



**Hamid v Niedemeier (Civil Application E035 of 2023)
[2024] KECA 552 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 552 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E035 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
MAY 24, 2024**

BETWEEN

AMIN MOHAMED HAMID APPLICANT

AND

WERNER SEBASTIAN NIEDEMEIER RESPONDENT

(Being an application for stay of execution and proceedings pending appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Malindi (Dr. M. A. Odeny, J.) delivered on 16th November 2023 in E.L.C Case No. 20 of 2019)

RULING

1. By a plaint dated 23rd April 2019 and amended on 25th March 2021, the respondent, Werner Sebastian Niedermeier, sued the applicant, Amin Mohamed Hamid, in the Environment and Land Court at Malindi in ELC Case No. 20 of 2019 praying for:
 - “(a) The Defendant, his agents, tenants, servants and/or employees currently residing and occupying the upper floor (1st floor) of the house situated in plot, parcel (portion) number 4850 (original number 1935/590) Malindi municipality registered in the name of the plaintiff be and is hereby ordered to vacate and render vacant possession of the said suit property.
 - b. The honourable court be pleased to issue a permanent injunction order against the defendant, his agents, tenants, servants and/or employees from occupying, trespassing, undertaking any development and/or constructing, renting out, entering and/or in any manner whatsoever from interfering with the plaintiff’s peaceful enjoyment of his parcel (portion) number 4850 (original number 1935/590) Malindi municipality together with the developments made therein.



- c. A declaration that the agreement dated October 15, 2013 purported to have been executed by the defendant is fraudulent, null and void and unenforceable in the circumstances.
 - d. An order for general damages for trespass against the defendant.
 - e. An order for the payment of mesne profits of Kshs 25,000/- per month being rent collected by the defendant as from March 12, 2011 till the date vacant possession is rendered by the defendant.
 - f. An order for payment of Kshs 17, 514/- being water bill paid by the plaintiff, but was utilized by the Defendant and his tenants.
 - g. The honourable court do issue an order directed to the officer in charge of station (OCS) Malindi Police Station to enforce, supervise and ensure compliance with prayer (a) and (b) above.
 - h. The honourable court be pleased to award interest at court rates on prayer (c), (d) and (e) above from March 12, 2011 till payment in full.
 - i. Costs of this suit.”
2. The respondent’s case was that he was the registered owner of the property known as Title No. 4850 (Original No. 1935/590) Malindi Municipality (the suit property), which he purchased from Malindi Estates Limited vide a sale agreement dated 21st December 2005; that the suit property was subsequently registered in his name vide an indenture dated 27th July 2006; that he constructed a two-bedroomed house on the ground floor where he resided and another two-bedroomed, and one-bedroomed houses on the 1st floor; that he travelled back to his home country, Germany, leaving the applicant to serve as his caretaker of the suit property; that, sometime in 2013, the applicant cautioned him to never return to Kenya due to an alleged warrant of arrest issued against him; and that he returned to Kenya in 2015 only to find that the applicant had rented the suit property to third parties. Hence his suit for the reliefs aforesaid, including vacant possession.
3. In his defence and counterclaim dated 5th August 2019 and amended on 20th July 2020, the applicant denied the respondent’s claim, but admitted that the respondent was the owner of the suit property, and that he (the respondent) constructed the ground floor thereof. According to the applicant, he is the one who built the 1st floor to completion after the respondent had donated it to him by way of a gift; and that he had not rented out the ground floor. He urged the trial court to dismiss the respondent’s suit with costs.
4. In his counterclaim of even date, the applicant prayed for:
- “(a) The plaintiff his servants, agents and/or any person acting under him be restrained by way of an injunction from occupying, trespassing, entering, interfering in any manner whatsoever with the defendant’s peaceful enjoyment of the two houses built on the 1st floor of all that building standing on parcel of Land No 4850 (original number 1935/590) within Malindi municipality.
 - b. The plaintiff his agents, assigns, representatives or otherwise be compelled to unconditionally restore the defendants water pipes and make good any other loss that he illegally caused to be occasioned or removed from the Defendant/



Applicants(sic) two houses built on the 1st floor on parcel of land No 4850 (original number 1935/590) within Malindi municipality.

