



Njiru & another v Kyambi (Suing as the Administrator and Legal Representative of the Estate of the Late Mueke Kyambi alias Lydia Mueke Kiambi (Deceased)) & 5 others (Civil Application E268 of 2024) [2024] KECA 1949 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KECA 1949 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E268 OF 2024
F SICHALE, F TUIYOTT & FA OCHIENG, JJA
DECEMBER 20, 2024**

BETWEEN

NELSON NYAGA NJIRU 1ST APPELLANT

DOROTHY MUKAMI MUNYI 2ND APPELLANT

AND

JULIUS MUASYA KYAMBI (SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE MUEKE KYAMBI ALIAS LYDIAH MUEKE KIAMBI (DECEASED)) 1ST RESPONDENT

MARTIN ODERA OLERO 2ND RESPONDENT

TABITHA NJERI IRUNGU 3RD RESPONDENT

JULIE IRENE OKESI 4TH RESPONDENT

REGISTRAR OF LANDS, NAIROBI COUNTY 5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 6TH RESPONDENT

(Being an Application for Stay of Execution against the Judgment and Decree of the Environment & Land Court at Nairobi (Mogeni, J), dated 26th October 2023) in (Nairobi ELC Case No. E411 OF 2021)

RULING

1. Before us is a notice of motion dated 15th April 2024, brought pursuant to the provisions of Sections 3 & 3A of the [Appellate Jurisdiction Act](#), Rules 5 (2) (b) of the Court of Appeal Rules 2022 and all



other enabling provisions of the Law in which Nelson Nyaga Njiru and Dorothy Mukami Munyi (“the applicants” herein) seek the following orders:

- a. Spent.
- b. That this honourable court be pleased to stay the enforcement and execution of the Judgment and Decree of the Honourable Lady Justice J.A Mogeni dated and delivered on the 26th day of October 2023 at the Nairobi Environment and Land Court, ELC Suit No E411 of 2021 in the interest of justice pending the hearing and determination of this appeal.
- c. That this honourable court do make such orders that it deems fit in the interest of justice pending the hearing and determination of prayer 2 herein.
- d. That costs of this application be in the cause.”

2. The motion is supported by the grounds on the face of the motion and an affidavit sworn by Nelson Nyaga Njiru, (the 1st applicant herein) who deposed that being aggrieved and dissatisfied with the judgment delivered by Mogeni J, in Nairobi ELC Case No. E411 of 2021, they had filed a Notice of Appeal signifying their intention to appeal against the same.
3. He further deposed that the intended appeal was arguable and not frivolous as it raised issues inter alia whether the learned judge erred in law and fact in failing to appreciate that the applicants were bonafide purchasers for value without notice for Land Parcel Number Nairobi/Block 118/1980 (hereinafter the suit property). Further, that the learned judge erred in law and fact in failing to appreciate that the elements of fraud were not proved as against the applicants so as to impeach their registration over the suit property.
4. He thus deposed that unless the orders sought were granted, they would stand to suffer irreparable damages as there was an imminent threat of eviction from the suit property where they had been in quiet uninterrupted possession from August 2008 to date and had constructed a school that had over 400 students.
5. The motion was opposed vide a replying affidavit sworn by Julius Muasya Kyambi on 10th June 2024, who deposed inter alia that there was unreasonable delay in filing the motion, the same having been filed 7 months after delivery of the impugned judgment which delay had not been explained.
6. He further deposed that the intended appeal was not arguable as the applicants were not bonafide purchasers’ for value without notice as they had admitted that they failed to carry out due diligence to determine the lawful owner. Further, that they did not have a sale agreement in respect of the sale and that as such, the trial court rightly held that in accordance with the law, there could not have been a valid sale of land.
7. By way of a background, the brief facts in this appeal are that the 1st respondent vide a plaint dated 30th November 2021, filed suit against the applicants and the rest of the respondents jointly and severally, seeking a declaration that the purported transfer of the suit property into the name of the 2nd respondent and the subsequent sub-division into resultant six parcels LR NO. Nairobi/Block 118/1980, 1981, 1982, 1983, 1984 and 1985 was fraudulent, illegal null and void.
8. In a judgment delivered on 26th October 2023, Mogeni, J found that the 1st respondent had proved his case on a balance of probabilities and entered judgment in his favour as prayed and issued a declaration that the purported transfer of the suit property into the name of the 2nd respondent and the subsequent



sub- division into resultant six parcels LR No. Nairobi/Block 118/1980, 1981,1982,1983,1984 and 1985 was fraudulent, illegal null and void for all purposes.

