



REPUBLIC OF KENYA



KENYA LAW
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Mburu v Karua (Civil Application E107 of 2023) [2024] KECA 800 (KLR) (5 July 2024) (Ruling)

Neutral citation: [2024] KECA 800 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E107 OF 2023
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
JULY 5, 2024

BETWEEN

JOSEPH NDEGWA MBURU APPLICANT

AND

NDUNGU KARUA RESPONDENT

(Being an application for a stay of execution from the judgment and decree of the Environment and Land Court at Murang'a, (L. Gacheru, J.) dated 29th June 2023 in ELC Case No. E006 of 2021(O.S))

RULING

1. It is trite that for an applicant to succeed in an application for stay of the execution of the decree following a judgment, he has to persuade the Court on two limbs; first that his appeal is arguable, that is to say that it is not frivolous, and, secondly, that if stay is not granted, his appeal, were it to be successful, would be rendered nugatory. (See *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others* [2013]eKLR). Both limbs have to be demonstrated. It is not enough that only one limb has been demonstrated.
2. The background of this application dated 27th November 2023 is that there was an originating summons dated 23rd September 2021 filed before the Environment and Land Court (ELC) at Murang'a by the applicant, Joseph Ndegwa Mburu, against the respondent, Ndungu Karua, seeking an order of adverse possession over LR. No. Loc.6/Gikarangu/1258 (the suit property). The applicant claimed to have been in occupation since 1985 and that he had extensively developed it; and that he had become entitled following long and uninterrupted possession. The respondent opposed the suit on several grounds. In a judgment dated 29th June 2023 the learned Judge (L. Gacheru, J.) dismissed the suit for lack of merits.



- 3. The applicant seeks stay of the judgment and decree pending the hearing and determination of the intended appeal. His case is that his appeal has raised several arguable grounds, and that he will suffer substantially if stay is not granted.
- 4. The application has not been opposed.
- 5. We are being asked, under Rule 5(2)(b) of the Court of Appeal Rules, to exercise original and discretionary jurisdiction to do justice to the application and to the parties. Even as the applicant states that no loss shall be suffered as either party continues to occupy their respective parcels of land, we consider that the suit before the ELC was dismissed with costs. This was, therefore, a negative order that was not capable of being stayed because the court did not order the parties to do anything or refrain from doing anything. On the basis of Western College of Arts and Applied Sciences v Oranga & Others [1976]KLR 63, we find that the application cannot be granted as there is nothing existing out of the ELC judgment for this Court to stay.
- 6. The result is that we dismiss the application with costs.

DATED AND DELIVERED AT NYERI THIS 5TH DAY OF JULY 2024.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

