



**Nthurima & 2 others v Mwangi & another (Environment and Land Appeal  
E024 of 2023) [2023] KEELC 18898 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18898 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E024 OF 2023**

**CK NZILI, J  
JULY 19, 2023**

**BETWEEN**

**KENNETH KIMATHI NTHURIMA ..... 1<sup>ST</sup> APPELLANT  
DENNIS MUTUMA NTHURIMA ..... 2<sup>ND</sup> APPELLANT  
SHARON MWENDWA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**JAMES NJUGUNA MWANGI ..... 1<sup>ST</sup> RESPONDENT  
JENARO NTHURIMA MWIRIA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By notice of motion dated May 2, 2023, the appellant seeks a temporary injunction and inhibition orders restraining the respondents from entering, selling, dealing, trespassing, evicting, or interfering with LR No Abothuguchi/Gaitu/3623, pending hearing and determination of this appeal.
2. The grounds are set on the face of the application and the supporting affidavit sworn by Kenneth Kimathi Nthurima on May 2, 2023.
3. It is averred that the co-appellants are in occupation of the suit land and have no other place to call home, but out of a decree issued in the lower court, which they were not a party to, the 2<sup>nd</sup> Respondent, who is their father is supposed to be evicted from the land by the 1<sup>st</sup> respondent, a purchaser who bought the land without their father consulting them yet they have customary rights over the land. The appellants aver that they had filed a suit, namely ELC No E023 of 2022, separate from the claim between the respondents herein, which the trial court declared as res judicata and dismissed, leading to the instant appeal.
4. The appellants aver that if evicted vide decree in ELC NO E009 of 2023, their appeal shall be rendered nugatory and they will be rendered homeless. Further, the appellants have attached a copy of the



- judgment in ELC No E009 of 2023 as annexure marked KKN "1", the decree as KKN 2, ruling appealed against as annexure KKN "3", copy of proceedings as KKN "4", application for execution of the decree as KKN "5" and memorandum of appeal as KKN "6". They urge the court to find that it is in the interest of justice to grant the order sought by maintaining the status quo for the appeal to be heard on merits.
5. The application is opposed through a replying affidavit sworn by James Njuguna Mwangi on May 9, 2023. He deposes that he bought the suit land from the 3<sup>rd</sup> respondent in 2016 for Kshs 700,000/=, out of a large parcel of land, following which the land was subdivided, his portion excised and transferred to him. The 1<sup>st</sup> respondent avers that at the time the seller was living on a small piece of the land and had agreed to move elsewhere but refused to vacate, leading to a suit at Githongo Law Courts for eviction as per judgment delivered on September 26, 2022, attached as annexure JN "1". The 1<sup>st</sup> respondent avers that after the decision, the appellants, as children of the 2<sup>nd</sup> respondent, filed ELC No E023 of 2022, which was declared *res judicata* by the trial court. He attached a copy of his replying affidavit in the primary suit as an annexure marked JN "2". The 1<sup>st</sup> Respondent avers that the judgment in his suit remains unappealed against or the decree stayed, and therefore, this application was an abuse of the court process.
  6. Parties with leave of court opted to dispose of this application through written submissions due for filing by May 31, 2023. The appellant was also granted leave to put in a supplementary affidavit by May 17, 2023.
  7. The 1<sup>st</sup> respondent submits that the appellants have not satisfied the requirements for the grant of temporary injunction as set in *Giella v Cassman Brown Co Ltd* [1973] EA 358 and reiterated in [Peter Kairu Gitu v KCB\(K\) Ltd](#) [2021] eKLR, more so, given that they were not a party to the decree about to be executed and which has not been appealed against.
  8. As to inhibition orders, the 1<sup>st</sup> respondent submits that he is an absolute owner of the land and that the appellants have presented nothing to show that the land was at risk of alienation or likely to be dealt with in a manner prejudicial to them, more so since he was an innocent or bonafide purchaser who has a valid decree which has not been appealed against.
  9. To grant or not to grant an injunction pending appeal under Order 42 Rule 6 (6) of the [Civil Procedure Rules](#) is a discretionary power exercisable judiciously and on sound principles.
  10. In [Hutchings Biemer Ltd vs Barclays Bank of Kenya](#) [2006] eKLR, the court observed that an appellant must satisfy the court that he has an arguable appeal which was likely to be rendered nugatory by refusing to grant orders of stay or injunction. The court cited with approval [Madhupaper International Ltd v Kerr](#) [1985] KLR 840, that injunctive orders were meant to preserve the property and maintain the status quo.
  11. In the case of [Kitbo Civil Engineering Co Ltd v National Bank of Kenya & another](#) (Civil appeal Application E706 of 2021) (2023 KECA 387 (KLR) March 31, 2023 (Ruling), the court cited with approval the parameters set in [Alfred Mincha Ndubi v Standard Ltd](#) [2020] eKLR, [Multimedia University & another v Prof Gitile N Naituli](#) [2014] eKLR and [Stanley Kangethe Kinyanjui vs Tonny Ketter & others](#) [2013] eKLR, on arguable appeal and nugatory aspects, based on particular facts and peculiar circumstances of each case. On an arguable appeal, the court said it was one raising a bonafide arguable ground that need not succeed necessarily but ought to be argued fully before the court. On the nugatory aspect, the court noted that this depends on whether what was sought to be stayed, if allowed to happen, will be reversible, and if not, whether damages would reasonably compensate the aggrieved party.



12. In this appeal, what is appealed against is the ruling dismissing the appellant's suit for being res-judicata. It is admitted that the appellants were not party to the previous case, nor did they seek to re-open the proceedings even after judgment and apply to be joined as interested parties through a post-judgment application.
13. The decree or judgment in the previous suit remains unappealed. Therefore, I do not find the appeal before the court as raising any arguable points. Secondly, the decree, which is likely to be executed, has not been appealed against. The appellants have not told this court if they have objected to the execution under Order 22 of the *Civil Procedure Rules*. They have not moved the execution court as interested parties either.
14. More so, the nature of the applicants' occupation of the suit land and the likely loss or damage has not been demonstrated to the court's satisfaction. The rights or interests which have been threatened or infringed by the decree-holder have not been shown to this court. See *Nguruman Ltd v Jan Bonde Nielsen & 2 others* [2014] eKLR.
15. Therefore, the appellants have not met the threshold for granting the orders sought. The application is dismissed with costs.

**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

Gachohi for Mutuma for 1<sup>st</sup> respondent

Karatu for applicants

**HON. CK NZILI**

**ELC JUDGE**

