



**Muriithi & 7 others v Njeru (Environment and Land Appeal  
18 of 2020) [2023] KEELC 22587 (KLR) (7 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22587 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL 18 OF 2020  
A KANIARU, J  
NOVEMBER 7, 2023**

**BETWEEN**

**ROBERT MURIITHI ..... 1<sup>ST</sup> APPELLANT  
MARGARET WANJA NYAGA ..... 2<sup>ND</sup> APPELLANT  
DOROTHY KARIMI NJURA ..... 3<sup>RD</sup> APPELLANT  
JANE NJERI NYAGA ..... 4<sup>TH</sup> APPELLANT  
NANCY KARIMI NYAGA ..... 5<sup>TH</sup> APPELLANT  
SARAH RUGURU NYAGA ..... 6<sup>TH</sup> APPELLANT  
LYDIA MUTHONI NYAGA ..... 7<sup>TH</sup> APPELLANT  
CHRISTOPHER NDWIGA NYAGA ..... 8<sup>TH</sup> APPELLANT**

**AND**

**CATHERINE MUTHONI NJERU ..... RESPONDENT**

**RULING**

1. The application before me for determination is a Notice of Motion dated 30.06.2021 filed in court on the same date and brought under a Certificate of Urgency. It is expressed to be brought under Section 3A of the *Civil Procedure Act*, Order 42 rule 4 of the *Civil Procedure Rules*, and all enabling laws. The applicants – Robert Muriithi Nyaga & 7 Others – were the Plaintiff's in the lower court suit and are the Appellants in this court now while the respondent – Catherine Muthoni Njeru – was the Defendant in the lower court matter and now the Respondent in this appeal. It is an application for stay of execution and some restraining orders and the prayers sought are as follows:

1. Spent



2. Spent
  3. Spent
  4. Spent
  5. That the Respondent either by herself, her Agents or any other person, or third party that she may have transferred land parcel No. Kagaari/Kanja/8619, their agents or servants be restrained from selling, transferring, charging, alienating, leasing or in any way dealing with this land pending the hearing of this appeal.
  6. That the Respondent either by herself, her Agents or any other person, or third party that she may have transferred land parcel No. Kagaari/Kanja/8619, their agents or servants be restrained from evicting, and or interfering with the Appellants peaceful occupation of the said land pending the hearing of this appeal.
  7. That the judgement delivered on the 18<sup>th</sup> day of December 2020 in ELC Case No. 28 of 2019 (*Robert Muriithi Nyaga & 7 others v Catherine Muthoni Njeru*) and all consequential orders arising out of the said judgement be stayed pending the hearing of this Appeal.
  8. That the costs of this application be provided for.
2. The application is premised on the grounds, *interalia*; that the Applicants, being aggrieved by the lower court judgement dismissing their case, intend to file an appeal herein. That the appeal will be rendered nugatory if the orders sought in the application are not granted as the Respondent, following the lower court judgement, has transferred the suit land herein to her cousin who is in the process of selling the said land to a third party. That the Appeal involves family land where the Applicants together with their families live and that they have no alternative land elsewhere in Kenya.
  3. The application came with a supporting affidavit deponed to by the 7<sup>th</sup> Appellant/Applicant on behalf of the other Applicants. She depones that they have filed an appeal, prepared the record of appeal, and that the same is ready for hearing. She further reiterates the grounds set out in the Application and urges the court that the land parcel no. Kagaari/Kanja/8619, which is the subject matter of this appeal, is family land and unless orders of stay and conservation of the land are issued, the appeal shall be rendered nugatory.
  4. The application was responded to *vide* a replying affidavit dated 16.09.2021 and filed on 17.09.2021. The affidavit was sworn by the Respondent who deposed, *interalia*; that the judgement the Applicants are seeking to stay simply dismissed their suit and that there were no specific orders capable of being executed. That the decree arising out of the said judgement was a negative order or a dismissal order which is not capable of being stayed and that there is nothing to stay as the Applicants had no counterclaim. She depones further that the Applicants had filed a similar application in the lower court which was dismissed with costs. Further, she depones that the suit land herein has never been family land and denies that there are any eviction proceedings against the Applicants or the allegation that the land has been transferred to another party.
  5. The Applicants filed a Further Supporting affidavit on 13.10.2021 sworn by the same Applicant, meaning the 7<sup>th</sup> Applicant, in response to the Replying Affidavit where she mainly reiterated the contents of her Supporting Affidavit.
  6. The application was canvassed through written submissions. The Applicant's submissions were filed on 03.02.2023. In their submissions, they were of the position that their appeal raises fair, just, and arguable grounds of appeal and that the appeal has overwhelming chances of success. They urge that



the only way to protect the subject matter of this Appeal, being land Parcel No. Kagaari/Kanja/8619, is by issuing orders of stay pending hearing and determination of the Appeal.

