



**Njoroge & 2 others v Kagika & 6 others (Civil Appeal (Application)
E243 of 2023) [2025] KECA 164 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KECA 164 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E243 OF 2023
SG KAIRU, F TUIYOTT & PM GACHOKA, JJA
FEBRUARY 7, 2025**

BETWEEN

**MOSES CLEMENT MUHIA NJOROGE 1ST APPLICANT
JACINTA NYAMBURA MBURU 2ND APPLICANT
JAMES NDUNG’U KINYANJUI 3RD APPLICANT**

AND

**JOSEPH GATHAGU KAGIKA 1ST RESPONDENT
JANE WAITHERA LESALOI 2ND RESPONDENT
ANDRIAN MURIITHI 3RD RESPONDENT
JOHN GITAU KIOI 4TH RESPONDENT
THE DISTRICT LAND SURVEYOR, KAJIADO 5TH RESPONDENT
DISTRICT LAND REGISTRAR, KAJIADO 6TH RESPONDENT
LEPASO OLE KIKARDE 7TH RESPONDENT**

(An application for stay of execution of the Judgment and Decree and all consequential orders arising therefrom pending the hearing and determination of an appeal arising from the Environment and Land Court at Kajiado (Gicheru, J.) delivered on 2nd November 2022 in Kajiado ELC No. 743 of 2017 Formerly Nairobi ELC No. 513 of 2013)

RULING

1. Determining the stay application dated 25th January, 2024 should have been straightforward but has not because the affidavits before us do not seem to tell the whole story. A frustration we expressed at the plenary hearing.



2. This appeal challenges the decision of Hon. M.N. Gicheru, J, delivered on 2nd November 2022 in Kajiado Environment and Land Court (ELC) No. 743 of 2017. In dispute was the legitimacy of land titles described as Ngong/Ngong/59355, 59356 and 59372, supposedly resulting from the subdivision of LR. Ngong/Ngong/48197. The crux of that decision is that the three titles were irregular and should be cancelled, and directed the Land Registrar to cancel those titles which were in the hands of the three applicants before us. A further order was that the three applicants be evicted from areas they occupy which encroach on land belonging to Adrian Muriithi (the 3rd respondent herein).
3. Now before us, the applicants seek stay of that decision pending the hearing and determination of this appeal. In support of the application is the affidavit of Moses Clement Muhia Njoroge (the 1st applicant) sworn on 25th January 2024. He narrates that the 2nd, 3rd and 4th respondents have commenced execution of the decree by approaching the 5th and 6th respondents seeking cancellation of the impugned titles and re-survey of the parent title. Running into difficulties they have through, notices of motion dated 18th September 2023 and 19th September 2023, sought the intervention of the superior court by requiring the Deputy Registrar to sign the relevant instruments for transferring the impugned title to 2nd, 3rd and 4th respondents; the applications were scheduled for ruling on 19th February 2024, a date past at the time of hearing of the application; the 2nd, 3rd and 4th respondents have destroyed the perimeter fence, all the crops and other developments on the applicants' parcel of land. The applicants aver that these actions will render the intended appeal, which is arguable, nugatory.
4. In response, the 3rd respondent states that the appeal has no chance of success and that the applicants are not in physical or actual possession of the property. We are urged to balance the interests of the applicants seeking to preserve the status quo against he who seeks to enjoy the fruits of his judgment.
5. Another affidavit is that of Elizabeth Wambui Gitau sworn on 7th May 2024. She claims to be an interested party in the proceedings giving rise to this appeal. Vide a substitution order, she was made a 2nd plaintiff in ELC No. 118 of 2018 where the 3rd respondent was the plaintiff. In that suit the plaintiff sought a declaration that the subdivision of LR. Ngong/Ngong/48197 into several plots was unlawful. The suit was therefore in respect of the disputed property in Civil Suit No. 743 of 2017. By directions given on 9th May 2023, M.N. Gicheru, J stated that the court having made a decision in Civil Suit No. 743 of 2017, there was nothing more to decide in ELC No. 118 of 2018.
6. The interested party averred that the learned judge had found that the 2nd to 4th respondents had been in occupation of the suit property for a long time and importantly, judgment has been executed and she continued to use part of the suit land.
7. The principles for the grant of an order of stay by the Court pursuant to Rule 5(2)(b) are well settled. The applicant must demonstrate an arguable appeal. An appeal which even if raising one point, and even if not eventually successful, is worthy of consideration at hearing of the appeal. At this stage we need not go into a detailed discussion into the merits of the appeal lest we embarrass the court that will hear and determine the appeal. A second limb to be satisfied is that the appeal will be rendered nugatory if the stay is not granted.
8. We have considered the application, and responses, read the submissions of the respective parties and reflected on the oral highlights by learned counsel Mr. Njengo for the applicants, learned counsel Mr. Mutitu for the 1st respondent, learned counsel Ms. Kawira for the 3rd respondent and learned counsel Ms. Mwangi holding brief for Ms. Macharia for the 4th respondent.
9. One of the complaints raised by the respondents, upheld by the trial court, is that the applicants acquired the suit properties by way of fraud. It is contended by the applicants that the respondents



did not prove those allegations to the high threshold required in civil claims of higher than a balance of probabilities but not beyond reasonable doubt. (See for example *Koinange & 13 others v Charles Karuga Koinange* [1986] KEHC 3 (KLR)). We are satisfied that this is an argument deserving of interrogation by the Court and the first limb for the grant of stay has been demonstrated.

10. On the nugatory aspect, it was contended by the respondents that the motion had been overtaken by events as the decree had been fully executed. We were meant to understand that the impeached titles had already been cancelled. This was denied by the applicants. As we do not have any evidence of whether or not the titles had already been cancelled, then we take a view that matters be held as they were when we made a status quo order on 8th May 2024, at the time this matter came up for hearing.
11. Regarding possession, it seems clear, from the material before us, that save for the 3rd respondent who was not in occupation of the entire land he claimed, the other respondents were in possession of the land parcels when judgment was passed. We cannot make an order that disturbs this reality. We think, however, that to allow the 3rd respondent permission to evict the applicants from the area they now occupy could prove disruptive enough to render the appeal nugatory.
12. Ultimately, we allow the motion of 25th January 2024 to the extent that:
 - i. There shall be stay of execution of the eviction order issued in favour of the 3rd respondent in respect to the land currently occupied by the applicants.
 - ii. The titles to the land which is the subject matter of the intended suit shall remain as they were at 8th May 2024.
 - iii. The above orders to remain pending the hearing and determination of the intended appeal.
 - iv. Costs of the application shall be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

