



**Mburu v Gakuya & 2 others; Nawel Business Agencies & 3 others (Interested Parties)
(Miscellaneous Application E011 of 2023) [2023] KEELC 19277 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19277 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION E011 OF 2023**

**BM EBOSO, J
JULY 26, 2023**

BETWEEN

FAITH NYAMBURA MBURU APPLICANT

AND

HENRY WAWERU GAKUYA 1ST RESPONDENT

IRENE NYAMBURA GAKUYA 2ND RESPONDENT

LEBERATA NJERI 3RD RESPONDENT

AND

NAWEL BUSINESS AGENCIES INTERESTED PARTY

NAWEL ENTERPRISES INTERESTED PARTY

NAWEL AGENCIES INTERESTED PARTY

JOHN NDUNG’U NGIGE INTERESTED PARTY

RULING

1. On December 8, 2022, Hon C K Kisiangani, Senior Resident Magistrate, rendered a Judgment in Ruiru SPMC MCCOMMSU Case No E002 of 2021 and issued a decree in the following verbatim terms:
 1. The 1st defendant to refund the entire purchase price of Kshs 1,150/= paid to her by the plaintiff herein with interest at court rate. The 1st defendant will also refund to the plaintiffs the transfer fee of Kshs 50,000 that the plaintiffs paid to them at the 1st interested party’s office.
 2. The claim against the 2nd defendant and all the interested parties is hereby dismissed in its entirety.



3. Due to the nature of the claim, each party to bear its own cost of the suit.
2. Three months later, Faith Nyambura Mburu brought a notice of motion dated February 9, 2023 seeking, from this court, an order enlarging the time for lodging an appeal against the said Judgment. Vide a ruling rendered on April 12, 2023, this court disposed the said application through the following disposal orders.
 - a. The time for lodging an appeal by Faith Nyambura Mburu against the Judgment rendered on December 8, 2022 in Ruiru MCOMMSU Case no E002 of 2021 is enlarged by thirty (30) days from today on condition that the said Faith Nyambura Mburu shall deposit in this court the sum of Kshs 1,150,000 prior to lodging the said appeal.
 - b. In the event of non-compliance, the order enlarging time shall stand vacated and shall stand substituted with an order dismissing the application dated February 9, 2023.
3. On May 12, 2023, Faith Nyambura Mburu brought a notice of motion dated May 11, 2023 seeking the following verbatim orders:
 - 3) That this honourable court be pleased to discharge, set aside, review and/or vary, the ruling and orders made herein on April 12, 2023 and order that the status quo be maintained pending the hearing and determination of this application.
 - 4) That this honourable court be pleased to order that the parcel of land known as L/R No 126 (Ruiru East) Block Plot No 21B comprised in the Share Certificate Number 1486 in the name of the 1st respondent herein do act as security for costs in the intended appeal.
 - 5) That pending the hearing and determination of this application and the intended appeal an order of temporary injunction be issued restraining the respondent and the 1st interested party whether by themselves, their servants, agents and/or anyone acting under or through them from selling, transferring, alienating subdividing, charging, leasing or in any manner whatsoever interfering with the status of the parcel of land known as L/R No 126 (Ruiru East) Block Plot No 21B comprised in Share Certificate Number 1486 in the name of the 1st respondent herein.
 - 6) That his honourable court be pleased to further enlarge the time within which the applicant should file an appeal against the Judgment of the honourable C K Kisiangani Senior Principal Magistrate delivered on December 8, 2022 in Ruiru MCOMMSU Case No E002 of 2021 by a further period of 30 days.
 - 7) That costs of this application be provided for.
4. The said application dated May 11, 2023 is the subject of this ruling. The application was supported with the applicant's affidavit sworn on May 11, 2023 and her further affidavit sworn on June 22, 2023. The application was canvassed through brief oral submissions tendered in the virtual court on June 26, 2023.
5. The 1st and 2nd respondents opposed the application through grounds of opposition dated June 20, 2023 and a replying affidavit sworn by Irene Nyambura Gakuya on June 20, 2023. The 3rd respondent and the 4th interested party opposed the application through grounds of opposition dated June 22, 2023.
6. The case of the applicant is that, despite diligent effort, she has been unable to raise the sum of Kshs 1,150,000 that she was ordered to deposit in court. She contends that should the order of April 12,



2023 not be varied, she would suffer irreparable harm as the door to justice shall have been permanently shut on her for lack of money. She adds that “the property known as LR No 126 (Ruiru East) Block Plot No 21B is still available and can act as sufficient security for any costs in this matter”.

