



**Muraga & another v M’Muranga (Environment and Land Appeal  
E030 of 2023) [2023] KEELC 22245 (KLR) (6 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22245 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E030 OF 2023  
CK NZILI, J  
DECEMBER 6, 2023**

**BETWEEN**

**FRANCIS MURAGA ..... 1<sup>ST</sup> APPLICANT**

**PATRICK MURIUNGI KIRIMA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**M’RIRIA M’MURANGA ..... RESPONDENT**

**RULING**

1. By an application dated 3.10.2023 the court is asked to:
  - a. Set aside the ruling dated 27.9.2023.
  - b. Stay the execution of the *ex parte* judgment and decree dated 2.11.2018.
  - c. Join the purchasers or registered owners as interested parties in the primary suit.
  - d. Grant temporary injunction barring and restraining the respondent, his agents, servants or employees from remaining, trespassing, encroaching, utilizing, selling, charging, invading or in any way interfering or dealing with LR No. Mweru Adjudication No. 342 and 343 pending the hearing and determination of the appeal.
2. The grounds are contained on the face of the application and an affidavit sworn by Patrick Muriungi Kirima on 3.10.2023. The applicants aver that an *ex parte* judgment was entered on 2.11.2018; and their application to set aside the judgment dated 24.4.2023, dismissed on 27.9.2023 leading to the current appeal.
3. The applicants aver they have a legitimate interest in the land which the 1<sup>st</sup> applicant who subdivided and sold to third parties as per resultant titles attached as PMK 5 (a) & (c) who have been condemned unheard.



4. The applicants aver their appeal has arguable points and are willing to deposit security before the court otherwise they will be evicted from the suit parcels of land.
5. The application is opposed through a replying affidavit by Mr. Riria M’Muraga sworn on 1.11.2023. It is averred that the trial court was justified in dismissing the application for setting aside under the circumstances obtaining given the applicants deliberately ignored court processes right from the summons to enter appearance up to the service of the decree. Again the trial court found that the applicants had failed to apply to cross-examine the process server; if at all service of summons was contested. It was averred there was also inordinate delay in moving court and the applicants were only awoken up by the impending evictions.
6. Further, the respondents averred the draft defence raised no triable issues and that the so-called bona fide purchasers for value have not moved the court by way of objection proceedings against the execution. Therefore the applicant has no authority or capacity to speak on their behalf. Moreover, the respondent averred the application does not meet the threshold under Order 42 Rule 6 [Civil Procedure Rules](#).
7. Through written submissions dated 13.10.2023, the applicants urge the court to find them deserving the orders sought, since the appeal is arguable, substantial loss has been demonstrated and they were willing to offer security for the due realization of the decree. Reliance was placed on [Esther Wamaita Njibia & others v Safaricom Ltd](#), [Doa Doa Tented Camp and Lodges Ltd v Jubilee Insurance Co. Of Kenya Ltd](#) [2021] eKLR, [J.M Gathanga v Cooperative Bank of Kenya](#) [2005] eKLR, [Equity Bank Ltd v West link MBO Ltd](#) C.A No. 78 of 2011, [Reliance Bank Ltd vs Norlake Investments Ltd](#) [2002] C.A 227 and [Gianfranco Manethi & another v Amaco Ltd](#) [2019] eKLR.
8. The respondent relied on written submissions dated 7.11.2023. It was submitted the trial court decision was sound. Given the applicants who were acting in person had appointed a law firm on 12.7.2023 who conducted the applications on their behalf, the respondent takes the view that the current law firm is improperly on record. Reliance was placed on Meru succession Case No. 74 of 1996, [Peter Kamau Ngugi & another v Grace Akinyi Olao & another](#) [2021] eKLR, [S.K Mrwad v Veronica Mubhemann](#) [2019] eKLR.
9. On compliance with Order 42 Rule 6 [Civil Procedure Rules](#), the respondent submitted though there is no requirement to demonstrate arguable appeal still the appeal before the court has no merits. Given the findings by the lower court that there was proper service of the summons and the decree.
10. Additionally, it was submitted the applicants have not demonstrated any sale agreements, the nature of developments they have on the suit land and capacity to seek orders in favour of persons who are not parties to these proceedings.
11. Additionally, the respondent submitted such interested parties, if aggrieved by the decree can still invoke Order 22 of the [Civil Procedure Rules](#) through objection proceedings.
12. As to occupation of the suit land, the respondent denied that the applicants lived on the land, other than the temporary structures, they have erected therein, since they reside elsewhere with their families. Reliance was placed on [Mukuna v Abuoya](#) [1988] KLR 645, [Kenya Shell Ltd v Karuge and another](#) [1988] KAR 1018 and [Equity Bank Ltd v Twiga Adauma](#) C.A No. 291 of 1997.
13. The court is asked to grant stay and grant temporary injunction orders pending the hearing and determination of this appeal. A party seeking such orders must move the court without inordinate delay, demonstrate substantial loss or damage, offer security for due realization of the decree should



