



**Ndanuko (Suing as the representative of the Esttae of Ndanuko
Kamau Ndanuko) & 2 others v Njoroge & 3 others (Civil Application
E058 of 2024) [2024] KECA 1407 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1407 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E058 OF 2024
K M'INOTI, M NGUGI & LA ACHODE, JJA
OCTOBER 11, 2024**

BETWEEN

**ZIPPORAH WAITHIRA NDANUKO (SUING AS THE REPRESENTATIVE OF
THE ESTTAE OF NDANUKO KAMAU NDANUKO) 1ST APPLICANT
BENEDICT GAITHO NDANUKO 2ND APPLICANT
BERNARD NDANUKO KAMAU 3RD APPLICANT**

AND

**RACHAEL NYAMBURA NJOROGE 1ST RESPONDENT
DIRECTOR OF SURVEY 2ND RESPONDENT
CHIEF LAND REGISTRAR 3RD RESPONDENT
THE HON ATTORNEY GENERAL 4TH RESPONDENT**

*(Being an application for stay of execution of the judgment and decree of the Environment
and Land Court at Thika (Eboso, J.) dated 22nd January 2024 in ELC No. 16 of 2020)*

RULING

1. In the application dated 13th February, 2024, the applicants seek the following substantive orders from the Court:
 - 1 ...
 2. That an injunction do hereby issue restraining the respondents whether by themselves and or agents and or employees and or through anyone acting on their behalf and or authority from excising, visiting the property for purposes of excising, selling, transferring, taking possession



or undertaking any action for purposes of excising from Karai/Gikambura/7702 and Karai/Gikambura/7703 any portion therefrom or in any way giving effect to the Award of the Kikuyu Land Disputes Tribunal in Land Dispute Claim No. KW/LND/9/6/55/2008 or decree in Kikuyu Principal Magistrates Court Land Case No. 27 of 2009 pending the hearing and determination of the intended appeal from the judgment and decree made by the Environment and Land Court (Hon. Justice Eboso) on 22nd January 2024 in Thika ELC Petition No. 16 of 2020: Zipporah Waithira Ndanuko & others v Rachael Nyambura & others.

3 ...

4 That the judgment and decree made by the Environment and Land Court (Hon. Justice Eboso) on 22nd January 2024 in Thika ELC Petition No. 16 of 2020: Zipporah Waithira Ndanuko & others v Rechael Nyambura & others be and is hereby stayed pending the hearing and determination of the intended appeal therefrom.

2. The application is brought under Article 163 of the *Constitution* of Kenya, section 3, 3A and 3B of the *Appellate Jurisdiction Act* and rule 5(2) b of the rules of this Court.
3. The application is based on the grounds set out on its face and is supported by an affidavit sworn on 13th February, 2024 by Bernard Ndanuko Kamau, the 3rd applicant. The application relates to entitlement to land parcel number Karai/Gikambura/404 which the applicants assert is registered in the name of the 1st applicant's deceased's husband, one Ndanuko Kamau Ndanuko.
4. The applicants aver that on 27th November, 2020 they received a letter from the County Government of Kiambu indicating that an officer from the County Survey Department would be visiting the suit property on 10th December, 2020 for purposes of subdividing the suit property in line with the decision of the Kikuyu Land Disputes Tribunal made on 29th June, 2009. The applicants complain that the Kikuyu Land Disputes Tribunal acted in excess of jurisdiction in making the said decision and as such, the decision, which was adopted as a judgment of the court by the Principal Magistrate's Court at Kikuyu on 23rd December, 2009, is unlawful.
5. The applicants aver that on 9th December 2020, they filed a petition before the Environment and Land Court (ELC) seeking a permanent injunction restraining the respondents from in any way interfering with the suit property. They further prayed that the decision of the Land Disputes Tribunal made on 29th June 2009 be declared null and void for having been made without jurisdiction. Upon hearing the parties, the ELC, in its decision dated 23rd January 2024, dismissed the applicants' petition, whereupon the respondents entered the suit properties and destroyed part of the applicants' property.
6. The applicants aver that there is imminent danger of an outbreak of violence and destruction of the suit property, with danger of loss of life. They assert that they have an arguable appeal on, among other grounds, that the learned judge erred in law and fact by finding that the applicants should have appealed against the decision of the Kikuyu Land Disputes Tribunal made on 29th June, 2009 on the ownership of the suit property despite the Tribunal lacking the jurisdiction to determine the ownership of the suit property. They maintain that the appeal will be rendered nugatory if the orders sought are not granted and all orders eventually made shall be rendered an academic exercise.
7. Before considering the merit or otherwise of the present application, it is useful to set out briefly the history of the dispute as it appears from the documents before us and the decision of the ELC.
8. The issue before the Land Disputes Tribunal in Kikuyu related to entitlement to Karai/Gikambura/404. The respondent, a step-sister of Ndanuko Kamau Ndanuko (referred to in the proceedings as Ndanuko Kamau 'A'), the deceased spouse of the 1st applicant, claimed a portion thereof



