



Kamuthi Farmers Co-operative Society Limited v Nairobi City Council; Arch-Diocese of Nairobi (Kahawa West Catholic Church) & 18 others (Interested Party) (Civil Appeal E320 of 2021) [2021] KECA 96 (KLR) (22 October 2021) (Ruling)

Neutral citation: [2021] KECA 96 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E320 OF 2021
AK MURGOR, KI LAIBUTA & HA OMONDI, JJA
OCTOBER 22, 2021**

BETWEEN

KAMUTHI FARMERS CO-OPERATIVE SOCIETY LIMITED APPLICANT

AND

NAIROBI CITY COUNCIL RESPONDENT

AND

**ARCH-DIOCESE OF NAIROBI (KAHAWA WEST CATHOLIC CHURCH) & 18
OTHERS INTERESTED PARTY**

*(Application for stay of execution from Judgment and Decree of the
Environmental and Land Court of Kenya at Nairobi (L. Komingoi, J.)
dated and delivered on 4th day of June 2020 in ELC No. 6898 of 1991)*

RULING

- 1 The Application before this Court for consideration is the applicant's Notice of Motion application dated 19th October, 2020, brought under Certificate of Urgency and pursuant Rules 5 (2) (b), 42, 47 of [Court of Appeal Rules 2010](#).
- 2 The Applicant seeks orders that: -
 - i. Spent.
 - ii. That the Honorable Court be pleased to stay execution of the judgment/order of the Honorable Court delivered by Lady Justice Loise Komingoi on the 4th day of June 2020 in Environmental and Land Court case No. 6898 of 1991



and the ensuing decree pending the hearing and determination of the appeal filed herein.

(iii) Costs in the cause.

3 The application is supported by a certificate in support of urgency and a supporting affidavit sworn by Bernard Kingu Miana, the Chairman of the applicant both dated 19th October, 2020.

4 The parties were directed to file written submissions for hearing on 10th August, 2021.

5 The grounds in support of the application are as follows: -

- i. The applicant claims ownership of the suit property.
- ii. That the respondent forcefully and without proper documentation entered the suit property and constructed a housing estate together with a sewerage treatment plant on portions of the suit property to the detriment of the applicant's 7,000 strong members.
- iii. The applicant filed suit ELRC 6898 of 1919 seeking eviction of the respondent from the suit property as well as mesne profits for the year 1989.
- iv. The respondent then filed a counter claim seeking orders inter alia an order compelling the applicant to excise and transfer the portions in the suit land in occupation by the respondents to the respondents.
- v. Vide judgment dated 4th June, 2020 the applicant's suit was dismissed and judgment entered in favor of the respondent.
- vi. That the applicant filed an application for stay, obtained orders, and on 15th October, 2020 the application for stay was dismissed and consequently the stay orders lapsed.
- vii. That the respondent has begun the process of issuing new title deeds/leases in respect of the suit properties herein.
- viii. The applicant's intended appeal is arguable and not frivolous.
- ix. The appeal will be rendered nugatory unless the stay sought is granted pending hearing and final determination.

6 The motion is opposed vide a replying affidavit dated 16th November, 2021 in which the respondent maintained that the applicant's intended appeal is frivolous, a waste of the court's time and had no chance of success. That the intended appeal raises new ground/issues that were not dealt with at the hearing and that the applicant has not demonstrated how the appeal will be nugatory as no substantial loss has been demonstrated nor deposed. That in any event the respondent is in a position to compensate the applicant for the properties if the appeal is successful.

Whether the Applicant has satisfied the requirement necessary for granting an order for stay of execution

7. The Supreme Court in Civil Application 12/15-*Deynes Muriithi & 4 Other vs LSK & Another* [2016] e KLR stated that Rule 5 (2) (b) applications arise at an interlocutory stage and the orders issued thereunder are for the purpose of protecting the subject matter of an appeal, the Court of Appeal having yet to finally determine the appeal.



