



Kiugi (Suing as the Legal Representative of the Estate of David Kiugi Nchebere - Deceased) v Kimathi (Sued as the Legal Representative of the Estate of M'Magiri Kamurani - Deceased) & 3 others (Environment and Land Appeal E029 of 2023) [2023] KEELC 18899 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18899 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E029 OF 2023**

CK NZILI, J

JULY 19, 2023

BETWEEN

MARY KIUGI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DAVID KIUGI NCHEBERE - DECEASED) APPELLANT

AND

STEPHEN KIMATHI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M'MAGIRI KAMURANI - DECEASED) 1ST RESPONDENT

JULIUS MURIUNGI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M'MAGIRI KAMURANI - DECEASED) 2ND RESPONDENT

THE LAND REGISTRAR IMENTI NORTH DISTRICT 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. This ruling relates to two applications dated 4.5.2023 and 31.5.2023. In the 1st application, the appellant seeks both stay of execution of the lower court decree and a temporary injunction restraining the 1st – 2nd respondents from entering, occupying, remaining, or in any way whatsoever interfering with the appellant's agents, family members, employees or assignees peaceful occupation, user and enjoyment of LR No. Kiirua/Ruiri/1502, pending hearing and determination of the appeal. The application is based on the grounds on the face of the application and a supporting affidavit sworn by Mary Kiugi on 4.5.2023. The appellant has deposed that she is the widow of the late David Kiugi Nchebere and the estate's legal representative. She avers that in 1975, the deceased, the father of the 1st & 2nd respondents, sold her 0.16 ha of LR No. Kiirua/Ruiri/1028, later subdivided into the suit premises as per the sale agreement annexed as MK "1", took possession and settled therein. The appellant further



avers that 1st & 2nd respondent's late father applied for the land control board consent and signed the transfer form for the suit land attached as MK 2 (a), (b) & (c), which upon lodging to the land registrar, penalties were imposed for late registration by which time the seller had also died. Additionally, the appellant avers that the 1st & 2nd respondents became greedy and sued in the lower court alleging fraud leading to the decree being appealed against. She states that after the judgment, the 1st – 2nd respondents amended the confirmed grant marked as MK "4" and armed with a decree marked as MK "3" subdivided the land intending to dispose of it to third parties.

2. Further, the appellant avers that land surveyors were brought to the ground to effect the subdivision, yet they are in occupation as per the attached photographs marked MK 5. The appellant, therefore, urges the court to find that she stands to suffer grave loss and damage if unfairly deprived of the land that she has lived on since 1975. The appellant avers that at one stage, she helped the 1st – 2nd respondents' mother, who had a mental problem until she recovered and eventually assisted in the subdivision of the initial parcel in favor of the respondents, who unfortunately sold all their portions and were now trying to unjustly take away the pieces of the land sold or gifted to her by their late father.
3. The 1st & 2nd respondents oppose the application through a replying affidavit sworn by Stephen Kimathi on 8.5.2023, terming the application as malicious, out to circumvent justice, an abuse of the court process, incompetent, defective in law, and based on falsified information which was never presented before the trial court, despite several opportunities to do so. The 1st – 2nd respondents aver that there was no gift given to the appellant by their late father as alleged or at all and that they were the ones utilizing a portion of the land, and it was only in 2018-2019, when the appellant and her family attempted to evict them from the land prompting the filing of a suit. The 1st – 2nd respondents aver that the trial court issued a temporary injunction against the appellant as per the attached copy marked SK "1".
4. The 1st & 2nd respondents in paragraph 11 averred that only one son of the appellant occupied the land measuring 0.16 ha, which was not fully paid. They termed the order sought as tantamount to evicting them, yet they occupied the rest of the land. The 1st & 2nd respondents further state that some of the developments appearing on the photographs attached to the application belonged to them, except the home. They termed the application as intended to frustrate the sharing of their deceased father's estate, which the appellant has schemed to steal from them based on fictitious documents allegedly signed in 1986.
5. In the 2nd application, the 1st and 2nd respondents seek;- a), a review of injunctive orders pending herein for the arrest of the ruling due on 19.7.2023, b), an order for a scene visit to establish who was in possession, occupation, and has developed the suit land, and c), for a temporary injunction restraining the appellant, her relatives, agents or anyone authorized into interfering with, entering into or in any way whatsoever dealing with a portion measuring 0.65 ha of the suit premises pending hearing and determination of the appeal.
6. The application is based on the grounds on its face and a supporting affidavit by Stephen Kimathi on 31.5.2023. The applicant deposes that the appellant and her family occupy 0.16 ha of the suit land while his siblings cultivate 0.65 ha of the remainder. It is averred that on 19.5.2023, the appellant hired goons to evict them from the suitland, who destroyed their crops, and demolished the farmhouse as per photographs attached as SK "2" despite an earlier order attached as annexure marked SK "1".
7. The 1st – 2nd respondents aver that the effect of the orders issued by this court has denied them access to the portion of the suit land they occupy and ideally amounts to an eviction from the land, which is a grave injustice to them.



