



Makathimo alias Itangata Makathimo v Kimathi & 2 others (Civil Application E001 of 2024) [2024] KECA 763 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KECA 763 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E001 OF 2024
P NYAMWEYA, LK KIMARU & AO MUCHELULE, JJA
JUNE 21, 2024**

BETWEEN

**FRANCIS MBURUGU MAKATHIMO ALIAS ITANGATA
MAKATHIMO APPLICANT**

AND

**GRACE KATHURE KIMATHI 1ST RESPONDENT
PRISCILLA MWARANIA NTHUKU 2ND RESPONDENT
FELICITY MAKATHIMO KAIGONGI 3RD RESPONDENT**

(An application for Stay of Execution of the Judgment and Decree of the Environment and Land Court at Meru (C. K. Nzili J.) dated and delivered on 27th September 2023 in Meru ELC Appeal No. E020 of 2022 arising from the Judgment in Meru Chief Magistrate Court (Hon. J.M. Njoroge CM) dated 20th April 2022 in Meru CMCC No. E015 of 2020)

RULING

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1. Francis Mburugu Makathimo alias Itangata Makathimo, (hereinafter “the Applicant”), has lodged an application in this Court by way of a Notice of Motion dated 10th January 2024, in which he seeks an order of stay of execution of the judgment and decree made and delivered in Meru CM ELC No. E015 of 2020 and affirmed by the Environment and Land Court in Meru ELC Appeal No. E020 of 2022, pending the hearing and determination of the appeal in Civil Appeal No. E198 of 2023 that he has filed in this Court. The application is supported by an affidavit sworn on an even date by the Applicant. We heard the application on this Court’s virtual platform on 4th March 2024. Learned counsel Mr Kariuki, appeared for the Applicant, while Learned counsel, Mr Onyango holding brief for learned Counsel Mr. Mutuma, appeared for the respondents herein. Both counsel highlighted their respective written



submissions dated 22nd January 2024 and 1st March 2024, and reiterated the averments made by the parties in their respective pleadings.

2. By way of a brief background and to provide the context of the application, a suit was filed in the Meru Chief Magistrates' Court in Meru CM ELC No. E015 of 2020 by Grace Kathure Kimathi, Priscilla Mwarania Nthuku and Felicity Makathimo Kaigongi (hereinafter "the Respondents"), who are the Applicant's sisters. The said Respondents sought a declaration that the Applicant held the suit property, being L.R. No. Ntima/Igoki/5735 in trust for them in equal shares, excision of a portion of 1.41 hectares from L.R. No. Ntima/Igoki/5735, and its division into four portions and registration of the same in equal shares between the Applicant and Respondents. The suit was heard and determined in favour of the Respondents, and the orders sought were granted in a judgment delivered by the trial Court (Hon. J.M. Njoroge CM) on 20th April 2022. The Applicant being dissatisfied with the decision, appealed to the Environment and Land Court in Meru ELC Appeal No. E020 of 2022. On 27th September 2023, Hon. C. K. Nzili J. delivered judgment in favour of the Respondents, dismissing the Applicant's appeal.

The Applicant thereupon proffered a second Appeal before this Court, being Civil Appeal No. E198 of 2023.

3. The Applicant's case in brief, is that he that he was the first registered owner of the suit property, is in occupation of the same to date and has no other place to move to. Further, that the Respondents have now moved the trial Court vide an application dated 20th December 2023 seeking to enforce by excision of a portion measuring 1.41 hectares from the suit property as ordered by the judgments of the trial Court, and the Applicant pleads that his appeal in Civil Appeal No. E198 of 2023 is well grounded with high chances of success and it will be fair and just to grant leave to exercise his right of appeal. Additionally, that he stands to be greatly prejudiced since he lives on the suit land with his family, and is at risk of being evicted and losing his permanent developments unless the stay orders are granted. Further, that the substratum of the appeal pending before this Court would be dissipated and the appeal rendered nugatory. The Applicant annexed a Notice of Appeal dated 28th September 2023 and lodged on 4th October 2023, and the Memorandum of Appeal dated 16th November 2023 in which he has raised ten (10) grounds of appeal.
4. The Applicant's counsel submitted that the Applicant had accordingly demonstrated that he has an arguable appeal, and reiterated that it was not contested that the Respondents were in the process of implementing the Judgment of the trial Court and that the substratum of the appeal would be completely dissipated and the pending appeal rendered nugatory, since the suit property will immediately cease to exist and the resultant sub-division will be out of reach of the Applicant and might render the outcome of the appeal a mere academic exercise. Furthermore, that the implementation of the decree will result in the eviction of the Applicant's family from the suit land and he would therefore suffer immeasurable loss which could not be compensated in damages. Thus, it was only right that the status quo is maintained by issuing a stay of execution until the appeal is heard and determined. Reliance was placed on the decision of this Court (differently constituted) in *Stanley Kang'ethe Kinyanjui vs Tony Ketter & Another* [2013] e KLR in this regard.
5. The Respondents on their part opposed the application in a replying affidavit sworn on 1st March 2024 by the 1st Respondent, and on behalf of the 2nd and 3rd Respondents. The Respondents deponed that they wanted to subdivide their father's land as per the judgment of the Court and were not interfering with the Applicant's developments thereon. They pleaded that the instant application was an afterthought meant to deny them their fruits of the judgment, and averred that the Applicant had filed a similar application which was pending before the Chief Magistrate's Court in Meru CM ELC



