



Njuguna v US Jamhuri Commercial Centre Welfare Association & 5 others (Civil Application E268 of 2023) [2024] KECA 166 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KECA 166 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E268 OF 2023
P NYAMWEYA, A ALI-ARONI & PM GACHOKA, JJA
FEBRUARY 23, 2024**

BETWEEN

MORIS MWIRIGI NJUGUNA APPLICANT

AND

**US JAMHURI COMMERCIAL CENTRE WELFARE ASSOCIATION ... 1ST
RESPONDENT**

THE HON ATTORNEY GENERAL 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

CHIEF LAND REGISTRAR, NAIROBI 4TH RESPONDENT

NAIROBI METROPOLITAN SERVICES 5TH RESPONDENT

DIRECTOR, PLANNING AND DEVELOPMENT NAIROBI

COUNTY 6TH RESPONDENT

(An application for stay of execution of the judgment of the Environment and Land Court at Nairobi (Oguttu Mboya J.) dated and delivered on 11th May 2023 in Nairobi ELC Petition No. E008 of 2022)

RULING

1. Morris Mwirigi Njuguna, the Applicant herein, is by a Notice of Motion application dated June 15, 2023, seeking orders of stay of execution of the judgment dated and delivered on May 11, 2023 in Nairobi ELC Petition No E008 of 2022 pending the hearing and determination of his intended appeal against the said judgment. The grounds upon which the application is based, are set out therein and in the affidavit sworn on June 15, 2023 in support thereof by the Applicant.



2. The grounds in summary, are that when Jamhuri Commercial Centre Welfare Association, the 1st respondent herein, filed its petition dated March 8, 2022 in Nairobi ELC Petition No E008 of 2022, there was an existing suit between substantially the same parties over the same subject matter being Nairobi ELC Suit No 354 of 2012 - *City Council of Nairobi v Morris Njuguna Mwirigi & Registrar of Titles*, which was determined and dismissed for want of prosecution on July 7, 2022. However, on May 11, 2023, the Environment and Land Court at Nairobi (Oguttu Mboya J.) delivered judgment allowing the 1st respondent's Petition and determining that the Title for LR No Nairobi/ Block 63/787 was invalid in as far as the same was obtained fraudulently, thereby revoking the said title and ordering the Applicant to surrender the said title in 60 days. In addition, that the 1st Respondent was awarded a sum of Kes 1,000,000/- for alleged breach, violation, and infringement of rights and fundamental freedoms of the members of the 1st Respondent, as against the Applicant.
3. The Applicant has raised twenty-six (26) grounds in his memorandum of appeal, revolving around the learned Judge's interpretation and appreciation of the effect and implications of the judgment delivered in HCRA 492 of 2009- [*Morris Njuguna Mwirigi v the Attorney General*](#), a criminal case that involved the suit property and the Applicant, his findings as regards the propriety and legality of the Applicant's title to the suit property, and the legal basis for order to pay damages. The Applicant depones that the Respondents shall not be prejudiced in any way by any of the orders sought, and should the judgment be executed his right of appeal shall effectively be extinguished, as the certificate of title for LR No Nairobi/ Block 63/787 shall be revoked; the eviction from the suit property within 60 days as ordered by the trial Court shall be effected, thus demolishing buildings erected thereon; and he would face a threat of execution of the unreasonable sum of Kes 1,000,000/- awarded to the 1st Respondent. The Applicant annexed copies of his Notice of Appeal dated May 18, 2023 and lodged on May 23, 2023, and of his memorandum of appeal.
4. The 1st respondent in opposing the application filed a replying affidavit sworn on July 6, 2023 by its chairperson, John Mwenda Rutere, who deponed that the appeal did not disclose any reasonable grounds for any arguable case thus frivolous, vexatious, and a waste of the already scarce judicial time. The 1st respondent pleaded that the Applicant had further misconceived and misconstrued the judgment rendered in ELC Petition No E008 of 2022 by implying that the honourable Judge reviewed and set aside the Judgment delivered in HCRA 492 of 2009 - [*Morris Njuguna Mwirigi v the Attorney General*](#). Additionally, the appellate Court found in HCRA 492 of 2009 - [*Morris Njuguna Mwirigi v the Attorney General*](#) that the PDP used to allocate the certificate of title to LR No Nairobi/ Block 63/ 787 was fraudulently procured and obtained, and the Applicant's allegation was orchestrated to mislead and misguide this Court in granting the orders of stay. The 1st Respondent further pleaded that they were not party to Nairobi ELC Suit No 354 of 2012 - *City Council of Nairobi v Morris Njuguna Mwirigi & Registrar of Titles*, which was dismissed for want of prosecution, and did not preclude the 1st Respondent from instituting a petition over the suit property.
5. The 1st Respondent averred that it had suffered and continued to suffer irreparable harm occasioned by unlawful erection of semi-permanent structures by the Applicant on the premise leading to poor sanitation, deplorable drainage and waste management and continued deprivation of the right to property and its enjoyment and violation of the constitutional rights of the members of the 1st respondent. In addition, that the applicant's allegation that he would be deprived of his proprietary interest over property LR No Nairobi/ Block 63/787 was baseless as the same property was and remained a public utility as determined in ELC Petition No E008 of 2022, and the Applicant could not lose proprietary rights which were illegally and /or fraudulently acquired. In any event, if the appeal succeeded the Applicant's proprietary rights of LR No Nairobi/ Block 63/787 would be restored. The 1st respondent urged that it was in the interest of justice that the application seeking stay orders be



