



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kirunge v Nyaga (Civil Application E046 of 2023)
[2023] KECA 1343 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1343 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E046 OF 2023
DK MUSINGA, A ALI-ARONI & JM MATIVO, JJA
NOVEMBER 10, 2023**

BETWEEN

PAUL KAMURA KIRUNGE APPLICANT

AND

JOHN PETER NYAGA RESPONDENT

(An application for stay of execution pending determination of the appeal from the Judgement of the Environment and Land Court of Kenya at Thika (Gaceru, J) dated 24th September, 2021 in ELC Appeal No 41 of 2018)

RULING

1. The applicant was aggrieved by the judgement of the ELC Court (Gaceru, J.) in Thika, ELC Appeal 41 of 2018 and having lodged an appeal, moved this Court under section 3A and 3B of the *Appellate Jurisdiction Act*, and rules 5(2) (b) and 47(1) & (2) of the *Court of Appeal Rules*, seeking orders of stay of the trial court's judgement and decree pending hearing and determination of the appeal.
2. The application is predicated on the grounds on the face of the application and the undated supporting affidavit of the applicant, where he deposed that the suit property is family land where their parents are buried; that he has a permanent home therein; and if the stay is not granted his home may be demolished; which will cause his family irreparable loss; yet the respondent will not suffer any prejudice as he has never occupied the property.
3. In his submissions counsel for the applicant urged that he has an arguable appeal, and if stay is not granted the appeal will be rendered nugatory.
4. The application was opposed by the respondent through his undated replying affidavit, wherein he stated that he is the proprietor of the land, Escarpment Kinari Block 1/1920, which he purchased in 1992 from one Mwaura Hindu, and relocated his father who was homeless; that the property was never



family land; further, the applicant does not reside on the land as alleged; and has been violent to the respondent whenever the respondent attempted to visit the property.

5. Counsel for the respondent, further submitted that the appeal is out of time; the respondent was not served with the letter bespeaking the proceedings; which means the notice of appeal stands withdrawn. Further, the applicant has not met the necessary threshold for issuance of an order under rule 5(2) (b) of the rules, in that the property belongs to the respondent and he is the one who stands to suffer loss.
6. The brief background of the case is that the applicant and the respondent are siblings. Their late father was buried on the land, which the applicant claims to have inherited, whereas the respondent claims that he bought the same and settled his parents on it. The trial court found in favour of the respondent and ordered the applicant to vacate.
7. The respondent submitted that the applicant did not serve him with the letter bespeaking the proceedings. The applicant may not have filed an appeal within 60 days, however that issue is not before us. Secondly, rule 86 of this *Court's Rules* is clear on what a party affected by an appeal may do, when necessary steps are not taken. It provides:

“A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—

- a. that no appeal lies; or
- b. that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.”

8. The application before us is based on rule 5 (2) (b) of this *Court's Rules* which provide that;

“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:

- (a)
- (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

9. In an application such as the one before us, the applicant is required to satisfy the Court that he has an arguable appeal, one which is not frivolous, but not necessarily that the appeal will succeed. Further, the applicant has to demonstrate that in the event stay is not granted the appeal will be rendered nugatory.

10. The twin principles referred to above were well captured in the following cases: -

Stanley Kangethe Kinyanjui v Tony Ketter & others [2103] eKLR where this Court stated:

“That in dealing with rule 5(2)(b), the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this court. The first issue for our consideration is whether the intended appeal is arguable. This court has



often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

In *Multimedia University & another v Professor Gitile N Naituli* [2014] eKLR it was stated:

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on rule 5(2) (b), the common vein running through them and the jurisprudence underling those decisions was summarized in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & others* [2103] eKLR”

In *Kenya Industrial Estate & another v Matilda Tenge Machia* Civil Application No.211 of 2020 where as regards the nugatory aspect this Court stated that: -

“On the nugatory aspect, 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.”

In *Re Estate of Harish Chandra Hindocha (Deceased)* [2021] eKLR, this Court stated *inter alia*:

“Turning to the second prerequisite, the position in law is that, an appeal would be rendered nugatory if the consequential effects for the failure to grant the relief sought would be either irreversible or highly prejudicial so as to render of no consequence the intended appeal or appeal if ultimately successful.

Herein, what is sought to be forestalled is basically the execution of the exparte judgment and decree. We appreciate the respondent filed a replying affidavit which as we mentioned above was not laid before us so as to gauge as to whether he had made provision for preservation of the substratum of the intended appeal, pending hearing and determination of the intended appeal or giving some guarantee, undertaking or assurance that the substratum of the proceedings which is title to the suit property will not fizzle out before the determination of the intended appeal, having found none in the written submissions. Instead, the theme of those written submissions in our consideration is that he should be allowed to proceed with the execution of the exparte Judgment and decree as subsequently reinstated.”

11. Having considered the matter, we are satisfied that the applicant has an arguable appeal. On the nugatory aspect, we are of the view that the circumstances of the case militate towards preserving the substratum of the appeal, as the consequential effect, if the stay is not granted may be irreversible and prejudicial to the applicant, in the event of a successful appeal. Consequently, we hereby grant the orders as sought.
12. The costs of the application will abide the outcome of the appeal.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2023.

D.K. MUSINGA, (P)

.....

JUDGE OF APPEAL

ALI-ARONI



.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