- Case No. E015 of 2020, where he was seeking an order of stay of execution of the judgment and the decree in Meru ELC Appeal No. E020 of 2022 pending the hearing and determination of Civil Appeal No. E18 of 2023. The Respondents contend that the Applicant was therefore guilty of abuse of the Court process and fell short of the principle for stay orders.
6. The Respondents' counsel placed reliance on the decision in the case of *Gatirau Peter Munya vs Dickson Kitbinji and 2 Others* (SC Application No. 5 of 2014) to submit that the Applicant's Memorandum of Appeal did not raise any arguable grounds, as the issues raised had been properly and conclusively determined by the trial Court and the Environment and Land Court. The counsel reiterated that the Respondents are sisters of the Applicant, and that their claim was based on a resulting or constructive trust and failure by the Applicant to acknowledge that the suit land was transferred to him from his father on their behalf. He set out the evidence adduced in the trial Court on the Respondents' entitlement to the suit property, that demonstrated that there was an irregularity in how the Applicant came to be registered as the owner of the suit property.
 7. Learned counsel for the Respondents therefore, urged that the trial Court and first appellate Court were right in holding that the trust was proved against the Applicant, and counsel cited the decision of the Supreme Court of Kenya in the case of *Geroge Mbiti Kiebia & Another vs Isaya Theuri M'Lintari & another* [2014] e KLR to submit that the Applicant did not have an arguable appeal. The counsel further submitted that refusal to grant a stay would not render the appeal nugatory if the appeal succeeded, as the land "was not going anywhere" if the appeal succeeded, and the sharing of the land was reversible. It was therefore not fair that the Respondents, being over 70 years of age, be delayed or denied the enjoyment of the fruit of their long-awaited judgment.
 8. 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 vs Tony Ketter & 5 Others* [supra].
 9. 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 grounds that which revolve around the legality of the findings on his first registration as owner of the suit property, the evidence to show that their father owned the suit land, and on the existence of a customary trust which he alleges was not pleaded or proved. These are issues of law that merit consideration.
 10. We are however not persuaded that the intended appeal will be rendered nugatory for two reasons. Firstly, the Applicant's Notice of Appeal is against the orders granted by the Environment and Land Court which were to the effect that "looking at the pleadings, evidence tendered, and the law, the trial court rightfully allowed the respondents claim. The appeal is, as a result of this, dismissed with costs". Given the nature of those orders, they are not capable of stay as the High Court neither ordered the parties to do anything or refrain from doing anything. See *Jennifer Akinyi Osodo vs. Boniface Okumu Osodo & 3 Others* [2021] eKLR.
 11. Secondly, while we are alive to the fact that the prayer in the instant application incorporates a prayer for an order for stay of execution of the judgment and decree in "Meru CM ELC No. E015 of 2020 as affirmed by the Environment and Land Court in Meru ELC Appeal No. E020 of 2022", under Rule 5(2) (b) the jurisdiction of this Court to grant a stay of execution in civil proceedings is dependent on a notice of appeal being lodged against the judgment sought to be stayed. Therefore, this Court cannot stay execution of an order with respect to which there is no notice of appeal, as held in *Nguruman*



Limited vs Shompole Group Ranch & another [2014] eKLR. This Court accordingly lacks jurisdiction to grant an order of stay in respect of a judgment and decree rendered by the Chief Magistrate’s Court in Meru CM ELC No. E015 of 2020. That jurisdiction in this case lay with the ELC. We also note that the Applicant did not contest the averments by the Respondents that there is an application pending in the trial Court for stay of execution of its orders, and his counsel informed us at the hearing that the said application has been held in abeyance, pending the outcome of the instant application. To this extent the instant application is therefore also in abuse of the due process of Court.

12. We accordingly find that the Notice of Motion dated 10th January 2024 is not merited for the above stated reasons, and it is hereby dismissed with costs to the Respondents. The interim status quo orders granted by this Court are also consequently discharged.

13. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JUNE, 2024

P. NYAMWEYA

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JUDGE OF APPEAL

L. KIMARU

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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