- the appeal not succeed, establish if it is in the interest of justice and there is sufficient reasons to grant the orders sought.
14. As to temporary injunction pending appeal Order 42 Rule 6 (6) of the [Civil Procedure Rules](#) provides that an appellate court may grant such a relief for a just cause.
  15. In [Gemstar Importers and another v Edward Nthiwa Mutiso](#) [2019] eKLR the court cited with approval [Century Oil Trading Co. Ltd vs Kenya Shell Ltd](#) NRB Milimani HCMCA 1561 of 2007, that substantial loss is more than ordinary loss and the court has to balance the interests of the applicant vis a vis those of the successful party. The court cited with approval [Samvir Trustee Ltd v Guardian Bank Ltd](#) [2007] eKLR, that a court should establish if there are special circumstances that sway it as it balances or weighs the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from enjoying fruits of his judgment.
  16. In [Kenya Shell Ltd vs Kabiru](#) (*supra*) Platt Acking J.A said it was a good practice to substantiate substantial loss through evidence since substantial loss was what has to be prevented from happening. In [Machira Machira v East African Standard](#) [2002] KLR 63, the court observed a successful litigant should not be prevented from realizing the fruits of his judgment and the court has to do justice in accordance with the law to prevent abuse of the court process. On security in [Focin Motorcycle Co. Ltd vs Ann Wambui & another](#) (2018) eKLR the court said security is a mark of good faith.
  17. Regarding the injunction pending appeal a party must show the appeal is not frivolous. In [Patricia Njeri & others v National Museum of Kenya](#) [2004] eKLR the court said an injunction pending appeal was discretionary in nature but would not be exercised if the appeal was frivolous. Further, the court said the relief should not be refused where it would inflict greater hardship than it would avoid and a party must show that if the application was refused the appeal will be rendered nugatory. Further, the court said the requirements of [Giella v Cassman Brown](#) [1973] E.A 358 must also be met.
  18. In this application, counsel for the respondent submitted orally before the court that execution had taken place. Those submissions were not backed by any averment in the replying affidavit or were in the supporting affidavit. In [Wangalwa v Cheseto](#) [2012] eKLR, the said execution process putting in motion does not amount to substantial loss and a party must bring tangible and cogent evidence that their execution would result into undesired consequences negating the very essential core or substratum of the appeal.
  19. Other than attaching the sale agreements and title deeds the applicants have not demonstrated what extraordinary loss or damage they were likely to suffer if execution took place. Entries in the copy of the register are reversible. What irreversible loss or damage was likely to occur was not demonstrated. Further to this, there was no authority to act or plead produced for the applicants to purport to represent the interests of the alleged interested parties. Any special circumstances obtaining in this appeal or matter have not been stated by the applicants. An eviction notice of three months has also not been issued to the applicants
  20. Even though the application was filed timeously, the applicants have failed to meet the threshold under Order 42 Rule 6 (6) of the [Civil Procedure Rules](#). It is also not in the interest of justice to grant the orders sought.
  21. The court will have occasion to hear and determine the appeal on merits. It cannot at this stage grant prayer No.2. of the application. Similarly, as regards prayer No. 4, the applicants move the court under Order 42 of the [Civil Procedure Rules](#). See [David Kiptugen v Commissioner of Land & others](#) [2016] eKLR, in the lower court, but the commencement of new proceedings in another court. Therefore, parties have a right to engage a new advocate or choose to remain with the same counsel, without being



required to file a notice of change of advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate. The upshot is I find the application lacking merits. It is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 6TH DAY OF DECEMBER 2023**

In presence of

C.A Kananu

Mr. Murango Mwenda for respondent

Kiyuki for the appellant

**HON. CK NZILI**

**JUDGE**