as a daughter of the 4th wife of the registered proprietor, also known as Ndanuko Kamau Ndanuko (referred to in the proceedings as Ndanuko Kamau Ndanuko ‘B’). In its decision dated 26th June 2009, the Tribunal directed that out of 2.0 acres of Karai/Gikambura/404, 0.50 acres would be taken by Ndanuko Kamau ‘A’ as ‘good will’. The remaining 1.5 acres was to be divided equally between Ndanuko Kamau ‘A’ and the respondent, Rachael Nyambura Kamau, the surviving child of Ndanuko Kamau Ndanuko ‘B’'s 4th wife, Janet Woki.

9. The applicants were aggrieved by the decision of the Tribunal and on 20th August 2009, they filed an appeal before the Nyeri Provincial Land Appeals Committee. The applicants, however, did not proceed with the appeal, on the basis, they aver, that the Provincial Land Appeals Committee was restructured and done away with by the current land law regime in Kenya.
10. The applicants also filed Civil Appeal No. 488 of 2010 at the High Court in Nairobi on 1st December 2010 against the decision of the Principal Magistrate’s Court at Kikuyu adopting the decision of the Land Disputes Tribunal. They contended in this appeal that the Tribunal did not have the jurisdiction to determine the dispute. They did not, however, pursue the appeal, and it was dismissed for want of prosecution.
11. The applicants contend before us that the suit property is also the subject of succession proceedings in Nairobi High Court Succession Cause No. 29 of 1997 commenced by Ndanuko Kamau Ndanuko’s family in respect of his estate.
12. The suit property has, according to the applicants, been subdivided into parcels, being Karai/Gikambura/7702 and Karai/Gikambura/7703 respectively, and new titles issued on 10th March 2021. The original title, Karai/Gikambura/404 was closed.
13. The applicants’ petition to the ELC was precipitated by a letter dated 27th November 2020 from the County Government of Kiambu indicating that on 10th December 2020, an officer from the County Survey Department would visit the suit property for the purpose of subdividing it in line with the decision of the Kikuyu Land Disputes Tribunal of 29th June 2009.
14. In the petition filed in the ELC dated 9th December 2020, the applicants contended that the Land Disputes Tribunal had no jurisdiction to issue the orders that it did, and that exercise of such jurisdiction violated Articles 27, 40, 47 and 50 of the Constitution. In its decision, the ELC found that the applicants could not rely on the Constitution of Kenya 2010 as the Constitution had not been in force when the decision of the Tribunal was rendered. Further, that the applicants had not followed the elaborate appeals procedure available to them under section 8 of the repealed Land Disputes Tribunals Act.
15. The applicants filed submissions dated 9th April 2024 which were highlighted by their learned counsel, Mr. Muoki, who appeared with Mr. Kanjama, SC, at the hearing of the application. There was no appearance for the respondents, nor had they filed any response or submissions in opposition to the application.
16. We have considered the application, the affidavit in support, and the decision of the ELC that the applicants seek to appeal against. The principles applicable in the exercise of this Court’s discretion under rule 5 (2) (b) of this Court’s Rules to grant an order for stay of execution as well as grant of a temporary injunction pending appeal are well settled. Firstly, an applicant has to satisfy the Court that he or she has an arguable appeal and, secondly, that unless the orders sought are granted, the intended appeal will be rendered nugatory-see Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR.. An applicant is required to satisfy both limbs in order to obtain orders from the Court.