8. The application is opposed by a replying affidavit of Mary Kingi sworn on 5.6.2023. She denies that the 1st – 2nd respondents are occupants of 0.65 ha of the suit land as alleged or at all. On the contrary, she avers that she was the one occupying 0.81 ha of the suit land, which the trial court had ordered that she vacates the excess of 0.16 ha of the land. She states that the 1st and 2nd respondents are trying to evict her after the orders of 10.5.2023 were granted and that they have even tried to seek the vacation of the inhibition orders through an application dated 19.4.2023 at the lower court due for a ruling on 8.6.2023.
9. In a supplementary affidavit sworn on 5.6.2023, the 1st – 2nd respondents reiterate that their house was demolished, but the police could not intervene since it is a civil suit. Further, the 1st and 2nd respondents denied the alleged allegations leveled against them by the appellant.
10. By an order made on 5.6.2023 the court directed the Executive Officer (EO) of this court to visit the locus in quo and furnish before this court a scene visit report. The E.O. visited the locus in quo in the presence of the parties and their advocates on record on 21.6.2023 and filed a report dated 17.7.2023. Observations were that one section of the suit land has an old timber building with overgrown grass and bushes occupied by the appellant's son while the other section had scattered macadamia and mango trees, recently harvested beans and growing maize. Similarly, there existed a small wooden structure recently constructed although overturned as claimed by the respondents
11. For a party to be entitled to stay of execution, he must file the application without inordinate delay, demonstrate substantial loss, offer security for the due realization of the decree should the appeal fail, and lastly, establish that it is in the interest of justice to grant the orders sought. Regarding an injunction pending appeal, an applicant must show if the appeal is arguable, raises meritorious issues of facts and law, and if it will be rendered nugatory unless the stay orders were granted. See *Patricia Njeri & 3 others vs National Museum of Kenya* (2004) eKLR and *Madhubaper International Ltd vs Kerr* (1985) eKLR.
12. In the case of the *Re-estate of Harish Chandra Hindocha (deceased)* (2021) eKLR, the court held that an arguable appeal did not have to succeed but must raise sufficient issues for interrogation before the court. As to the nugatory aspect, the court observed that it applies where the consequential effects for the failure to grant the relief sought would either be irreversible or highly prejudicial to render of no consequence the intended appeal if ultimately successful.
13. In the 1st application, both parties admit that there was a sale agreement and taking up of vacant possession. Both parties also appear to be occupying the suit premises, though in different proportions. The 1st & 2nd respondents had sought from the trial court for the inhibition orders to be vacated and the land registrar to be allowed to dispense with the production of the original title deed to effect the transfers over the suit land. If the trial court permits the said orders, the decree shall be affected by the land changing hands from its current status despite the pending appeal. I believe the appellant has a demonstratable stake in the suit land. Looking at the memorandum of appeal, there appear to be arguable points that require interrogation before this court. The substratum of the appeal is in danger of dissipating through transfers to the 1st & 2nd respondents and third parties. If this happens, the suit land would be beyond the appellant's reach should the appeal be successful. I think the nugatory aspect and the substantial loss have been demonstrated for the court to preserve the subject land pending the hearing and determination of the appeal.
14. Regarding the 2nd application, there is no doubt that at the trial court, the appellant and the 1st & 2nd respondents were found to be in occupation of separate portions on the suit land. Therefore, the stay or injunction sought cannot grant either of the parties more than the trial court established to be under their respective occupation. Preserving the status quo or the subject land should not mean that any



party should acquire an advantage over the other. The 1st – 2nd respondents have admitted to what the appellant occupies. Therefore, the orders for stay or injunction pending appeal should not be taken to mean the eviction of the 1st and 2nd respondents from what they have been occupying alongside the appellant. The sale agreement was specific to what the appellant was buying.

15. Consequently, I allow a stay or injunction pending the hearing of the appeal to last for one year only. The 2nd application is dismissed. The Deputy Registrar shall hold the security deposited by the appellant.
16. The Deputy Registrar is directed to call for the lower court file. Mention on 17.8.2023.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 19TH DAY OF JULY 2023**

In presence of

C.A John Paul

Kajuju for Thangicia for respondent

Arithi for applicants

HON. CK NZILI

ELC JUDGE