9. It is this judgment that has now provoked the motion that is before us.
10. When the matter came up for plenary hearing on 16th September 2024, Mr. Njagi learned counsel appeared for the applicants whereas Ms Elizabeth Mukuna holding brief for Miss Mungai appeared for the 1st respondent. The 2nd and 4th respondents did not appear despite having been served with a copy of the hearing notice on 2nd September 2024.
11. The 3rd respondent did not appear in the proceedings before the trial court and neither did she appear before us whereas the Attorney General appeared for the 5th respondent in the trial court but did not appear before this Court despite service of a hearing notice upon them on 2nd September, 2024.
12. Mr. Njagi for the applicants additionally, informed us that the parties who participated in this particular appeal were the applicants and the 1st respondent. He relied on his written submissions dated 18th June 2024 and a further affidavit of even date. Miss Mungai for the 1st respondent relied on her written submissions, replying affidavit and further affidavit dated 20th June, 10th June and 19th June 2024 respectively. Both parties briefly orally highlighted their written submission in Court.
13. It was submitted for the applicants that they had an arguable appeal as set out in their memorandum of appeal, having inter alia been bonafide purchasers for value without notice of the suit property and that if the 1st respondent was to actualize the judgment of the trial court, they would stand to lose substantially as opposed to the 1st respondent who was not in occupation and possession of the suit property and who had never been in occupation of the same.
14. It was further submitted that if stay orders were not granted, the applicants' intended appeal would be rendered nugatory as the 1st respondent would proceed to evict them from the suit property in which they had constructed a school which had over 400 pupils and as a result cause substantial loss which could not be compensated by way of damages.
15. The 1st respondent on the other hand in his submissions basically reiterated the contents of his replying affidavit dated 10th June 2024. It was submitted that the applicants' motion was not merited as the same had been filed 7 months after delivery of the impugned judgment, which delay had not been explained and that as such the same was unreasonable.
16. It was further submitted that the applicants' appeal was entirely hinged on the fact that the applicants were claiming to be bonafide purchasers for value without notice and that the trial court having interrogated had found otherwise as the applicants had admitted that they failed to carry out due diligence to ascertain the lawful owner of the property. Further, that the applicants did not have a sale agreement in respect of the suit property and they could not therefore prove that they had purchased the same.
17. It was thus submitted that the intended appeal was frivolous and that in the circumstances an afterthought and that as such, stay orders were not merited.
18. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the further affidavit, the rival oral and written submissions by the parties, the cited authorities and the law.
19. The applicants' motion is brought inter alia under Rule (5) (2) (b) of this Court's Rules. The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay of execution/ injunction or stay of proceedings as the case maybe are now old hat.



20. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle.
21. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. An applicant has to satisfy the Court on both limbs. These principles were summarized by this Court (differently constituted), in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR as follows:
 - v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
 - vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
 - vii. 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.
 - viii. An applicant must satisfy the Court on both the twin principles.
 - ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
 - x. 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.
 - xi. 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.
 - xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - xiii. Whether or not an appeal will be rendered nugatory depends on whether or not 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 party aggrieved.”
22. Turning to the first limb, we have looked at the annexed Memorandum of Appeal and we are satisfied that the applicants have an arguable appeal. It is our considered view that some of the grounds raised therein namely; whether the learned judge erred in law and fact in failing to appreciate that the applicants were bonafide purchasers for value without notice and failing to appreciate that the elements of fraud were not proved as against the applicants so as to impeach their title against the suit property are not frivolous and are worthy of consideration by this Court.
23. Additionally, we note that the applicants have been in possession of the suit property since August 2008, a fact that the respondents have not controverted.
24. We are of course mindful to the fact that an arguable appeal is one that must not necessarily succeed and we will say no more regarding this issue at this stage, lest we embarrass the bench that will be eventually be seized of the appeal. Ultimately, therefore we are satisfied that the applicants have an arguable appeal.
25. Turning to the nugatory aspect and as we have already alluded to, we note that the 1st respondent has never been in occupation/possession of the suit property. On the other hand, the applicants have been in possession of the suit property since August 2008 and they have built a school that has over 400



pupils. 26. Given the circumstances, if the applicants were to be evicted from the suit property, the ripple effect on the learners would have serious ramifications and in our considered opinion the same cannot be compensated by way of damages.

27. Accordingly, and the applicants having satisfied both limbs that an applicant has to satisfy in an application of this nature, the applicants motion dated 15th April 2024, is merited and we accordingly allow the same and stay the execution of the judgment and decree delivered by Mogeni, J in Nairobi ELC suit No. E411 of 2021, on 26th October 2023, pending the hearing and determination of the appeal herein.

27. The costs of this motion shall abide the outcome of the intended appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2024.

F. SICHALE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

