



Kiugi (Suing as the legal representative of the Estate of David Kiugi Ncebere) v Kimathi (Suing as the legal representative of the Estate of M'Magiri Kamurani) & 3 others (Environment and Land Appeal E029 of 2023) [2023] KEELC 17932 (KLR) (5 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17932 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E029 OF 2023**

CK NZILI, J

JUNE 5, 2023

BETWEEN

MARY KIUGI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DAVID KIUGI NCEBERE) APPELLANT

AND

STEPHEN KIMATHI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M'MAGIRI KAMURANI) 1ST RESPONDENT

JULIUS MURIUNGI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M'MAGIRI KAMURANI) 2ND RESPONDENT

THE LAND REGISTRAR IMENTI NORTH DISTRICT 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. The application for determination is dated 31.5.2023. The applicant is seeking for; review the orders of injunction restraining the applicants from accessing the suit land and instead substitute with an order that restrains the applicant from accessing 0.16 ha of LR Kiirua/Ruiri/1502 hearing and determination of the application dated 4.5.2023; the court to arrest its ruling for 19.7.2023; order for a visit of the suit land; issue a temporary injunction restraining the applicants from trespassing, interfering with, entering into or interfering within the applicant's occupation and developments on 0.65 ha of the suit land, pending the determination of the two applications and the appeal.
2. Grounds in support of the motion are on the face of the application and further grounds in the affidavit sworn by Stephen Kimathi on the even date. He alleged that they have been in possession and occupation of 0.65 ha and the appellants 0.16 ha of the suit land; the appellants were restrained from trespassing into the suit land in Meru CMC ELC No. 80/2019, there is no appeal against the said



- order; their crops will be wasted; the appellant hired goons who evicted them, destroyed the crops and demolished their house. The order of 10.5.2023 amounts to sanctioning the eviction without them being heard.
3. Further, the appellant had bought the 0.16 ha of the suit land from their father; the appellant's late husband fraudulently had the entire suit land transferred to him. He attached the order issued on 29.8.2019, pictures of the damaged order issued on 29.8.2019, pictures of the damaged order issued on 10.5.2023, sale agreement P & A41 grant of letters of administration, a copy of the register and a letter dated 19.5.2023 as annexure marked "SK 1-7".
 4. When the matter came up for an inter-parties hearing on 5.6.2023, parties were granted leave to put in replies and written submissions. Only the appellant/respondent opposed vide an affidavit sworn by Mary Kiugi dated 5.6.2023. She averred that the application was full of lies that the applicant has not been in possession of the suit land; that she has been in actual occupation and possession of the entire suit land measuring 0.81 ha as decreed in Meru CM ELC No. 80/2019 that ordered her to vacate 0.16 ha of the suit land within 90 days thereof, the applicant resides in Nanyuki, a stay was granted by this court for the lower court decree; the application is an appeal of this courts own orders of 10.5.2023; he should file an appeal and not try to have the orders vacated; all the developments & crops on the suit land belonged to her. That the applicant is seeking an illegal eviction before the appeal, the demolitions were by the applicant out of frustration; he is seeking to have the inhibition orders at the lower court lifted; the lower court application is due for ruling on 8.6.2023.
 5. That further, the court to stay proceeding in the trial court, the application is premised on the wrong provisions of the law; that the application is incompetent and fatally defective, full of misrepresentations factually and legally baseless to hoodwink the court into granting underserved orders; the applicant has committed perjury. The application will suffer no prejudice. She annexed a copy of the decree of 30.3.2023, a copy of the order and a copy of the notice of motion dated 19.4.2023 and a replying affidavit dated 18.5.2023 as annexed marked MK -1-3b respectively.
 6. In *Felista Chamaiyo Sosten v Samson Mutai* (2013) eKLR the court held that order 40 rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal, since when the court granted the orders it must have considered why it was necessary to grant the same.
 7. The exercising discretion the court has to have proof that the injunction was obtained through the concealment of facts there has been a radical change of circumstances and that the conduct of the holder of injunction is that the court should be impelled to discharge the injunction and lastly that there must be proof that the sustenance of the injunctions would cause an injustice.
 8. Applying the foregoing guiding principles to the instant application, there is no evidence that the applicant had concealed material facts secondly the applicant had participated in the application. Thirdly there is no evidence that circumstances have changed and fourthly no evidence has been tendered that there would be injustice to the applicant if the injunction is sustained.
 9. Consequently, I find no merits to issue any interim orders at this stage. The application shall be determined alongside the one due for ruling on 19.7.2023 for the avoidance of doubt there was no order issued in the nature of eviction against the applicant herein. Additionally, since the court stayed the execution of the lower court decree and good order would have required that both parties pend the application dated 19.4.2023 before the trial court. The lower court ruling shall stand stayed until the ruling on 19.7.2023.

Orders accordingly.



**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 5TH DAY OF JUNE 2023**

In presence of

C.A John Paul

Thangicia for applicant

Muhtomi Njeru for respondent

HON. CK NZILI

ELC JUDGE

