



**Omurwa & 2 others v Nyachae & 2 others (Environment and Land Appeal E002 of 2022) [2022] KEELC 2333 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2333 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT AND LAND APPEAL E002 OF 2022**

**JM KAMAU, J**

**MAY 12, 2022**

**BETWEEN**

**ONGIRI OMURWA ..... 1<sup>ST</sup> APPELLANT**

**MOKAYA RIENDO ..... 2<sup>ND</sup> APPELLANT**

**RICHARD MOKAYA ATAMBO ..... 3<sup>RD</sup> APPELLANT**

**AND**

**GEORGE MORARA NYACHAE ..... 1<sup>ST</sup> RESPONDENT**

**NYAMIRA COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**AFRITEX KENYA LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Judgment of Hon. Nyigei – R.M. in Nyamira Chief Magistrate’s Court ELC No. 4 of 2020 as consolidated with ELC No. 69 of 2019 and delivered on 2nd March, 2022)*

**JUDGMENT**

1. In this Application dated 01/04/2022 the Appellants seek orders that L.R. NO. Kiangoso Market Plot No. 28 and Kiangoso Market Plot No. 24 be preserved pending the hearing and determination of this Appeal and that in the interim a temporary injunction be issued restraining the respondents either by themselves or through their agents, and/or proxies from demolishing, constructing, dealing, interfering, alienating or disposing of the said parcels of land. The Application is supported by the grounds that the Appellants are the beneficiaries and legal owners of the parcels of land and having lost in the lower court, they have preferred an appeal to this court from the Judgment of the Honourable Nyigei (P.M) in Nyamira CMCC ELC Case No. 4 of 2020 which appeal is arguable and has high chances of success and that should the orders sought for are not granted, then the appeal if successful would be rendered nugatory. They therefore urge the court to preserve the substratum of the appeal.



They proceed to say that the orders, if granted, would not in any way prejudice the Respondents. The Applicants conclude their Application by claiming that the Respondents engaged in the construction works that are encroaching onto the subject properties and are likely to dispossess of the Appellants in the latter's properties where they live and do business.

2. The Respondents have opposed the Application through the Replying Affidavit sworn on 21/04/2022 by the 1<sup>st</sup> Respondent who doubles up as a member of the County Assembly of Nyamira, Mr. George Morara Nyachae who has deponed that there is no order capable of being stayed since the Appellants' claims were dismissed in the Judgment dated 02/03/2022 and that the orders sought are to stay negative orders and there is therefore no good reason for granting preservative orders. He depones that the land in question is a public land. He states that the subject matter whose preservation is being sought has already been sub-divided and therefore there is nothing to preserve. He depones that the Application is a blatant abuse of this court as the Application, to use his own words "is patently premature fitted in rush (*sic*) and intended to cannulate the real issues and advance mischief" and finally that the Applicants do not reside on the suit property and would want to use the order resulting from their Application (if granted) to take possession. I invited parties to make oral submissions which I have carefully considered.
3. I must point out from the outset that what is before the court in support of the Application dated 01/04/2022 is not adequate enough to enable the court appreciate what transpired in the lower court. The Memorandum of Appeal is in general terms and very precise to the extent that this court cannot appreciate what the claim in the lower court was all about. In the absence of copies of pleadings from the lower court this Appellate Court cannot tell whether the Judgment given by the trial court is one capable of being stayed pending Appeal or not. No copy of the Decree of the trial court has been exhibited in the Application.
4. All that the applicants have told this court is that they "have preferred an Appeal against the Judgment of the trial court; being ELC Appeal No. E002 of 2022 in this court...." And that they have an arguable Appeal against the Judgment with high chances of success. They also stand to suffer irreparable damage should the orders not be granted. How would the court be able to tell whether any damage would arise as a result of construction work going on and which encroach on the subject properties without knowing what the claim was all about. Even the reasons in the certificates of urgency do not shed light as to what the Judgment was all about. It takes a very short time to extract the Decree sought to be impugned.
5. A Decree spells out the claim that was the basis of the suit and finally gives the Decision that was made by the trial court.
7. The Judgment sought to be reversed was read and delivered to the parties on 02/03/2022. I have perused the entire file for this Appeal and I do not see any letter requesting for the Decree. Probably the same was requested immediately upon pronouncement of the Judgment orally in court. But the court has no room for conjecture. In the absence of records of what transpired in the trial court that would enable this court to know what the duel is all about I am unable to tell whether the Application before court is meritorious or not. I have therefore no option but to dismiss the same with costs to the Respondents.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 12<sup>TH</sup> DAY OF MAY, 2022.**

**MUGO KAMAU**

**JUDGE**

**In the Presence of:-**



Court Assistant: Sibota

Appellants: Mr. Okemwa

Respondents: Mr. Ochoki

