



REPUBLIC OF KENYA



**Kuya & another v Waruimbo & another (Civil Application
E511 of 2023) [2024] KECA 519 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 519 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E511 OF 2023
SG KAIRU, P NYAMWEYA & GWN MACHARIA, JJA
APRIL 26, 2024**

BETWEEN

TERESIA MUTHONI KUYA 1ST APPLICANT

AGNES WAMBUI KUYA 2ND APPLICANT

AND

STANLEY WAGENDO WARUIMBO 1ST RESPONDENT

JOHN NDUNG’U KAMAU 2ND RESPONDENT

(An application for stay of execution of the orders issued by the Environment and Land Court at Machakos (Nyukuri, J.) on 27th September 2023 in ELC Case No. 50 of 2014)

RULING

1. In their application dated 1st November 2023, the applicants Teresia Muthoni Kuya and Agnes Wambui Kuya, seek an order under Rule 5(2)(b) of this *Court’s Rules*, that pending the hearing and determination of their appeal, there be a stay of execution of the orders issued by the Environment and Land Court (ELC) at Machakos in Machakos ELC Case No. 50 of 2014. In the judgment delivered in that case on 27th September 2023, A. Nyukuri, J. dismissed the applicants’ suit in which they had sought declarations that the property known as LR No. 14812/5 measuring 10.14 hectares (the property) belongs to the estate of Lekina Ole Kuya Noonkileti, deceased; an injunction restraining the respondents from trespassing thereon; and a mandatory injunction compelling the respondents to remove their structures from the property.
2. The applicants, being the administrators of the estate of Lekina Ole Kuya Noonkileti, contended that the property was fraudulently transferred to the 1st respondent by one Moses Kuya ole Kina under a non-existent power of attorney. The 1st respondent on the other hand counterclaimed and sought



declaration that he is the owner of the property known as LR No. 14812/5 measuring 10.14 hectares and parcels resulting from the subdivision thereof.

3. The judge framed the issue whether the 1st respondent fraudulently acquired title to the property and found that the 1st respondent “came on the suit property in 1996 as conceded” by the applicants, that they could not feign ignorance of the power of attorney executed by the deceased in his lifetime, and that it was not until 14th October 2019, over five years later, when the applicants introduced the alleged fraud against the respondent. In the end, while dismissing the applicants’ suit and allowing the 1st respondent’s counterclaim, the ELC in its impugned judgment declared that the property LR No. 14812/5 measuring 10.14 hectares and parcels resulting from the subdivision thereof is the sole property of the 1st respondent. The court also restrained the applicants by injunction from trespassing on the property, and ordered them to remove their structures from the property within 90 days.
4. Aggrieved, the applicants filed a notice of appeal dated 29th September 2023 on which the present application dated 1st November 2023 is hinged.
5. In support of the application, learned counsel Mr. Loki made reference to the affidavit in support thereof, and submitted that the learned judge of the ELC erred in dismissing their suit and failing to uphold their plea that the transfer of the property was fraudulent; that all the documents on the basis of which the transaction in favour of the 1st respondent was concluded including power of attorney and the consent to transfer lead to the conclusion that the transaction was fraudulent from the onset; and that the applicants have been on the property and have homes thereon and if the respondents are not restrained, the applicants will be evicted.
6. Mr. Mutia and Mr. Githui, learned counsel for the 1st and 2nd respondents respectively submitted that the application has no merit; that it is not demonstrated that the intended appeal is arguable and there is no basis for granting the orders sought. Reference was also made to the replying affidavit sworn by the 1st respondent in which it is deposed that the claim that the applicants are likely to lose their homes is contested on the grounds that they are not settled on the property.
7. Mindful of the legal principles applicable in applications of this nature and bearing in mind that an arguable appeal is not one that will necessarily succeed, we are satisfied that the intended appeal is not frivolous. There is for instance the question whether the ELC erred in concluding that the holder of the power of attorney from the deceased had the requisite authority to sell the property.
8. On the nugatory aspect, the applicants deposed in their affidavit in support of the application that “our homes are in the disputed parcel of land and we risk eviction if stay orders are not granted.” The 1st respondent on the other hand in his replying affidavit deposed that the applicants “are not settled in the land the subject of the appeal”. On the face of the conflicting depositions, it was incumbent upon the applicants to present cogent evidence that they are in possession of the property to warrant the grant of the orders sought. As it is the order that commends itself to us, which we hereby make, is to order that the parties do maintain the status quo obtaining on the property LR No. 14812/5 as at the date of delivery of this ruling, so that neither party is at liberty to interfere with the other, pending the hearing and determination of the appeal.
9. Costs of the application shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