7. The Respondent's submissions were filed on 07.02.2023. According to the Respondent, the Applicants have not clearly and expressly stated which Ruling or Judgement they want to set aside or appeal against and urge that the appeal be dismissed on this ground alone. However, I have looked at the Memorandum of Appeal filed herein and to me there is a proper description of the judgement being appealed against. I do not therefore understand on what basis the Respondent is making this allegation. Nevertheless, the Respondent gave an outline of the history of the case in her submissions and went on to submit that the trial court considered all the evidence produced by the Applicants and came to a conclusion that the suit land was not family land and that the same was not being held in trust for the family. She says that the grant that gave her the suit land was not revoked and is therefore still valid. She then admits that after the judgement was delivered, the Applicants did not apply for stay of execution. Therefore she fully executed the decree and disposed of the suit land. She urges the court to protect her and her children as they are vulnerable, with her being a widow, and that the Applicants are only after taking the suit land which she inherited from her late husband.
8. I have considered the Notice of Motion as filed, the Respondent's Replying affidavit, and the rival submissions. I find that two issues are for determination;
  - i. Whether the Applicants are entitled to restraining orders;
  - ii. Whether the applicants are entitled to an order for stay of execution.
9. On the first issue of whether the Applicants are entitled to restraining orders the guiding principles in handling this application are the principles laid down in the case of *Giella v Cassman Brown Co Ltd* (1973) 358 that the Applicant must establish a *prima facie* case with a probability of success; that an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages, and that when the court is in doubt, it will decide the application on a balance of probabilities. I appreciate that while Giella's case (*Supra*) envisages a suit of first instance, what is before me is not such a suit but an appeal. I think I need therefore to consider whether the appeal filed has a probability of success.
10. On whether the Applicants have established a *prima facie* appeal with probability of success. I will here equate a *prima facie* appeal with a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in *Mrao Ltd v First American Bank Kenya Ltd & 2 Others* [2003] eKLR as follows:

“A *prima facie* case in a civil Application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
11. It is not in dispute that the suit land is registered in the name of the Respondent. The Applicants also claim ownership to the land as they believe it is family land that was held in trust for them by their brother, the deceased husband to the Respondent. They also claim to have resided on the suit land for over 60 years to date. The main issue in contention between the parties is clearly ownership. Although the Applicants are not the registered owners of the suit land, it is clear from the pleadings and annexures that they may or possibly have a legitimate claim of the suit land. On the basis of the material that is on record, I find that the Applicants have established a *prima facie* appeal with some probability of success.
12. As regards the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by award of damages. The Court of Appeal in [\*Nguruman Limited v Bonde Nielsen &\*](#)



2 Others (2014) eKLR as cited in Isaac Musyoki Komoni v Sammy Kaumbulu Mbuvi [2022] eKLR held that: -

“On the second factor, the Applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no stand by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.”

13. The Applicants claim that since the Respondent is registered owner of the suit property, she may attempt to or has even sold the suit land to another party and this puts them at the risk of being evicted. They also claim that the Respondent has started evicting them and their families, destroying all their farm produce and left them completely homeless, all with the intention of defeating the appeal and claim for the family land. The Respondent has also confirmed that she has sold the suit land to another party and this to me gives the Applicants a legitimate fear of being evicted. The land may be disposed of to other parties therefore making the process of recovery very difficult. I find that the Applicants stand to suffer irreparable harm that cannot be compensated by way of damages if the suit property is transferred to third parties.
14. On the issue of balance of convenience, the court has to weigh the hardship to be borne by the Applicants by refusing to grant the restraining orders, against the hardship to be borne by the Respondent by granting the same. Looking at the evidence presented by the parties herein, I find that if the suit property is not preserved, it may be dissipated or wasted away. On the issue of balance of convenience, I find that it tilts in favour of maintaining the status quo on the suit property.
15. On the issue of stay of execution of the judgement delivered on the 8<sup>th</sup> day of December 2020 in ELC Case No. 28 of 2019 (*Robert Muriithi Nyaga & 7 others v Catherine Muthoni Njeru*). As submitted by the Respondents the judgement resulted in dismissal of the suit against the Applicants seeking declaration of the suit land, being Kagaari/Kanja/8619, as family or clan land. In the judgement the court did not give a positive command that need to be stayed. Therefore there is nothing to be stayed.
16. In light of the foregoing, I allow the notice of motion application dated 30.06.2021 in part in terms of prayers (5) and (6) and direct that status quo be maintained in terms of these two prayers pending the hearing and determination of the Appeal. Prayer no (7) is however dismissed.
17. Costs in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2023.**

In the presence of Respondent and Leadys – Court Assistant

**A.K. KANIARU**

**JUDGE**

**07. 11.2023**

