



Behalf) & 3 others v Kamutu & 2 others (Civil Application E064 of 2022) [2024] KECA 1050 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KECA 1050 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E064 OF 2022
J MOHAMMED, LK KIMARU & LK KIMARU, JJA
FEBRUARY 23, 2024**

BETWEEN

**ANTHONY MUNENE GITHUMBA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE GITHUMBA KANYUGI AND ON HIS OWN BEHALF) 1ST APPLICANT
JOHN WACHIRA GITHUMBA 2ND APPLICANT
CLEMENT KARIMI GITHUMBA 3RD APPLICANT
BENSON WANJOHI GITHUMBA AS TRUSTEE FOR THEMSELVES AND OF MARGARET KARUANA GITHUMBA) 4TH APPLICANT**

AND

**CHARITY NYAGUTHII KAMUTU 1ST RESPONDENT
FRANCIS MAINA KAGUCUI 2ND RESPONDENT
ESTHER WANGUI MURIITHI 3RD RESPONDENT**

(Being an application for an order of stay of execution of the Ruling and/order of the Environment and Land Court at Kerugoya (E.C. Cherono, J.) dated 8th July 2022 in ELC Case No. 227 of 2016)

RULING

1. By an application dated 2nd August 2022 filed under a certificate of urgency brought under Rule 5(2) (b) of the *Court of Appeal Rules* the applicants seek orders of stay of execution of the ruling/orders dated 8th July 2022 issued in Kerugoya ELC Case No. 227 of 2016.
2. The application is predicated on grounds that the ruling in question is unconstitutional for introducing a new cause of action and determining the same without hearing the parties, and that if



- the ruling is executed, the appeal may be rendered nugatory. It is supported by the affidavit sworn by Anthony Munene Githumba on even date, sworn on his behalf and on behalf of the other applicants.
3. We have read the said affidavit and the annexures thereto. Bearing in mind that this is an application for stay orders of a specific ruling, we shall confine ourselves to the said ruling and avoid delving into any materials filed in this application that impact on either the judgment itself, or the other applications referred to in the parties' affidavits.
 4. The application giving rise to the said ruling is the one dated 16th December 2021, which in the main, sought an order for review of the judgment that had earlier been in ELC Case No. 227 of 2016).
 5. In the replying affidavit sworn by Charity Nyaguthii Kamutu on 16th August 2022 in opposition to the application, Nyaguthi deposes that the intended appeal is not arguable. She deposes that the applicants did not file any appeal against the judgment itself and so the finding that they are entitled to about one acre of the land that they have lived on for more than 40 years has not been challenged.
 6. She says that the land is not going to change its form as they have been in possession of the said plot for over 40 years and there is no threat of them invading the land occupied by the applicants. In addition, the respondents aver that the applicants have not demonstrated arguability of their appeal and they have not shown what prejudice they stand to suffer if the application is dismissed. Conversely, the respondents say they will suffer prejudice as they will not be in a position to develop their land or repair their dilapidated houses.
 7. In a further affidavit sworn on 18th August 2022, Anthony Munene Githumba deposes that they indeed filed an appeal against the judgment itself, contrary to what was deposed by the respondent.
 8. We have considered the application, the rival affidavits, submissions and the applicable law. We remind ourselves that we are not dealing with the appeal itself, and we must, as stated earlier, confine ourselves to whether the appeal against the review of the judgment is arguable, and if so whether if the stay order sought is not granted, the appeal, was it to succeed, will be rendered nugatory.
 9. In order for this application to succeed, the applicants need to demonstrate that they have an arguable appeal, and further that the said appeal will be rendered nugatory absent the stay orders sought.
 10. In *NIC Bank Ltd & 2 Others -vs- Mombasa Water Products Ltd* [2021]eKLR, this Court held thus:

“On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court...

On the nugatory aspect, which is whether the appeal, should it succeed would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* (supra) this Court stated that:

 - ix) ...
 - (x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved...”
 11. On the question of arguability, the applicants urge that the land had been subdivided three years before the suit was filed and this fact ought to have been availed to the respondents herein. Hence as the information could have been obtained with due diligence, then the orders for review ought not to



have been granted. The respondent maintains that the said information was not available and the land registry did not give them that information even after conducting several searches.

12. Those are issues that will be urged at the hearing of the appeal. We are prepared to find that point arguable. The application, therefore, passes the first test on arguability.
13. However, the applicants have to go a step further and demonstrate that if the stay is not granted they will suffer irreparable damage and their appeal will be rendered moot.
14. In our view, the respondents are still occupying the portion they were awarded by the court. There is no claim that they have invaded any part that they had not occupied before. In any event, although we are informed that an appeal was filed against the said judgment, there are no orders of stay granted by any court against it.
15. Secondly, as submitted by the respondents, the only thing that can change is the documentation at the Lands Office, if they are given title documents. In the event the appeal succeeds, entries made in favour of the respondents at the Land Register in respect of title to the suit parcel of land can be reversed. The appeal would not therefore be rendered nugatory.
16. We are not persuaded that the applicants have demonstrated the 2nd limb on the nugatory aspect.
17. Accordingly, we hold that this application fails to meet the required threshold. The application is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