17. The applicants submit that they have an arguable appeal, noting that such an appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court. They refer to their draft memorandum of appeal dated 13th February, 2024 in which they set out some eight grounds of appeal and submit that they have an arguable appeal in that the trial court erred in law and fact by failing to appreciate that Articles 162(2) and 165(6) and (7) of the Constitution provide the Environment and Land Court with the supervisory jurisdiction over subordinate courts or a body exercising judicial or quasi-judicial power such as the Kikuyu Disputes Tribunal; in failing to appreciate that the Land Disputes Tribunals established under section 3(1) of the Land Disputes Tribunals Act lacked the jurisdiction to hear and determine disputes touching on title to registered land and therefore the decisions which the Tribunal made touching on title to registered land was a nullity in law; and that the trial court misdirected itself by finding that the applicants should not have filed the petition at the ELC but should instead have filed an appeal from the decision of the Kikuyu Disputes Tribunal despite there being clear evidence that the applicants' right to protection of property under Article 40 of the Constitution were infringed upon.
18. Regarding the second principle, the applicants rely on the case of *Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA 227 to submit that should the orders sought not be granted, the intended appeal will be rendered nugatory as the respondents might dispose of the suit property which is currently registered in the name of the 1st applicant's late husband; that they will be illegally dispossessed of the suit property; and that there is imminent danger of breakout of violence should any attempt be made to illegally evict them.
19. We have considered the application and the applicants' submissions. Two preliminary observations as a prelude to our determination of the application are necessary. First, the application is brought under rule 5(2)(b) of this Court's Rules, ostensibly to stay the decision of the ELC dated 24th January 2024. That decision, however, being a dismissal, a negative order, is incapable of being stayed. Second, the applicants, as their substantive prayers indicate, are really aggrieved by a decision made by a tribunal, appointed under the repealed Land Disputes Tribunal Act, on 26th June 2009. Through their petition which was the subject of the judgment of the ELC that the applicants aver they seek to appeal against, they sought to challenge that decision by alleging violation of their right to property under the 2010 Constitution.
20. The issue before us, then, is whether the applicants have demonstrated that they have an arguable appeal which will be rendered nugatory should the orders sought not be granted. In dismissing the petition, the ELC found, first, that the 2010 Constitution was inapplicable to the matter, having come in force in August 2010, while the dispute before the Land Disputes Tribunal was lodged in 2008 and determined in June 2009. It found, secondly, that the applicants had not demonstrated a violation of their rights. Thirdly, that the applicants chose not to challenge the decision of the Tribunal through the mechanism provided under the repealed Land Disputes Act. They filed an appeal to the Provincial Land Appeals Committee which they did not pursue; an appeal to the High Court which was dismissed for want of prosecution; and they did not challenge the jurisdiction of the Tribunal through the judicial review mechanism that was available to them.
21. Taking the above matters into consideration, we are not satisfied that the applicants have demonstrated that they have an arguable appeal, the first limb required in order to be entitled to exercise of discretion in one's favour under rule 5(2)(b).
22. Having so found, we need not inquire into the second limb, whether the appeal will be rendered nugatory should the orders sought not be granted. It is our finding therefore that the application dated 13th February, 2024 is without merit. It is accordingly dismissed but with no order as to costs.



DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

K. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

