



REPUBLIC OF KENYA



**Mbuthia v Murithi (Civil Appeal (Application) E123 of 2023)
[2024] KECA 257 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KECA 257 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E123 OF 2023
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
MARCH 8, 2024**

BETWEEN

JOSEPH MBUTHIA APPLICANT

AND

IRENE WANGITHI KINYUA MURITHI RESPONDENT

*(Being an application for a stay of execution from the judgment of the
Environment and Land Court of Kenya at Nanyuki (K. Bor, J.) dated 15th
March 2023 in ELC No. 27 of 2021 (formerly Nyeri ELC Case No. 251 of 2014))*

RULING

1. The applicant, Joseph Mbuthia, was the defendant in the suit filed by the respondent, then plaintiff, at the Environment and Land Court at Nanyuki through a plaint dated 19th March 2013. The respondent was seeking the eviction of the applicant from parcel Laikipia Tigithi Matanya Block 3/1638 (Matanya Centre) (the suit property). She further sought an order of permanent injunction against the applicant. Her case was that she was the registered proprietor of the suit property. She claimed that the applicant had illegally entered into the suit property, fenced it and had begun developing it; this being a property that she had inherited from her late husband, Clement Kinyua Murithi.
2. The applicant opposed the suit, pleading that the respondent's registration as proprietor was fraudulent; that he had been in possession of the suit land since 1990, and had developed the same. His case was that the suit property was the subject of ongoing litigation between him and the deceased husband of the respondent. In a counterclaim, he pleaded that he had adversely acquired the suit property.
3. The dispute was heard through oral evidence of the parties, following which a judgment was rendered on 15th March 2023 allowing the respondent's suit with costs and dismissing the applicant's counterclaim with costs. It was found that the respondent had title which was protected by Sections



- 24, 25 and 26 of the *Land Registration Act*, and that the applicant had failed to prove that he bought the suit property or that he had been in continuous, uninterrupted and exclusive possession of the suit property and that he had acquired it by adverse possession.
4. What is before us is an application for stay of execution of the judgment and decree of the trial court. The application was filed by the applicant under Rules 5(2)(b) and 49 of the *Court of Appeal Rules, 2022* and sections 2, 3A and 3B of the *Appellate Jurisdiction Act* to have the execution of the decree to be stayed pending the hearing and determination of the appeal. The applicant stated that he had an arguable appeal, and that if stay is not granted the appeal, if successful, will be rendered nugatory.
 5. On whether the applicant had an arguable appeal, reference was made to the Memorandum of Appeal in the record of appeal. It has the following six grounds:-
 - “ 1) That the learned Honourable Judge erred in law and facts in her finding that the respondent lawfully obtained registration to Title No. Laikipia Tigithi Matanya Block 3/1638 (Matanya Centre) procedurally in absence of evidence to trace the root of that title.
 2. That the learned Honourable Judge erred in law and facts in her decision that the Appellant’s claim of adverse was yet to crystalize by relying on the appellant’s reference at the Land Dispute Tribunal and the criminal proceedings commenced against him.
 3. That the learned Judge erred in law and in facts in making her inference and determining that the initial registration by the respondent’s late husband and the subsequent registration by the respondent to Title No. Laikipia Tigithi Matanya Block 3/1638 (Matanya Centre) affords them legal protection under sections 24, 25 and 26 of the *Land Registration Act, 2012*.
 4. That the learned Honourable Judge erred in law and facts in her interpretation of the provisions of the *Land Registration Act, 2012* and *Limitation of Actions Act* Cap 22 Laws of Kenya.
 5. That the learned Honourable Judge erred in law and facts in shifting the burden of proof to the appellant and holding that the respondent proved her case on a balance of probability.
 6. That the learned Hon. Judge erred in law and facts in her analysis of the evidence.”
 6. In the written and oral submissions by learned counsel Mr. Mwangi for the applicant, the findings were that the claim to the suit property by adverse possession had not crystalized, and that time had been interrupted by the Land Dispute Tribunal and criminal proceedings, both of which we were urged to find were erroneous. It was considered that the root of the title of the suit property had not been carefully interrogated.
 7. On the question of the appeal being rendered nugatory if the sought orders were not granted, it was submitted that the applicant may be evicted from the suit property; that the judgment decreed that he vacates within 60 days failing which he would be evicted.
 8. Reference was made to the decisions in *Stanley Kangethe Kinyanjui -vs- Tony Keter & 5 Others* [2013]; *Mwangi Gitbu - vs- Livingstone Ndeete* [1980]eKLR, and *Munyu Maina -vs- Hiram Gathiba Maina* [2013]eKLR.



9. The respondent filed a replying affidavit to oppose the application. She contended that the application was in bad faith and without any merit, the only intention being to deny her the fruits of her judgment. She stated that the applicant had not shown that he stood to suffer any substantial loss if stay was not granted; that he had failed to provide security for the due performance of the decree and that, on the other side, she had the means to make any payment if stay is denied and the appeal ultimately succeeds. Learned counsel Mr. Bwonwonga for the respondent did not attend hearing, but filed written submissions in which he sought to demonstrate that the appeal was not arguable. Learned counsel supported the findings by the learned Judge.
10. We are alive to the discretionary power of this Court when dealing with an application for stay pending appeal. This discretion is exercised to do justice to the parties in any given case, care being taken to make sure that the applicant has an arguable appeal and that there is demonstration that if stay is not granted, the appeal will be rendered nugatory in the event that it ultimately succeeds. (*Trust Bank Limited & Another -vs- Investech Bank Limited & 3 Others* [2010]eKLR). On arguability of the appeal, it is enough if there is a single bona fide arguable ground. (See *Stanley Kangethe Kinyanjui -vs- Tony Keter & 5 Others*) (*Supra*). And this is not an appeal that will necessarily succeed. It is enough to show that it is an issue that merits considering by the Court that will ultimately hear and determine the appeal.
11. We have considered the grounds upon which the appeal has been founded. After considering the rival submissions, we are satisfied that the question, for instance, how long the applicant was on the suit property, or the question whether the criminal case and the Land Disputes Tribunal case interrupted time for the purposes of adverse possession, are not mere frivolous questions. The appeal is arguable.
12. On whether the appeal may be rendered nugatory if stay is not granted, we are mindful that the applicant was given 60 days to vacate or he be evicted. His evidence before the trial court was that he had been living on the suit property for 33 years. He had bought the suit property for Kshs.45,000. in 1990 from a shareholder of Matanya Estates Limited. On the other hand, the respondent's evidence was that her late husband had been registered as proprietor in 1999. Upon his death, she became the registered proprietor in 2012. In 2007 she begun the process to evict the applicant by writing a letter and later on filing a criminal case. By 2013 when the suit was filed the applicant was still in the suit property. It is our considered view that, given these facts, the justice of the case requires us to grant stay as there has been demonstration that the appeal may be rendered nugatory if ultimately the applicant were to prove his case. The risk of eviction is real.
13. Consequently, we allow the application and order the stay of execution of the judgment and decree until the appeal is heard and determined. We, however, order that costs do abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

