



REPUBLIC OF KENYA



KENYA LAW
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**Njogu & 3 others v Muriuki (Civil Application E390 of 2023)
[2024] KECA 82 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 82 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E390 OF 2023
S OLE KANTAI, F TUIYOT'T & A ALI-ARONI, JJA
FEBRUARY 9, 2024**

BETWEEN

**PURITY WAMBUI NJOGU 1ST APPLICANT
FELICITY NJERI NJOGU 2ND APPLICANT
GRACE GERTRUD MILLER 3RD APPLICANT
REGINA GERTRUD NJOGU 4TH APPLICANT**

AND

CHARLES MUCHIRI MURIUKI RESPONDENT

((Application for stay of execution and proceedings of the ruling and orders of the Environment and Land Court of Kenya at Nairobi (Omange, J.) dated 6th June 2023 in ELC Cause No. E354 of 2022))

RULING

1. In the notice of motion dated August 9, 2023, the Applicants, Purity Wambui Njogu, Felicity Njeri Njogu, Grace Gertrud Miller and Regina Gertrud Njogu seek stay of execution of the ruling of July 6, 2023 by the Environment and Land Court (hereafter 'ELC') in ELC E354 of 2022 and also seek stay of proceedings of the said suit pending inter parties hearing and determination of the current application and intended appeal. The application is brought under rule 1(2), 5 (2) (b), 20 and 47 of the [Court of Appeal Rules](#) and section 3A and 3B of the [Appellate Jurisdiction Act](#) and all other enabling provisions of law.

We set out a brief background of the matter.

2. The plaintiff in the said ELC case was the current respondent herein, Charles Muchiri Kariuki, and is a brother to the late James Evans Njogu (deceased) who passed away sometime in 2014. The deceased is the father to the 1st, 2nd and 3rd applicants and husband to the 4th applicant.



3. The respondent filed an application at the ELC dated November 14, 2022 seeking a temporary injunction against the applicants herein from dealing with the suit property Dagoretti/Kangemi/S.149 and Dagoretti/Kangemi/S.151 in any way, and from interfering with his quiet possession of the same, pending hearing and determination of the suit. He also sought an injunction to stop the current applicants from collecting rental income from the 11 rental houses on the property and an order that he, the respondent, be the one to collect the rental income. Lastly, he sought an order that the Officer Commanding Station, Kangemi police station, assist in enforcement of court orders. The respondent's case was that the suit property was registered in the names of the applicants but the land was family land and he had stayed on the property since 1965 and benefitted from the rental income of the same but the applicants took over the property sometime in June 2022 when they obtained succession documents for his brother's estate without his involvement.
4. The current applicants' position at the ELC was that the property in issue had always belonged to their father (the deceased) since 1959 but their father opened it up to his parents and siblings for their comfort but not with the intention to exchange possession in their favour. They stated that their uncle (the respondent) had been collecting rent without consent.
5. In a ruling delivered by Omange, J on June 6, 2023, the Court held that it was difficult to determine an issue of ownership of the suit properties at the interlocutory stage in view of the competing claims by the rival parties who are family members. The Court ordered that rental income from the properties be deposited in a joint interest earning account within 30 days of the date of the ruling and that the plaintiff's daughter's fees would be paid from that account. The Deputy Registrar of the Court was directed to appoint a mediator to resolve the issues raised by the rival parties.
6. In the Motion before us and in written submissions which the parties' counsel fully adopted at the virtual hearing on October 11, 2023 the applicants fault the ELC for giving orders in favour of the respondent when it had deemed that he had not proved a *prima facie* case. The applicants also take the position that they have no legal obligation to educate the respondent's daughter who had in fact declined an offer of education from the 1st applicant and that the applicants have an arguable appeal which will be rendered nugatory as some of the issues have been determined prematurely by ELC. They also submit that paying the income into a joint account will affect operational issues of the rental properties. They add that the respondent is in occupation of only a portion of the land which he can continue to enjoy in peace even if the application is granted. The applicants also fault the Court for failing to note that they have been managing the property since 2014 when their father died and the respondent had not been collecting rent, save through use of force. The respondent is also said to have failed to tell the Court that he has 5 adult children who support him; the implication being that he does not rely on the property.
7. The respondent filed a replying affidavit sworn on August 18, 2023 and written submissions dated September 13, 2023. The respondent states that he has occupied the land since 1965 and has used the income to educate his children from the properties which belonged to his parents. He submitted that his mother built 7 of the rental houses while the respondent himself built 4 of the houses and he had been managing the property since the year 2000 when his mother died. He submits that the orders of the Court were made using the court's inherent powers in the interest of justice. He states that the appeal would not be rendered nugatory if the application fails, as the applicants can be compensated by damages if their appeal succeeds.
8. We have considered the application and written submissions.
9. For an applicant to succeed in an application of this nature he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not



frivolous. Such an applicant must also demonstrate that the appeal would be rendered nugatory absent stay - See the cases of *Multimedia University & another v Professor Gitile N. Naituli* (2014) eKLR and *Stanley Kangethe Kinyanjui v Tony Ketter & others* [2013] eKLR.

10. In the present application, the Applicants state that they have an arguable appeal as per their Memorandum of Appeal dated August 9, 2023 where they state that the Court erred in granting the prayer for payment of school fees for Michelle Njeri, which prayer had not been sought, and which order has the effect of burdening them with school fees indefinitely. They also intend to argue that they will have trouble with Kenya Revenue Authority if the rent is collected in a joint account. Further, they intend to argue that the Judge erred in law and fact by ordering the suit to be referred to mediation when there was no application to do so. We find these to be arguable points on appeal.
11. What about the nugatory aspect which an applicant must also satisfy to be entitled to the protection accorded by rule 5(2)(b) of our *Rules*? The Judge ordered that contested rental income be deposited in a joint account operated by the parties and that school fees for a school-going member of the family be paid from that account. The rental collection deposited in that account will be available to the person who the Court will eventually find to be entitled to the same after the suit is heard and determined. The appeal would therefore not be rendered nugatory.

The applicant having failed to satisfy the second limb of the principles that apply in an application of this nature, the motion fails and is dismissed. Let each party meet their costs - as they are family members.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

S. ole KANTAI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

