



**Mwingirwa v Nkauraru & 2 others (Civil Application
E119 of 2024) [2025] KECA 946 (KLR) (2 May 2025) (Ruling)**

Neutral citation: [2025] KECA 946 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E119 OF 2024
JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA
MAY 2, 2025**

BETWEEN

MBIRITHI JEREMIAH MWINGIRWA APPLICANT

AND

M'MAILUTHA NKAURARU 1ST RESPONDENT

DISTRICT LAND ADJ SECTION – TIGANIA 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

(Being an application for setting aside/vacating of dismissal orders pending an appeal from the judgment of the Environment and Land Court at Meru (L. Mbugua, J.) delivered on 23rd September 2020 in ELC Appeal No. 69 of 2019)

RULING

1. The applicant's Notice of Motion dated 18th November 2024, expressed to be brought under rule 2 of the Court of Appeal Rules, Order 42 rule 6, Order 22 rule 22 & 25 of the Civil Procedure Rules and all other enabling provisions of the law seeks that the Court issues:

“Orders of status quo in that the applicant do remain in occupation of the suit land Kianjai/ Kianjai/1842 pending the hearing and determination of the intended appeal.

And or in the alternative the court grants injunctive orders restraining the 1st respondent from entering, planting or harvesting any crops, changing boundaries, put (sic) any developments or interfering in any way with the suit land until the intended appeal is heard and determined.”

2. It is further sought that “the annexed copy of Memorandum of Appeal be deemed filed.”



3. According to the affidavit in support of the application sworn by Mbirithi Jeremiah Mwingirwa, the applicant: his father-in - law owned parcel No. Kianjai/Kianjai/1842 since 1967 but transferred the same to him in 2018; that to date, the applicant has been cultivating the said parcel of land; that he filed Tigania ELC No. 70 of 2018, seeking injunctive orders and obtained a decree which has never been challenged to date; that the 1st respondent filed ELC Appeal No. 69 of 2019 which was dismissed; that after the dismissal of the appeal, the 1st respondent filed Tigania ELC Case No. 72 of 2021 and obtained judgement in his favour; that being dissatisfied with that judgement, the applicant filed Meru High Court ELC Appeal No. E003 of 2023 in which directions were given on the timelines within which the record of appeal was to be filed; and that his previous firm of advocates indicated to him that the same was filed on 15th July 2024 but on checking, he found that the said record was not uploaded.
4. At this point the affidavit takes a different tangent and adopts the language of the applicant's advocate rather than the applicant himself and deposes verbatim:
 9. That the applicant was upset by the work of the previous advocate's secretary and instructed me.
 10. That I then filed Notice of Change of advocate and started uploading the record which was passed to me by the applicant which he had taken from the previous advocate.
 11. That 18th July 2024 was Thursday and Friday continued with uploading and on Monday it was 22/7/24. That then counsel was not served with Notice of Change until later in the day
 12. That I informed the earlier advocate to proceed on 22/7/2024 so that she could explain to court exactly what was the issue that caused delay.
 13. That she explained that there was a failure in the filing system in their office and also explained the same until the ICT manager of the court assisted us and the record was uploaded.
 14. That then I filed the application dated 25/7/2024 which the court dismissed.
 15. That the appeal was then not heard on merit but dismissed on technicalities rendering the applicant to lose his land which is family land acquired around 1967.
 16. That we are now appealing against dismissal of our application dated 25/7/2024 and for reinstalment of the appeal to be heard on merit.
 17. That the physical record was ready only that the uploading of the record delayed and this was not good reason to dismiss an emotive land matter.
5. The affidavit is then signed off in the name of Mbirithi Jeremiah Mwingirwa, the applicant.
6. In opposition to the application, the 1st respondent swore an affidavit on 29th November 2024, in which it was averred: that the suit land Kianjai/Kianjai/1842 has never been occupied by the applicant but has been the 1st respondent's property which was inherited from the father in 1966; that despite the applicant obtaining an ex parte judgement in 2018, he has never executed it by evicting the 1st respondent from the suit land; that the said judgement is in the process of being reviewed; that the trial court noted the fraudulent manner in which the applicant acquired the land; that the status quo is that it is the 1st respondent and his family which has the use and occupation of the land since 1966; that in ELC Case No. 70 of 2018, what was in dispute was the boundary in contradistinction to Civil Suit No. E072 of 2021 which was in respect of the title to Land Parcel No. Kianjai/Kianjai/1842 and in which the 1st respondent was declared the rightful owner and that the Court should dismiss the application.



7. We heard the application on the Court’s virtual platform on 28th January 2025, when the applicant was represented by learned counsel, Ms Mercy Kaume, learned counsel, Ms Asumah, held brief for Mr Mutembei for the 1st respondent, while learned counsel, Mr Ali Juma, appeared for the 2nd and 3rd respondents. It transpired that only the 1st respondent had filed written submissions.
8. In her brief oral address to the Court, Ms Kaume stated that there is a valid decree which is unchallenged and therefore, the Court should direct the maintenance of status quo. Ms Asumah reiterated that the 1st respondent has never vacated the land despite attempts by the applicant to evict him. Mr Juma did not participate in the matter.
9. We have considered the application and the respective positions adopted by the parties. We deliberately set out the provisions under which the application was brought. It is clear that none of the cited provisions is relevant to the orders sought. While rule 2 of the Rules of this Court does not deal with maintenance of status quo, the provisions of the Civil Procedure Rules cited, similarly do not apply to applications before this Court.

While the Court leans towards determination of matters before it on substantive justice and disregards the technicalities of procedure, sloppily drafted applications and pleadings inspire very little confidence in the administration of justice. The application before us was not only inelegantly drafted, but the affidavit in support itself was very casually drawn. A reading of the supporting affidavit, without recourse to the application, may lead to an assumption that the application was a poor attempt at seeking an extension of time rather than conservatory orders.

10. We have considered the material placed before us, and it is clear that the applicant has not attempted to identify the conditions required for the grant of orders for maintenance of the status quo let alone showing that they have been met. Those conditions are well known, and one does not need any authority to know that in such applications, the applicant needs to satisfy the Court that there is an arguable appeal and that the intended appeal, should it succeed, will be rendered nugatory, absent an order for a stay. See Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR.
11. In any case, it is not clear to us what the status quo is, since the 1st respondent’s position, a position that does not seem to have been seriously challenged, is that he has been in occupation of the suit property, together with his family, since 1966.
12. Consequently, we find no merit in this application which we hereby dismiss with costs.

DATED AND DELIVERED AT NYERI THIS 2ND DAY OF MAY, 2025.

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

