



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gitongu v Mbuci & another (Environment and Land Appeal  
E037 of 2022) [2023] KEELC 20591 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20591 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL E037 OF 2022**

**JM MUTUNGI, J  
OCTOBER 12, 2023**

**BETWEEN**

**DANIEL WAMUGUNDA GITONGU ..... APPELLANT**

**AND**

**POLINE WAWERU MBUCI ..... 1<sup>ST</sup> RESPONDENT**

**JOHN KARURI GITHINJI ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from the Ruling of the Magistrate’s Court at Wang’uru (Hon.  
P.M. Mugure) dated 21st November 2022 in ELC Case Number E098 of 2021)*

**RULING**

1. This Ruling emanates from the application by the Appellant seeking for orders of stay pending the determination of an Appeal from the Ruling of the Magistrate’s Court at Wang’uru (Hon. P.M. Mugure) dated 21<sup>st</sup> November 2022 in ELC Case Number E098 of 2021.
2. In the application, the Appellant seeks for orders; that status quo be maintained, and an order restraining the Respondents from interfering with the quiet possession of Rice Holding Number 3672 B Wamumu Section Unit W 6 (“the suit property”).
3. The application in the Lower Court that gave rise to the Ruling by Hon. Mugure was an application by the Interested Party (now the 2<sup>nd</sup> Respondent) for orders that he be joined as an Interested Party and the joinder of National Irrigation Board (NIB) as the 2<sup>nd</sup> Defendant and for orders that the consent Judgment dated 20.11.2021 be set aside. In her Ruling, Hon. Mugure P.M granted the said orders.
4. The Applicant contended that the hearing in the Magistrate Court was due to take place on February 6<sup>th</sup>, 2023 and if no stay was granted by this Court before the said date, the hearing would proceed in the Magistrate Court and the Appeal against the Ruling of Hon. Mugure P.M will be rendered futile.



5. To enable all the parties, crystalize their positions the Court considered the application and directed the Appellant to serve the Respondents. The Respondents filed and served their responses.
6. In order for the Applicant to succeed in an application of this nature, the Applicant would be required to firstly, that the pending Appeal is arguable, is not frivolous, and, secondly, that if the stay of proceedings is not granted the Appeal when ultimately heard would be a futile exercise.
7. It is not in dispute that the Applicant in the present application, Mr. David Wamugunda Gatongu, is the registered owner of the suit property. It is not also in dispute that the registration of the Applicant was done pursuant to the consent Judgment dated 20<sup>th</sup> November 2021, entered between the Applicant and the 1<sup>st</sup> Respondent.
8. The Applicant alleges that there was a looming imminent danger of malicious and malevolent execution process of the impugned Ruling, that would dispossess him of his rights over the suit land.
9. The Applicant further contends that these actions by the Respondents were being done in complete disregard of the Applicants right to be accorded a fair trial and that the continuation of the fraudulent attempts by the Respondents to change ownership of the land, would result in the alienation of the suit property and the suit pending before the subordinate Court would be rendered nugatory unless stay of execution of the Ruling and observance of status quo was granted.
10. His application is predicated upon the provisions of Articles 48, 50 & 159 2 (d) of *the Constitution* of Kenya, Section 1A, 1B, 3A & 63 (e) of the *Civil Procedure Act*, Order 11 Rule 3, Order 40, Order 46 and Order 51 of the *Civil Procedure Rules*, Section 13, 16A, 18 & 19 of the *Environment and Land Court Act*.
11. The Respondents contend that despite the Court directing that status quo of the suit land be maintained, the Appellant went ahead to sell the suit property to other third parties vide a sale agreement dated 22<sup>nd</sup> September 2022. The Respondents further contend that the applicant approached this Court with unclean hands given that there was an ongoing suit in the lower court which sought to determine the legal ownership of the suit property.
12. In addition, the Respondents further contend that the Appellant had sold the suit property to 3<sup>rd</sup> parties contrary to the orders issued by the Lower Court for maintaining status quo.
13. The Respondent further contend that the applicant acquired the license card fraudulently and, in that case, a good title did not pass.
14. In the instant matters, it is not for this Court in this type of application to go too deeply into the merits of the pending appeal and/or the case before the Lower Court as doing so may prejudice the Court at the hearing of the Appeal. The Court is merely required to consider the grounds of Appeal and determine whether the Appeal is arguable and/or it is frivolous and whether any intervention is necessary at the present stage.
15. The Applicant filed a Memorandum of Appeal dated 16<sup>th</sup> December, 2022 raising 18 grounds of Appeal for consideration by the Court. I have gone through the Memorandum of Appeal and am satisfied that the grounds raise an arguable appeal that is not frivolous.
16. On the second issue whether the Appeal would be rendered nugatory, the Applicant submitted that allowing the joinder of the 2<sup>nd</sup> Respondent and the setting aside of the consent Judgment would render the Appeal nugatory as the same formed the fulcrum of the Appeal herein.