7. The applicant invites the court to take judicial notice of the effect the cancer treatment of her late sister-in-law had “in draining the resources of the families affected by the disease”. She further invites the court to take judicial notice of “the general state of the economy which is in dire straits”. She adds that she stands to lose both the money she received for the sale of the property and the property itself because the lower court did not pronounce itself on what was to happen “once it rescinded the sale agreement” between her and the 1st respondent.
8. The case of the 1st and 2nd respondents is that the application is frivolous, vexatious and meant to waste the court’s time. The 1st and 2nd respondents further contend that the property which the applicant is offering as security is not available, adding that the property is the subject of criminal proceedings in Kiambu CMC Criminal Case No MCCR/1955/2018, hence it cannot be used as a security.
9. The case of the 3rd respondent and the 4th Interested Party is that the application is incurably defective because the order of April 12, 2023 lapsed on May 12, 2023. They add that the application is frivolous, vexatious and an abuse of the process of the court.
10. I have considered the application, the responses to the application, and the brief oral submissions that were tendered in the virtual court. The broad question to be answered in this ruling is whether the applicant has made out proper basis for grant of the reliefs that are sought in the notice of motion dated May 12, 2023.
11. Prayer 3 is a plea for an order setting aside, reviewing and/or varying the orders made on April 12, 2023 and directing that there be a status quo. In ordering the applicant to deposit the sum of Kshs 1,150,000 in court, the court took into account the allegation that had been made to the effect that the applicant took the said sum from the 1st and 2nd respondents purporting to sell land while aware that the said land did not exist and that she would not be able to convey the land to them. The trial court found the allegation to have been proved. Weighing and balancing the dictates of justice, the court deemed it necessary to grant the appellant conditional leave to lodge an appeal out of time. The court rendered itself at paragraphs 9 and 10 of the ruling of April 12, 2023 as follows:

“9. The impugned Judgment was a culmination of a claim for refund of a sum of Kshs 1,150,000 which the applicant received from the 1st and 2nd respondents as purchase price for a plot that was described by the applicant as Number 21B. It was contended that the applicant was not able to convey the land to the 1st and 2nd respondents. It was also contended that the applicant was not able to survey and grant vacant possession of the land to the two purchasers. It was further contended during trial that whereas the plot which the applicant purported to sell to the 1st and 2nd respondents was described by the applicant as Plot Number 21B, on the ground it was Plot Number 31B belonging to one John Ndungu Ngige.

10. Taking the foregoing into account, the court will conditionally enlarge the time within which the applicant will be at liberty to exercise her right of appeal. The condition is that the applicant will deposit in court the sum of Kshs 1,150,000 which she admitted as having received from the 1st and 2nd respondents as purchase price.”



12. No new evidence has been placed before this court to warrant a relook at the above considerations which this court weighed when issuing the order of April 12, 2023.
13. Similarly, no new evidence has been placed before this court to demonstrate that the land described by the applicant as “L/R No 126 (Ruiru East) Block Plot No 21 B” exists, is available and can be accepted as security for the due performance of the decree of the lower court.
14. On the plea for an order of temporary injunction, it is noted that this court exercised jurisdiction under Section 79 G as an appellate court. No material has been placed before this court to demonstrate that the applicant had a counterclaim in the lower court upon which the plea for a temporary injunction can be anchored. None of the pleadings that were filed in the lower court have been placed before this court. The judgment of the lower court does not advert to any counterclaim by the applicant. Secondly in the absence of an appeal at this point in time, I do not think this Court has a proper platform or a proper basis upon which to issue an interlocutory injunction to the applicant.
15. For the above reasons, I find that the applicant has failed to lay a basis for grant of any of the reliefs sought in the application dated May 12, 2023. Consequently, the said application is dismissed for lack of merit. The applicant shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 26TH DAY OF JULY 2023

B M EBOSO

JUDGE

In the presence of:-

Mr Njiru for the Applicant

Mr Mwenda for the 3rd Respondent and 1st Interested Party

Court Assistant: Osodo

