



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge v Maina (Civil Application E491 of 2023)
[2024] KECA 121 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 121 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E491 OF 2023
P NYAMWEYA, JA
FEBRUARY 9, 2024**

BETWEEN

MARGARET NJOKI NJOROGE APPLICANT

AND

ERNEST MUNENE MAINA RESPONDENT

(Being an application for stay of execution pending the intended appeal against the Judgment and Decree of the Environment and Land Court at Nairobi (O. A. Angote, J.) delivered on 28th September 2023 in ELC No. E239 of 2017)

RULING

1. On 27th October 2023, I declined to certify the Applicant's Notice of Motion application dated 24th October 2023 as urgent. By a letter sent to the Registrar of this Court on 2nd November 2023, the learned counsel for the Applicant requested to have the matter placed before a judge for inter partes hearing on the question of urgency, pursuant to Rule 49 (5) of the [Court of Appeal Rules](#) of 2022.
2. The reasons for the urgency are set out in the Applicant's Certificate of Urgency dated 24th October 2023, and the affidavit in support thereof of even date sworn by John Swaka, the advocate having conduct of the matter. In summary, these are *inter alia* that the trial Court delivered its judgement on 28th September 2023 in ELC Case No. 239 of 2017 in favour of the Respondent *inter alia* declaring that the notice issued by the Applicant rescinding the agreement for Sale in respect of L.R No. 4894/479 was illegal and unlawful, granted a permanent injunction against the Applicant restraining her from dealing with the suit property, and further granted the Respondent vacant possession in respect of the suit property, compelling the Applicant to execute the transfer documents of the suit property in favour of the Respondent failure of which the Deputy Registrar was to execute. In addition, that the Applicant intends to appeal the said judgment, and the triable issues in the appeal were outlined in the Certificate of Urgency and supporting affidavit.



3. The Applicant further averred that the suit property is part of the Applicant's matrimonial home, that the Applicant is an elderly woman who has since retired and has no other source of income other than her savings and retirement benefits which have been significantly depleted by the current litigation, and that she is unable to bear the burden of an immediate execution of judgment. These reasons were reiterated in submissions dated 14th November 2023 filed by Swaka Advocates who are on record for the Applicant. Reliance was placed therein on the holding in the cases of *Thika Coffee Mills v Rwama Farmers' Cooperative Society* [2018] eKLR and *New Kenya Co-operative Creameries Ltd v Olga Ouma Adede* [2015] eKLR that the relevant consideration in a certification of urgency is whether there are circumstances that might render the unheard motion an exercise in futility if it is not heard urgently and thus prejudice the applicant in the appeal, and that matters that go to the merits of the pending application do not fall for consideration at this point. It was submitted in this respect that the trial Court granted the Applicant thirty (30) days stay of execution of the judgement which lapsed on 30th October 2023, and time has now started to run for the Applicant to execute the necessary conveyance documents in favour of the Respondent within thirty (30) days as compelled by the trial Court.
4. In response, the Respondent filed a replying affidavit he swore on 10th November 2023, in which he stated that he entered into an agreement for sale dated 4th November 2015 with the Applicant jointly with her husband for sale of a plot that was identified as "B" measuring approximately 0.1006.5 to be excised from Title No. LR No.4894/435 for a consideration of Kshs.14,000,000/=, which was later registered as LR. No.4894/479, and that after he effected payment of the purchase price the Applicant declined to sign the transfer documents. The Respondent detailed the Applicant's conduct during the process of the sale of LR No.4894/479, as well as during the proceedings in ELC Case No. 239 of 2017, in which the Applicant's suit was dismissed for want of prosecution, and judgment delivered in the Respondent's favour allowing his counterclaim.
5. The Respondent further averred that the Applicant never showed any urgency in prosecuting her case in ELC Case No. 237 of 2017; that it is misleading for the Applicant to depose that her matrimonial home is part of the suit property since she has a separate title to the same; and that there is no urgency in the application she has filed, as its intention is to delay and/or deny him the fruits of his judgment. These averments were reiterated in submissions dated 20th November 2023 filed by F.W. Njoroge & Co. Advocates, the Respondent's advocates on record, who cited the decision in *Equip Agencies Limited v Akber Abdullabi Kassam Esmail & 4 Others* [2015] eKLR for the position that the Applicant had not demonstrated any of real, clear and present peril of harm to warrant a certification of urgency, as well as the decision in *John Njue Nyaga v Nicholas Njiru Nyaga & Another* (2013) eKLR, for the submission that the Applicant's conduct is relevant in deciding the urgency in this matter as she has not come to court with clean hands.
6. Learned counsel Mr. Kamau holding brief for Mr. Swaka for the Applicant, and learned counsel Mr. Kathuku Mutua appearing for the Respondent highlighted their respective submissions at the hearing on the question of urgency which was held on 4th December 2023. The Applicant's counsel referred to their letter to the Court dated 16th November 2023 which annexed a draft decree dated 10th November 2023 from the Respondent's advocates, to submit that execution was imminent. I sought Mr. Mutua's confirmation on the status, and the counsel conceded that they did serve the Applicant with the said draft decree.
7. I have considered the submissions on the issue of urgency and I am persuaded that in light of the intervening action of service of the draft decree upon the Applicant, there is now a real and imminent threat of execution that may render the Applicant's pending application an exercise in futility, and which necessitates a review of my earlier order declining to certify the pending application as urgent.



- 8. I accordingly certify the Applicant’s Notice of Motion application dated 24th October 2023 as urgent and direct that it be allocated a priority hearing date by the Registry of the Court.
- 9. Orders accordingly.

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

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY RREGISTRAR