- b. A declaration that the agreement dated October 15, 2013 is a valid and enforceable contract by law and that by dint of its express provisions a declaration does hereby issue that the Defendant is the rightful owner of (two houses/top floor) the 1st floor on parcel of land No 4850 (original number 1935/590) within Malindi municipality.
 - c. Costs of the suit.
 - d. Any other relief this court may deem fit to grant.”
5. In its judgment dated 16th November 2023, the ELC (Odeny, J.) dismissed the applicant’s counterclaim with costs and allowed the respondent’s suit with orders that:
 - “a. The defendant, his agents, tenants, servants and/or employees currently residing and occupying the upper floor (1st floor) of the house situated in plot, parcel (portion) number 4850 (original number 1935/590) Malindi municipality registered in the name of the plaintiff be and is hereby ordered give vacant possession of the suit property within 45 days.
 - b. A permanent injunction order is hereby issued against the defendant, his agents, tenants, servants and/or employees from occupying, trespassing, undertaking any development and/or constructing, renting out, entering and/or in any manner whatsoever from interfering with the plaintiff’s peaceful enjoyment of his parcel (portion) number 4850 (original number 1935/590) Malindi municipality together with the developments made therein.
 - b. A declaration is hereby issued that the agreement dated October 15, 2013 purported to have been executed by the Defendant is fraudulent, null and void and unenforceable in the circumstances.
 - c. An order is hereby issued to the Officer in charge of station (OCS) Malindi Police Station to enforce, supervise and ensure compliance with the order of vacant possession after 45 days if there is no compliance.
 - d. Costs of this suit to the plaintiff.
 - e. Defendant’s counterclaim is dismissed with costs.”
6. Aggrieved by the learned Judge’s decision, the applicant moved to this Court on appeal on 9 grounds set out in its undated draft Memorandum of Appeal, namely that the learned Judge erred in law and fact: by considering matters that she ought not to have considered; by failing to consider all the material placed before her by the applicant; by upholding the respondent’s claim unsupported by evidence; by disregarding vital exhibits/documents and corresponding testimony given in favour of the applicant; in arriving at a self-contradicting judgment; in disregarding and deviating from vital principles of the law of evidence and the rules of civil procedure; in finding as fraudulent documents which both the police and the documents examiner had found to be genuine; and for failing to exercise her discretion judiciously.
7. In addition to his appeal, the applicant filed a Notice of Motion dated 6th December 2023 pursuant to rule 5(2) (b) of the Court of Appeal Rules praying for: temporary stay of proceedings and execution



- of the judgment and decree of the ELC delivered on 16th November 2023 in Malindi ELC Case No. 20 of 2019 pending hearing and determination of his intended appeal; and that costs be in the cause.
8. We hasten to observe that there are no proceedings pending determination that are capable of being stayed, unless the applicant has in mind the impending execution of the impugned judgment and decree.
 9. The applicant's Motion was supported by his annexed affidavit sworn on 6th December 2023 essentially deposing to the grounds on which the applicant's Motion is anchored. Relevant among those grounds are, inter alia: that the applicant is aggrieved by the impugned judgment and wishes to appeal; that he stands to suffer substantial loss and damage in view of the fact that he had stayed in the suit premises for more than 10 years; that he had invested heavily in the suit property, and that he had attached great ornamental and sentimental value to the residence he calls home; that, in the event the respondent is allowed to execute the decree, the applicant will be left homeless; that, unless the orders sought are granted, the appeal shall be rendered nugatory; that the applicant has an arguable appeal with high chances of success; and that the ends of justice will be met by granting the relief sought.
 10. Learned counsel for the applicant, M/s. Machuka & Company, filed written submissions and list of authorities dated 15th December 2023 citing the cases of Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR, highlighting the twin-principle for grant of stay orders under rule 5(2) (b), namely that the applicant should demonstrate that he/she has an arguable appeal, and that the intended appeal would be rendered nugatory if interim orders were denied; Re Estate of Harish Chandra Hindocha (Deceased) [2021] eKLR where this Court held that an appeal would be rendered nugatory if the consequential effect of failure to grant the relief sought would be either irreversible or highly prejudicial; and Teachers Service Commission vs. KNUT & 3 Others [2015] eKLR where the Supreme Court held that rule 5(2) (b) is essentially a tool of preservation, and that it safeguards the substratum of an appeal. Counsel urged us to allow the applicant's Motion as prayed.
 11. Opposing the Motion, the respondent filed a replying affidavit sworn on 9th January 2024. According to him, the applicant's intended appeal is neither arguable, and nor is there substantial loss to be suffered by the applicant; that the applicant's allegation that he (the respondent) gifted him part of the suit property goes against the principle that a gift is without consideration; that the applicant does not reside in the suit premises; and that he is able to refund the amount (if any) of quantified damages the applicant might suffer should his appeal succeed. He urged us to dismiss the applicant's Motion with costs.
 12. On their part, learned counsel for the respondent, M/s. N. O. Sumba & Company, also filed written submission dated 15th January 2024 requesting us to dismiss the applicant's Motion with costs. However, counsel cited no judicial authorities to buttress their submissions.
 13. The twin principles that apply in applications under Rule 5(2) (b) of this Court's Rules for stay of execution pending appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must also demonstrate that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution of the impugned judgment, decree or order were not stayed.
 14. On the 1st limb of this twin principle, this Court held in Anne Wanjiku Kibeh vs. Clement Kungu Waibara and IEBC [2020] eKLR that, for stay orders to issue in appropriate cases, the applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, absent stay, be rendered nugatory (see also Kenya Tea Growers Association