dismissed in its entirety, and it is allowed to enjoy the fruits of its judgment. In the alternative and without prejudice, they plead that the Applicant be ordered to deposit a sum of Kes 1,000,000/- with the Court as security of costs.

6. The application was heard on this Court's virtual platform on November 15, 2023. Learned counsel Mr. Muriithi holding brief for learned counsel Mr. Kingori, appeared for the Applicant, while learned counsel Ms. Mango appeared for the 1st Respondent. There was no appearance for nor response filed by the rest of the Respondents, despite their advocates having been duly served with the hearing notice. The learned counsel present highlighted their respective submissions dated July 20, 2023 and July 31, 2023. We note in this respect that both submissions extensively dwelt on the principles that apply in an application of stay of execution made under order 42 rule 6 of the *Civil Procedure Rules*, which are not applicable to grant of a stay of execution by this Court. This was duly pointed out to the counsel during the hearing, and Ms. Mango orally highlighted the averments in the replying affidavit on there being no irreparable harm caused to the applicant, in submitting that the appeal will not be rendered nugatory if the orders of stay are not granted.
7. The applicable principles that apply to the exercise of this Court's discretion to grant an order of stay of execution under rule 5(2)(b) of the *Court of Appeal Rules* are that the Applicant is required to demonstrate firstly, an arguable appeal and secondly, that unless an order of stay is granted the intended appeal will be rendered nugatory. These principles have been restated and amplified by this Court in various decisions and most notably in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
8. We are of the view that the applicant has presented an arguable appeal, bearing in mind that such an appeal is not necessarily one that will succeed, but one that merits consideration by this court. In this respect the Applicant has raised the ground of the legal import and effects of the court decisions on the propriety of his title to the suit property, which is an issue that merits consideration. We are however not persuaded that the intended appeal will be rendered nugatory, for two reasons. Firstly, the orders of the trial court required the Applicant to surrender his title to the suit property on account that it was public property. There is therefore no risk of any irreparable dealings being undertaken on the property, and if the appeal succeeds, the possibility of the property reverting back to the Applicant. Secondly, the loss that may be occasioned in the event of eviction can be recoverable in damages as the Applicant's counsel clarified that structures on the suit property are semi-permanent in nature, and there is the need to balance the respective rights of the parties, in light of the prejudice that is being caused by the structures on the suit property, as averred by the members of the 1st respondent.
9. We accordingly find that the notice of motion application dated June 15, 2023 is not merited, and it is hereby dismissed with costs to the 1st respondent.
10. It is so ordered.

DATED AND DELIVERED NAIROBI THIS 23RD DAY OF FEBRUARY, 2024

P. NYAMWEYA

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JUDGE OF APPEAL

ALI-ARONI

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M. GACHOKA, CIArb, FCIArb



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

