



REPUBLIC OF KENYA



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**Muriithi & another v Muriithi (Civil Application E052 of 2022)
[2024] KECA 1289 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1289 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E052 OF 2022
W KARANJA, J MOHAMMED & LK KIMARU, JJA
SEPTEMBER 20, 2024**

BETWEEN

BETH WANJIRA MURIITHI 1ST APPLICANT

AGNES WAGUTHII WACHIRA 2ND APPLICANT

AND

JOSEPH NJIRAINI MURIITHI RESPONDENT

*(Being an application for stay of execution of the judgment and decree
of the Environment and Land Court at Kerugoya (E.C Cheronu,
J.) delivered on 13th May 2022 in ELC Case No. 521 Of 2013)*

RULING

Background

1. Before us is a notice of motion dated 4th July, 2022 filed by Beth Wanjira Muriithi and Agnes Waguthii Wachira (the applicants) expressed to be brought under Rules 5(2)(b) and 47 of the Court of Appeal Rules, 2010 now Court of Appeal Rules, 2022 (this Court's Rules). The application seeks orders in the main:
 - a. Spent
 - b. that pending inter partes hearing and determination of this motion, the Court do order stay of execution of the decree in Kerugoya High Court ELC No. 521 of 2013 delivered on 13th May 2022;
 - c. that the Court be pleased to order stay of execution of the decree/judgment in Kerugoya High Court ELC No. 521 of 2013 pending the hearing and determination of the appeal before this Court; and



d. that costs of this application be borne by the respondent.

Joseph Njiraini Muriithi is the respondent herein.

2. The application is based on the grounds, inter alia: that the Environment and Land Court (ELC) on 13th May 2022 ordered cancellation of two title deeds comprised of MUTIRA/KIRUNDA/ 1476 & 1481 (the suit properties); that the said parcels are registered in the names of a 4th party who had bought the properties from the 3rd party who had in turn bought the same from the applicants; that if the cancellation and subsequent registration of the said titles in the names of the respondent occurs, the application and the appeal will be rendered nugatory if they eventually succeed; that the respondent will dispose them to defeat this application and the appeal; that the respondent has already registered the decree in the Land Office for purposes of executing the same; that the applicants are poor and very elderly and will not be able to refund the purchase price that they were paid more than a decade ago; that the respondent is their only brother who defrauded them of more than 2/3rds of their father's land; that no prejudice will be suffered by the respondent if stay of execution is ordered and in any event the status of the said land has been unchanged for over a decade; that the applicants have an arguable appeal with high chances of success; that the subject matter is land which in itself is enough security; and that the equitable remedy for stay is the most appropriate under the circumstances.
3. The application is supported by the affidavit of the 1st applicant sworn on her own behalf and on behalf of the 2nd applicant. The 1st applicant deponed that the applicants were sued by the respondent in Kerugoya ELC No. 521 of 2013. That they filed a defence and counter-claim to the suit. That the suit was determined on 13th May, 2022 in favour of the respondent. Aggrieved by the decision they filed a notice of appeal to this Court on 23rd May 2022.
4. The 1st applicant further deponed that they seek a stay of execution of the decision of the ELC pending the hearing and determination of the appeal. Further, that if execution proceeds, the instant application and the intended appeal will be rendered nugatory. Further, that as the suit properties are registered in the respondent's name, he will dispose of them to defeat the appeal. That the respondent is not a man of known means and he cannot therefore compensate the applicants if the appeal succeeds. Further, that the applicants are entitled to an equal share of the suit property.
5. A brief background of the application is that the respondent is a brother of the applicants and was the registered owner of the suit properties. He sued the applicants in Kerugoya ELC case No. 521 of 2013 through a plaint dated 21st October, 2011 claiming that the applicants, without his knowledge, filed a dispute at the District Land Disputes Tribunal (the Tribunal) and sought transfer of the suit properties from his name into their names. That the Tribunal agreed with the applicants and awarded the suit properties to the applicants and ordered the Executive Officer to execute the transfer deed. The award of the Tribunal was endorsed as a judgment of the Court and the suit properties were transferred to the applicants who later transferred them to a 3rd party and subsequently to a 4th party. The respondent sought before the ELC for an order declaring that the award of the Tribunal was a nullity for lack of jurisdiction to deal with registered land under the Registered *Land Act* Cap 300 (repealed). The respondent also sought cancellation of the titles of the suit properties from the 4th party's name and registration of the same into his name.
6. The applicants defended the suit and raised a counterclaim against the respondent. The applicants maintained that the respondent fraudulently transferred the suit properties to his name without the knowledge of other family members since he was the only son. The applicants prayed for an order that