and Another vs. Kenya Planters Agricultural Workers Union [2012] eKLR; and Ahmed Musa Ismail vs. Kumba Ole Ntamorua and 4 Others [2014] eKLR).

15. A cursory look at the grounds of appeal advanced in the applicant’s undated memorandum of appeal, viewed in the backdrop of the record as put to us reveals issues of law and fact deserving of the Court’s inquiry on appeal. Moreover, and as this Court has often stated, even one ground of appeal is adequate to satisfy the first limb of the twin principles. University of Nairobi vs. Ricatti Business of East Africa [2020] eKLR is a case in point.
16. We need not say more with regard to those grounds lest we embarrass the bench that will ultimately pronounce itself on the merits or otherwise of the intended appeal. Suffice it to observe that, as this Court held in the case of Wasike vs. Swala [1984] KLR 591, an arguable appeal is not one that would necessarily succeed, but one that merits consideration by the court as is the case here (also see Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR. Put simply, an arguable appeal is one that is not idle and/or frivolous.
17. With regard to the 2nd limb of the twin principle, the term “nugatory” was defined in Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA p.227 at p.232 as “worthless, futile or invalid”. It also means “trifling”.
18. Having concluded that the applicants’ intended appeal is arguable, the decisive question is whether the intended appeal, if successful, would be rendered nugatory if the stay orders sought were not granted. We are not persuaded that it would. In so far as the applicant’s case is anchored on the claim that he expended substantial sums of money to undertake improvements on the respondent’s property, any sums, if found due, would be recoverable. Moreover, the respondent’s averment that his is able to refund any sums found due remains uncontroverted.
19. We take to mind that the respondent’s proprietary right over the suit property remains uncontested. It is equally common ground that the applicant’s occupation thereof has its genesis in his engagement by the respondent as his caretaker in respect of the suit premises. Accordingly, the claim by the applicant that he invested KShs. 300,000 in the alleged development of the 1st floor of the premises would, if found to be due, be recoverable in a claim for special damages. Indeed, it would not be difficult to recover such sums in the event that its appeal succeeded. In effect, the appeal would not be rendered nugatory absent stay.
20. On our consideration of the impugned judgment and decree, the applicant’s Motion, the grounds on which it is anchored, the affidavits in support and in reply thereto, the written and oral submissions of learned counsel for the applicant and for the respondent, the cited authorities and the law, we reach the conclusion that the applicant has failed to satisfy the conjunctive limbs of the twin principles for grant of the stay orders sought under rule 5(2) (b) of the Rules of this Court. Accordingly, its Motion dated 6th December 2023 fails and is hereby dismissed with costs. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

A. K. MURGOR

JUDGE OF APPEAL

.....

DR. K. I. LAIBUTA C.Arb, FCI Arb.

JUDGE OF APPEAL

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G. V. ODUNGA
JUDGE OF APPEAL

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I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