8. In the case of *Teachers Service Commission vs Kenya National Union of Teachers & 3 Others*, Sup. Court App 16/2015 [2015] eKLR “[23] It is clear to us that Rule 5(2) (b) is essentially a tool for preservation. It safeguards the substratum of the appeal in consonance with principles developed over the years.”
- [“27] Rule 5 (2) (b) of the Court of Appeal Rules is derived Article 164(3) of the Constitution. It illuminated the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of the Appeal intended Appeal.”
9. This Court has set out the parameters to be met for an order of stay to be granted in an application under Rule 5 (2) (b). In the case of *Alferd Mincha Ndubi vs Standard Limited* [2020] eKLR this Court quoted with approval the case of *Ishmael Kangunyi Thande vs Housing Finance Company of Kenya Limited* Civ. Appl No. Nai 157/2006 “to succeed in an application in 5 (2) (b) the applicant has to establish that:
- i. The Appeal is arguable,
 - ii. The Appeal is likely to be rendered nugatory if the injunction is not granted and Appeal succeeds.
10. These principles were restated by this court *Multi Media University & Another vs Prof. Gitile N. Naituli* (2014) eKLR ‘...from the long line of decided cases on Rule 5(2)(b) the jurisprudence is underlined in the case of *Stanley Kangethe Kinyanjui vs Tony Ketter & Others* (2013) eKLR as follows:
- i) In dealing with Rule 5 (2) (b) the court exercises original and discretionary jurisdiction,
 - ii The discretion is wide and unfettered if it is just to do so,
 - iii Court becomes seized of the matter only after Notice of Appeal is filed under 75,
 - iv In considering whether the appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances,
 - v. An applicant must satisfy the twin principles,
 - vi Whether appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised,
 - vii Arguable appeal is not one that will necessarily succeed but one which ought to be argued fully before court and is not frivolous,
 - viii. The court must not make a definitive/final finding as to facts of law in an application under Rule 5 (2) (b),
 - ix. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party.
11. Further in the case of *Gitirau Peter Munya vs Dickson Mwenda Kitbinji & 2 Others* [2014] eKLR, the Supreme Court of Kenya added a third consideration, this being whether it is in the public interest that the order of stay be granted.



- 12 Is the Appeal arguable? In the case of *Wasike vs Swala* [1984] KLR 591 this court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court.
- 13 In the case of *Attorney General vs Okiya Omtata & Anor* [2019] eKLR this Court held “the principles for our consideration in exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay is well settled. Firstly, the applicant must satisfy that it has an arguable appeal. However, this is not to say that the appeal will necessarily succeed but suffice it that the appeal is not idle or frivolous.”
- 14 This Court has held in *Co-operative Bank of Kenya Ltd vs Banking Insurance and Finance Union Kenya* [2014] eKLR ‘it is sufficient that the issues raised are arguable.’ In *Kisumu Civil Appeal 74/2016, George O. Gache & Anor vs Judith Akinyi Bonyo & Others* this Court stated ‘at this stage the court is not expected to inquire into the merits of the case and whether or not the appeal will succeed. It is sufficient that the applicant has met the threshold as existence of a single bona fide issue is sufficient.’
- 15 On the issue of an arguable appeal, perusal of the Draft Memorandum of Appeal herein raises some arguable issues being the question of limitation, jurisdiction (as jurisdictional issues can be raised at any time of the proceedings) the validity of the sale agreement dated 2nd January, 1973 and consequently the ownership of the suit property in light of queries around consent and the Land Control Board.
- 16 We hold that the applicant’s intended appeal is not frivolous, and raises arguable issues. This Court at this stage cannot delve into the merits of the appeal, as that is for the bench that will hear the main appeal.

B. Will the Appeal be rendered nugatory should the injunction not be granted?

- 17 On the Appeal being rendered nugatory, this Court has held in the case of *Reliance Bank Limited vs Norlake Investment Limited* [2002] 1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides. (See also *Oraro & Rachier Advocates vs Co-operative Bank of Kenya* [1999] LLR 1118
- 18 In the case of *African Safari Club Limited vs Safe Rentals Limited*, Nai Civ App 53/2010 this Court held “... with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.” In this the court is to decide which party’s hardship is greater.
- 19 In the case of *Africa Eco Camps vs Exclusive African Treasures Ltd* [2014] eKLR this court held ‘as was observed in *National Credit Bank vs Aquinas Francis Wasike and Another* – a legal duty is placed on the applicant to prove that its intended appeal will be rendered nugatory because the respondent will be unable to pay back the decretal sum should the applicant succeed on appeal.
- 20 This requirement is however not absolute. It is qualified in that it is unreasonable to expect the applicant to know in detail the resources owned by a respondent or the lack of them. Once the applicant expresses a reasonable fear that a 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 as this is a matter likely to be peculiarly entirely within the respondent’s knowledge.’
- 21 We note that the land is in the hands of third parties, and should it at this stage be transferred to the respondent, there is the risk of sub-division and further transfer, thus placing it beyond the reach of the applicants. With the above in mind, on the nugatory aspect, it is apparent that unless an order of stay is granted, the applicant’s intended appeal will be rendered nugatory as the applicant has shown



that the respondent has already started issuing titles/leases to the suit property to the detriment of the applicant's 7,000 strong members.

22 Further the respondent in its replying affidavit has just stated that it is in a position to compensate the applicant for the properties should the intended appeal be successful and has not shown the resources available to it to do so, as per the requirement in the *Africa Eco Camps case* (supra).

23 We hold that the applicant has established both limbs, that it has an arguable appeal and that the appeal would be rendered nugatory if the instant application is dismissed and the intended appeal succeeds, for consideration in an application under Rule 5 (2) (b).

24 We find therefore that the applicant is entitled to a stay of execution of the impugned judgment, and given the scenario obtaining, that the applicant has title but not possession, we direct that the stay is limited to stopping transfer of the title to the respondents.

25 Costs of this motion shall be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

A. K. MURGOR

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

