



**Mbiti (Suing as personal representative of the Estate of Mbiti Muthigire
- Deceased) v Nguru (Environment & Land Case 178 of 2014)
[2023] KEELC 22516 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22516 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 178 OF 2014
A KANIARU, J
NOVEMBER 29, 2023**

BETWEEN

**THOMAS MUGO MBITI PLAINTIFF
SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MBITI
MUTHIGIRE - DECEASED**

AND

JANE WANGUI NGURU APPLICANT

RULING

1. The application before me for determination is a Notice of Motion dated 02/11/2022 and filed on 11/01/2023. It is expressed to be brought under order 22 Rule 8 (5) of *Civil Procedures Rules*. The applicant – Jane Wangui Nguru – was the Defendant in the suit while the respondent – Thomas Mugo Mbiti (Suing as a personal representative of the Estate of Mbiti Muthigire (deceased) – was the Plaintiff. The prayers sought are as follows:
 - a. That the Deputy Registrar of this Honourable Court be ordered to execute all the necessary documents to facilitate the transfer process of Land Parcel No. Nthawa/Gitiburi/1765 to the defendant/applicant herein Jane Wangui Nguru.
 - b. That the Land Registrar Embu County be authorized to dispense with the production of the original title deed of the land.
 - c. That the costs of this application be borne by the Respondent.
2. The application is premised on the grounds set out in it and on a Supporting Affidavit sworn on 02.11.2022 by Jane Wangui Nguru. She stated, inter alia; that she was decreed to be entitled to be registered as the proprietor of land parcel No. Nthawa/Gitiburi/1765 on account of adverse



possession; that she has been pleading with the Plaintiff to execute the necessary documents to facilitate the transfer of the suit land to her name in vain; that she is entitled to be registered as the proprietor; that she has been in exclusive possession of the said land since 1978 to date; and that the Plaintiff will suffer no prejudice if the orders sought are granted.

3. The application was responded to vide a replying affidavit dated 04.04.2023 and filed on 05.04.2023 by the Plaintiff - Thomas Mugo Mbiti. He deponed, inter alia; that being dissatisfied with the courts judgement, he has filed an Appeal against it in Nyeri vide Appeal No. 114 of 2020. He attached a copy of the Memorandum of Appeal. He stated that his appeal has high chances of success and would be rendered nugatory if the application herein is allowed as he might win in the Court of Appeal. For the said reasons, he urges the court to disallow the Defendants application. He also contends that the Defendant stands to suffer no prejudice; that the Defendant is the one in occupation of the suit land; and that he has no intention of interfering with her occupation pending the hearing and determination of the said appeal.
4. The application was canvassed through written submissions. The applicant's submissions were filed on 13/06/2023 whereas the Respondents submissions were filed on 19.07.2023.
5. I have considered the application, the response made to it, rival submissions, and the entire court record in general. The issue for determination is whether the Applicant is entitled to the orders sought.
6. It is not in dispute that judgment was entered in favor of the Defendant herein on 04.06.2020 declaring the Defendant to be entitled to be registered as the proprietor of the suit land by way of adverse possession. It is also not in dispute that the Plaintiff has lodged an appeal against the said judgement in the Court of Appeal of Nyeri as evidenced by a Memorandum of Appeal filed on 14/08/2020. The Defendant's case is that having been declared to be entitled to the suit land, she approached the Plaintiff to transfer the same to her but her request did not bear any fruit. She is now seeking to have the court assist her to actualize her right to be registered as the proprietor of the suit land. The Plaintiff on the other contends that this will prejudice him and render his appeal nugatory should the said land be transferred to the Defendant before his appeal is heard and in the event he wins the appeal.
7. It is necessary to first appreciate the law applicable in a matter like this one. In this regard, Order 42 rule 6(1) of the [Civil Procedure Rules](#), 2010, is instructive. It provides as follows:

“No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which the appeal is preferred shall be at liberty, on application being made, to consider such application and to make such orders thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”
8. Further, Order 42(6)(6) of the same [Rules](#) provides as follows:

“Notwithstanding anything contained in sub rule (1) of this rule, the High court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
9. To my mind, a party who loses in a suit and has filed an appeal or intending to file one has two legal devices at his disposal in order to obviate execution. The two are an order of stay of execution or an



order of temporary injunction. Where a party fails to make use of these devices, there is nothing to prevent the logical and legal consequences of a judgement or ruling from befalling him. Such is the situation obtaining in the matter at hand. The respondent failed to apply for an appropriate order to cushion himself from the consequences of the decision made by the court against him. He seems to think that mere existence of an appeal is enough to prevent implementation of the decision made against him. He is wrong. He needs a court order. And to get one, he has to apply for it. He needs also to meet the stringent thresholds set by law in order to get the orders.

10. And where such order does not exist, nothing in law can prevent a successful party in a suit from enjoying the fruits of a favourable decision. No order exist in the matter at hand. Bearing this in mind, this court is persuaded that the merits of the application under consideration have been demonstrated. The application is therefore allowed but I make no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 29TH DAY OF NOVEMBER, 2023.

In the presence of M/s Naliaka for Kinyua Kiama for defendant/applicant; Hei for Kathungu for respondent.

Interpretation: English/Kiswahili

Court assistant: Leadys

A.K. KANIARU

JUDGE

29.11.2023