17. On their part, the Respondents submitted that Order 42 Rule 6 of the *Civil Procedure Rules* (CPR) provided the conditions for granting stay and it was their position that the Applicant had not satisfied the same. The Respondents submitted that the said rule required that an Applicant must satisfy that substantial loss may be suffered by the Applicant if the orders sought are not granted, which the Applicant had failed to demonstrate.
18. According to the Respondents, the applicant had not and could not demonstrate the substantial loss that he would suffer given that he had no title over the land, following his transfer of the title to 3<sup>rd</sup> parties contrary to the Lower Court's order.
19. Stay pending appeal may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay the Court should be conscious of the need to do Justice having regard to the overriding objective stipulated in Sections 1A and 1B of the *Civil Procedure Act*. The Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation and application of any of its provisions.
20. Section 1A(2) of the *Civil Procedure Act* provides that "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under Section 1B the application of the overriding objective principle is intended to achieve "the interalia just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties."
21. As to what constitutes substantial loss the Court in the Case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, observed 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. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. 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."
22. In the instant matter, the applicant's main concern is that if the stay pending appeal is not granted, the subject matter of the suit will have been extinguished and/or be conveyed to unknown persons.
23. The 2<sup>nd</sup> Respondent disagrees with the Applicant and has annexed to his Replying Affidavit a sale agreement of the suit property marked as JKG/4 between the applicant, Daniel Wamugunda Gatongu and Bancy Njoki Wachira and Nancy Wanjiku Munene (3<sup>rd</sup> parties), that is dated 22<sup>nd</sup> September 2022 to demonstrate that it was infact the Applicant who was in the process of selling the suit property in blatant disregard of the lower court order issued on 13.06.2022, for status quo to be maintained. The record indeed shows that there was an order that the parties maintain the status quo prevailing on 13/6/2022 and it is not evident that this order was varied and/or discharged.
24. As per the agreement between the applicant and the 3<sup>rd</sup> parties, Kenya Shillings Nine Hundred Thousand (Kshs. 900,000) has already been paid to the applicant as the deposit of the purchase price. The Applicant in entering into the sale transaction could not have been acting in good faith when



he was aware there was an ongoing suit involving the suit property that was pending hearing and determination by the Court.

25. It is not discernable how joinder of the 2<sup>nd</sup> Respondent in the lower court and the setting aside of the consent Judgment would result to change the current ownership status of the suit property, considering the fact that there is in force an order for status quo to be maintained, issued by that Court.
26. Upon evaluation and analysis of the grounds in support of the application and in opposition I am not satisfied that the Appellant's appeal would be rendered nugatory if stay of the Lower Court proceedings is not granted. Even if the Lower Court hearing was to proceed and a Judgment rendered, if any party to the proceedings were to be aggrieved and/or dissatisfied with the Judgment, a right of Appeal is available as of right. I am not in the premises satisfied that the Applicant has demonstrated the substantial loss that he stands to suffer if stay of the proceedings before the Lower Court was not granted.
27. The upshot is that I find the Applicant's Notice of Motion dated 18<sup>th</sup> January 2023 to be devoid of merit and the same is ordered dismissed with costs to the Respondents.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 12<sup>TH</sup> DAY OF OCTOBER 2023.**

**J. M. MUTUNGI**

**JUDGE**

