



REPUBLIC OF KENYA



Kanja v Kanja; Kanja & 6 others (Applicant) (Environment & Land Case 150 of 2013) [2023] KEELC 476 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELC 476 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 150 OF 2013
JO OLOLA, J
FEBRUARY 2, 2023**

BETWEEN

DAMARIS WANJIKU KANJA PLAINTIFF

AND

JOHN MUTHEE KANJA RESPONDENT

AND

EVERLYN WAKIURU KANJA APPLICANT

WAINUKU MUTHEE APPLICANT

JACKSON GACHUNGU APPLICANT

PETER MAINA MUTHEE APPLICANT

PAUL MURIITHI RUICHIRIA APPLICANT

WILSON MWANGI MUTHEE APPLICANT

MARTIN KINGA MUTHEE APPLICANT

RULING

1. By the notice of motion dated and filed on August 18, 2022, the six applicants herein pray for an order of stay of execution of the orders made herein on May 19, 2022. The application which is supported by an affidavit sworn on behalf of the applicants by Jackson Gachungu Ruichiria (the 2nd applicant) is premised on the grounds:
 - (i) That substantial loss may result to the six (6) applicants;
 - (ii) That there is danger of disruptions;
 - (iii) That the plaintiff/respondent has her own land;



- (iv) That the appeal if successful would be rendered nugatory;
 - (v) That no prejudice will be suffered by the plaintiff; and
 - (vi) That in the circumstances, it is only fair and just that the 2nd to 7th applicants to remain on the suit premises until the intended appeal is heard and determined.
2. The application is opposed. By her replying affidavit sworn and filed herein on August 31, 2022, Damaris Wanjiku Kanja (the plaintiff) avers that the application is ambiguous, devoid of substance, untenable and an abuse of this court's process.
 3. The plaintiff asserts that the application raises no triable issues and that the same is merely meant to stop her from enjoying the fruits of her judgment.
 4. I have carefully perused and considered the application as well as the response thereto. By an earlier application dated October 8, 2018, the six (6) applicants had sought orders to set aside the judgment delivered herein in favour of the plaintiff on December 11, 2014. The applicants further sought orders to be enjoined in the suit as interested parties and for the cancellation of sub-division of the parcel of land known as LR No Ruguru/Kiamariga/464 as ordered by the court.
 5. In a ruling delivered herein on May 19, 2022, the court determined that the applicants were the wife and children of the defendant herein and that they had all along been aware of the suit between the plaintiff and the defendant but had failed to apply to be enjoined to enable them articulate their interests on the suit property until some four (4) years after the suit was concluded and judgment was delivered in favour of the plaintiff. Accordingly the court declined the said application and directed the applicants to voluntarily vacate the suit property within 90 days failure to which they would forcefully be evicted therefrom.
 6. By the present application before me, the applicants urge the court to stay the execution of the orders granted on said May 19, 2022 on account that they stand to suffer substantial loss and that there is danger of disruptions if the court's orders are effected.
 7. Order 42 rule 6 of the [Civil Procedure Rules](#) upon which the application is premised provides for the circumstances under which an order of stay of execution may be granted. In that respect Order 42 rule 6(2) provides as follows:

“No order for stay of execution shall be made under Sub-rule 1 unless –

 - (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;
 - (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
 8. As to what substantial loss is, it was observed in [James Wangalwa and Another v Agnes Naliaka Cheseto](#) (2012) eKLR as follows:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss under Order 42 rule 6 of the [Civil Procedure Rules](#). This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in



the appeal. ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

9. In the instant matter before me, the six applicants aver at paragraphs 3 to 6 of the supporting affidavit of Jackson Gachungu Ruichiria as follows:
 3. That we may suffer substantial loss if we are not granted stay of execution pending our appeal;
 4. That there is a danger of disruptions for we have extensively developed our respective portions of the land as allocated to us all these tens of calendar years;
 5. That I believe we have a good appeal since I personally redeemed the land from an auction over an unpaid loan and I paid the said loan single handedly, and we just want the setting aside and joinder into the suit; and
 6. That the appeal if successful, would be rendered nugatory.
10. It was not clear to me from a perusal of the said supporting affidavit the nature of loss that the applicants stand to suffer. I did not think it was sufficient for the applicants to merely state that they may suffer substantial loss and that they had extensively developed their portions of the land without explaining the nature of the loss and the developments they have made on the suit land. The applicants ought to have established other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essence of the appeal if the same were successful.
11. In the circumstances of this case where judgment was rendered in favour of the plaintiff against the applicant’s husband and/or father some four (4) years before the applicants sought to set aside the same, it was apparent that the application before me was geared towards frustrating the plaintiff from enjoying the fruits of her judgment.
12. In the premises, I was not persuaded that there is any merit in the motion dated August 18, 2022. I dismiss the same with costs to the plaintiff/respondent.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 2ND DAY OF FEBRUARY, 2023.**

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendant

Court assistant - Kendi

J. O. OLOLA

JUDGE

