or in association with others in any part of the country as the certificate of title is held to be of conclusive evidence of proprietorship in line with section 26 of the Land Registration Act, and prayed for the dismissal of the applicant's application with costs to them.
12. Our invitation to intervene on behalf of the applicant is anchored on the provision of law cited in its heading Rules 12, 39 and 47 are merely procedural and require no interrogation. Sections 3A and 3B



enshrine the overriding objective of this Court. The parameters for application of this principle have now been crystallized case law. See *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008)*; and *Kariuki Network Limited & Another vs. Daly & Figgis Advocates Civil Application No. Nai 293 of 2009*.

13. The substantive provision for seeking relief sought is however Rule 5(2)(b) of the Court of Appeal Rules. It is now trite that the court's exercise of its mandate under the said Rule, is original, independent and discretionary. See *Githunguri vs. Jimba Credit Corporation Ltd No. (2)[1988] KLR 88*. It is a procedural innovation designed to empower this Court to entertain interlocutory applications for the preservation of the subject matter of the appeal where one has been filed or is intended. See *Equity Bank Ltd vs. West Link NBO Civil Application No.78 of 2011 (UR)*. The jurisdiction under Rule 5(2)(b) only arises where the applicant has lodged a notice of appeal. See *Safaricom Ltd vs. Ocean View Beach Hotel Ltd & 2 others, Civil Application No. 327 of 2009 (UR)*.
14. The conditions to be met before a party can obtain relief under Rule 5(2)(b) have been numerous restated by the Court. We take it from the crystallization of these in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR*, wherein the guiding principles for the court's exercise of its mandate under Rule 5(2)(b) of the Court of Appeal Rules were summarized as hereunder;

“(i) in dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Reuben & 9 Others v Nderitu & Another (1989) KLR 459*;

(ii) the discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so;

(iii) the Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. See *Halai & Another vs. Thornton & Turpin (1963) Ltd. (1990) KLR 365*;

(iv) in considering whether an appeal will be rendered nugatory the Court must bear in mind that each case must depend on its facts and peculiar circumstances. See *David Morton Silverstein vs. Atsango Chesoni*, Civil Application No. Nai 189 of 2001;

(v) an applicant must satisfy the Court on both of the twin principles;

(vi) in whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. See *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004;

(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. See *Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008;

(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. See *Damji Pragji (supra)*;

(ix) the term “nugatory” has to be given its full meaning. It does not only mean worthless, futile, or invalid. It also means trifling. See *Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232*;

(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;



(xi) where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impunity, the onus shifts to the latter to rebut by evidence the claim. See *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”

15. We have applied the above principles to the rival arguments made before us herein. We are satisfied that our jurisdiction has been properly invoked under the applicable rule as there is a notice of appeal in place in accordance with Rule 75 of this Court's Rules. See the case of *Githunguri vs. Jimba Credit Corporation Ltd (Supra)*.
16. Our next task is to determine whether the applicant on the facts as laid before us highlighted above has brought herself within the ambit of the twin principles for granting of a relief under Rule 5(2)(b) of this Court's Rules. The first prerequisite to be established is the demonstration of the existence of an arguable appeal. The applicant herein relies on seven (7) grounds of appeal set out in the annexed memorandum of appeal.
17. We have reconsidered them and are in agreement with the applicant's position that the issues intended to be raised on appeal in the memorandum of appeal annexed to the application and also as summarized above by us and which we find no need to rehash here for purposes of the determination of the application are arguable. By arguable we mean that they warrant the Court's interrogation as well as the respondent's response thereto.
18. In the result, we are satisfied that the applicant's intended appeal is therefore not frivolous, but arguable. We find no harm in us reiterating that one arguable point will suffice. See the case of *Kenya Railways Corporation vs. Edermann Properties Ltd (supra)*. Herein, we have identified several issues for determination as already highlighted above. Second, that an arguable appeal need not be one that will necessarily succeed. See *Sammy Mwangi Kiriethe & 2 Others vs. Kenya Commercial Bank [2020] eKLR. Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008*.
19. On the nugatory aspect, we find this ingredient also satisfied in view of the applicant's assertion that there is a threat to sell to third parties and that she has all along been a beneficiary of injunctive relief granted by the High Court which lapsed upon the delivery of a judgment. See *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004*.
20. There is also requirement that both prerequisites must be satisfied before relief can be granted under Rule 5(2)(b). Herein, we are satisfied as already demonstrated above that both limbs have been satisfied by the applicant in the application under consideration.
21. The applicant's right to be heard on the intended appeal is now crystallized both constitutionally and statutorily. We take it from the case of *Richard Nchapi Leiyagu vs. IEBC & 2 Others [2013] eKLR; Mbaki & Others vs. Macharia & Another [2005] 2EA 206*; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003*; in which it was variously held, inter alia, that: the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.
22. Applying the above principles to the rival positions herein, it is our position that considering the nature of the circumstances surrounding the litigation giving rise to the intended appeal, it is not only fair and



just that the applicant be accorded an opportunity to be heard on her intended appeal but also that the suit properties be preserved pending hearing of the intended appeal.

23. The above conclusion now leads us to determine which of the two substantive prayers that is stay and injunction is the appropriate relief for us to grant herein. As correctly contended by the respondents, what the High Court issued as the final order is a negative order. It is now trite that a negative order is incapable of being stayed. See *Nairobi Metropolitan PSV Saccos Union Limited and Twenty Five others vs. County of Nairobi Government and three others [2014] eKLR* for the proposition that there is no jurisdiction to grant a relief under Rule 5(2) (b) of this Courts Rules where the High Court's order either resulted in a dismissal or a striking out order; or alternatively where the court did not order either party to do or refrain from doing something capable of being restrained.
24. The above being the correct position in law, it is our position that it is only the injunction relief that can issue herein as an appropriate relief.
25. In light of the totality of the above assessment and reasoning, we are satisfied that the Applicant's application is merited and in the circumstances, we do allow the application in terms of prayer 5 of the Motion dated 7th September, 2021 and order as follows:
- i) That pending the hearing and determination of the intended appeal, the Respondents, their servants, agents, and/or employees or otherwise howsoever be and are hereby restrained by way of a permanent injunction from entering, remaining on, cutting trees, cutting fodder, cutting plants, constructing on, building on and/or in any other manner howsoever from interfering from the Applicant's quiet possession, occupation and enjoyment of the Land Parcels Nos. Matinyani/ Kalimani/ 231, Matinyani/Kalimani/224, Matinyani/ Kalimani/899 and Kyangwithya/Thungutu/1153.
 - ii) Costs shall abide the result of the appeal.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