- the respondent held the suit property in trust for the other members of the family and that the same should be shared equally.
7. Upon hearing the suit, the ELC found that the respondent had proved his claim against the applicants to the required standard. The learned Judge issued the following orders:
 - a. A declaration that the Tribunal Award and the adoption of the same by the Kerugoya Magistrate's Court without jurisdiction was ultra vires, unlawful, null and void.
 8. Aggrieved by that judgment, the applicants filed a notice of appeal and the instant application.
 9. On his part, the respondent filed a replying affidavit in which he opposed the application and deponed that there is nothing to stay in this case. That the impugned judgment was delivered on 13th May, 2022 and he extracted the decree and registered it at the Kirinyaga Land Registry on 24th May, 2022. The respondent further deponed that the application dated 4th July, 2022 filed three months after the judgment is overly delayed and overdue. That the applicants are not the owners of the suit properties and are not in occupation or use and neither have they included the persons they sold the suit properties to yet those parties were parties to the primary suits before the ELC.
 10. The respondent further deponed that the applicants seek stay based on the apprehension that the registered owner will demand a refund of the purchase price from them. Further, that the applicants have no arguable appeal as they obtained the suit properties without the respondent's notice through the Central Land Disputes Tribunal, a jurisdiction which the Land Disputes Tribunal did not have.
 11. The respondent further deponed that the applicants are not willing to provide security for costs and do not therefore deserve stay. The respondent deponed that he does not intend to sell the suit properties.
 12. The respondent further deponed that he has been advised that there is no appeal and the notice of appeal filed is incompetent having been filed 21 days after the date of the impugned judgment in violation of Rule 75(2) (now Rule 77(2) of this Court's Rules. The respondent urged that the instant application is incompetent and should be dismissed with costs.
 13. The applicants have filed written submissions based on provisions of Order 42 rule 6(2) of the Civil Procedure Rules and not this Court's Rules. The applicants submitted that they stand to suffer substantial loss of losing not only money which they may be required to refund the 3rd party buyer but also the suit properties unless the stay orders sought are granted.
 14. There are no written submissions by the respondent on record.

Determination

15. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.
16. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled. For example, this Court in the case of Trust Bank Limited and



Another v. Investech Bank Limited and 3 Others [2000] eKLR delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous

and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

17. We have carefully considered the grounds set out in the motion. There is on record no memorandum of appeal. From the record, the ELC found that:

“It is clear from the provisions of the Land Disputes Tribunal Act (Repealed) that the Tribunal had been given jurisdiction to handle specific disputes regarding Land Disputes. One of those powers did not include handling disputes on ownership of land. When it purported to determine a claim by the 1st and 2nd defendants in respect of the suit properties which were registered in the name of the plaintiff under the Registered Land Act, Cap 300 (Repealed), the Tribunal acted ultra vires and its award and subsequent adoption by the Magistrate’s Court at Kerugoya was therefore unlawful. It follows that, if the Tribunal had no jurisdiction to entertain the matter, whatever proceedings flowed from its decision would be null and void since a decision made without jurisdiction must be of necessity be null and void.”

18. The ELC proceeded to rely on the decision of this Court in *Dominica Wamuyu Kihu vs. Johana Ndura Wakaritu* [2012] eKLR (*Dominica Wamuyu Kihu case*) which held as follows:

“On jurisdiction, Section 3(1) of the Land Disputes Tribunal Act is quite clear as to the matters the Tribunals under the Act were authorized to adjudicate upon...This provision clearly puts disputes relating to ownership or Title to land beyond the Tribunal’s jurisdiction. In this case, the dispute is on ownership of Title No. Magutu/Gathehu/53. That was a dispute outside the jurisdiction of the Tribunal.” [Emphasis supplied].

19. Further, in *Joseph Malakwen Lelei & Another vs. Rift Valley Disputes Appeals Committee & 20 Others* [2014] eKLR (*the Joseph Malakwen Lelei case*), this Court stated as follows:

“On the issue of jurisdiction, we note that the law on this issue is settled and we do not need to belabour it. Section 3 of the Land Disputes Tribunal Act (repealed) gives jurisdiction to the Land Disputes Tribunal to handle claims in the following matters only:

“3

- (1) subject to the Act, all cases of a civil nature involving a dispute as to:-
 - a. The division of, or the determination of boundaries to land, including land held on in common,
 - b. A claim to occupy, or work land or
 - c. Trespass to land.”



Evidently the above provision does not include jurisdiction to deal with issues of determination of title or ownership of registered land, or the determination of a Trust in favour of a party, which in essence was the basis of the 3rd respondent's claim. Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate the matter before them, then all other grounds become moot.

We say so because it is trite that where a court or a tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity. See *Macfoy v. United Africa Co. Ltd* 1961 3 All ER 1169; *Re Continental Credit Finance Ltd* [2003] 2 EA 399; *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Limited* (1989) KLR 1.

On that ground, we find that the tribunal lacked the requisite jurisdiction to enable it hear and purport to determine the 3rd respondent's claim...From the foregoing, it is clear that the Tribunal's proceedings were ultra vires and its decision null and void for all intents and purposes." [Emphasis supplied].

20. The applicants' intended appeal turns on the issue of ownership of the suit properties. The ELC found that the titles issued to the 1st and 2nd applicants are a nullity and the subsequent transfer to the 3rd and 4th parties are of no legal effect. This Court has authoritatively and conclusively pronounced itself on this matter in various authorities including the *Dominica Wamuyu Kihu* case and the *Joseph Malakwen Lelei* case. Accordingly, it is not arguable whether the ELC erred in finding that the Tribunal did not have jurisdiction to determine issues relating to ownership of the suit properties which were registered in the respondent's name. Without saying more, lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is not arguable.
21. It is well settled that for an application under Rule 5(2)(b) of this Court's Rules to succeed, the applicant must satisfy both limbs of the twin principles. (See: *Republic v Kenya Anti-Corruption Commission & 2 others* (2009) KLR 31, and *Reliance Bank Ltd v Norlake Investments Limited* (2012) 1 EA 227). Having failed to satisfy the 1st limb, we need not proceed to determine the 2nd limb on whether the appeal will be rendered nugatory, absent stay.
22. In the circumstances, the notice of motion dated 4th July, 2022 fails to meet the threshold set for applications of this nature. In the result, the same is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....



JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

