



**Kubai v Mburugu (Suing as the Administratrix of the Estate of Justus M'murithi M'mbagiri) & 3 others (Civil Application E073 of 2023) [2024] KECA 1355 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1355 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E073 OF 2023  
W KARANJA, LK KIMARU & AO MUCHELULE, JJA  
OCTOBER 4, 2024**

**BETWEEN**

**JAMES TAITUMU KUBAI ..... APPLICANT**

**AND**

**JEMA KARIMI MBURUGU (SUING AS THE ADMINISTRATRIX OF THE  
ESTATE OF JUSTUS M'MURITHI M'MBAGIRI) ..... 1<sup>ST</sup> RESPONDENT**

**JOYCE KANANAN MURITHI ..... 2<sup>ND</sup> RESPONDENT**

**JENADIS NKATHA MURITHI ..... 3<sup>RD</sup> RESPONDENT**

**FAITH WANJA MURITHI ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application pending the hearing and determination of the intended appeal for Injunction and/or inhibition against a judgment of the Land and Environment Court at Meru (C. Yano, J.) dated 12th July 2023 in ELC Case No. 149 of 2012 (OS))*

**RULING**

1. James Taitumu Kubai, the applicant, moved the Environment and Land Court (ELC) by Originating Summons (OS) dated 23<sup>rd</sup> October 2012 claiming ownership of ¼ acre of Land Parcel No. Ntima/Igoki/227 (the suit land) by way of adverse possession. The land was registered in the names of Justus Muriithi M'Magiri (deceased), who was the father of the respondents herein. The applicant claimed to have entered into the land in 1993 without the permission of the registered owner, and had lived on the property until 2013 when he was evicted as the matter was still in court.
2. The respondents, who are all beneficiaries of the Estate of the deceased, on the other hand deposed that after the deceased died, they filed a succession cause and they became the registered owners of the suit property on transmission in 2007. Their defence was that the applicant had rented one of the



butcheries on the suit premises before the deceased died and had refused to move out before the death of the deceased and instead, he lodged the claim for adverse possession.

3. After hearing the parties, the learned Judge (Yano, J.) in his judgment dated 12<sup>th</sup> July 2023 found that the applicant had admitted having entered into the land with the permission of the deceased who wanted the land to be protected from being sold to “Mafuko Industries”. Following the agreement, the applicant had been allowed to build some shops which he could rent out to recoup his investment.
4. The learned Judge having found that the applicant was in occupation of the suit land with the permission of the registered owner dismissed the applicant’s originating summons. The dismissal led to the appeal now before this Court, and the application before us dated 1<sup>st</sup> August 2023 filed under Rule 5(2)(b) of the *Court of Appeal Rules*. In the application he seeks an order of injunction restraining the respondents from dealing with the suit land in any manner pending the hearing and determination of the appeal. In the alternative, the applicant seeks an order of inhibition against the registration of any dealing over the suit land pending the hearing and determination of the appeal.
5. The application is predicated on the grounds on its face and supported by the applicant’s two affidavits sworn on 1<sup>st</sup> August 2023 and 16<sup>th</sup> November 2023. The gist of the grounds and the deposition in both affidavits is that the applicant occupied the suit property in 1993 and remained in open possession and occupation of the same until 2020 when he was evicted therefrom. He maintains that his occupation was adverse as he was not on the suit property with permission of the registered owner. He proffers that point as the arguable issue that should warrant the granting of the orders sought.
6. In a replying affidavit sworn by Jemima Kanini Mburugu, on her own behalf and that of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, she deposes that the land was transferred to them on transmission following the conclusion of Meru High Court Succession Cause No. 15 of 2007, the court having determined that the applicant was not a beneficiary to the deceased’s estate. They maintain that the applicant was a tenant on the property having been invited to the property by the deceased. The respondents maintain that the applicant had actually conceded before the trial court that he moved into the suit land with permission of the deceased and his claim for adverse possession could not therefore lie. They insist that the appeal is not arguable and the application should be dismissed.
7. On the nugatory aspect, the respondents assert that the applicant is not on the suit land, that in the unlikely event that the appeal succeeds, damages would be an appropriate remedy. They urge the Court not to restrict them from enjoying the fruits of their judgment.
8. In support of the application, learned counsel Mr. Muia filed submissions dated 16<sup>th</sup> November 2023 along with a list of authorities. The respondent on the other hand through the firm of Mithega Kariuki Advocates filed their submissions dated 30<sup>th</sup> August 2023, along with a list of authorities. In the submissions, both parties expound and reiterate their positions and have cited case law in support of their rival positions.
9. We have considered the application, the rival affidavits and submissions along with the lists of authorities cited to us by both parties.
10. In order for such an application to succeed, the applicant needs to demonstrate the twin principles of arguability and the nugatory aspect. These requirements were elucidated in *Trust Bank Ltd & another v Investech Bank Ltd & 3 others* [2000] eKLR, where the Court held:

“The jurisdiction of the Court under Rule 5(2)(b) aforesaid is original and discretionary and it is trite law that to succeed applicant has to show firstly that his appeal or intended appeal



is arguable or 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”

11. On arguability, the applicant must demonstrate that he has an appeal which is not frivolous and which deserves to be canvassed fully before the Court. As reiterated by this Court many times, an applicant needs only to demonstrate that he/she has at least one arguable ground of appeal and not a litany of grounds. We also remind ourselves that an arguable appeal need not be one that will succeed. See *Stanley Kangethe v Tony Keter and 5 others* [2015]eKLR.
12. The gravamen of the applicant’s appeal and application is that he entered the suit property without the permission of the registered owner. The learned Judge found that the applicant moved into the land with express permission of the owner. We have gone through the record. Like the trial Judge, we have confirmed that the applicant admitted having moved into the suit premises upon invitation by the registered owner. In as much as we are not supposed to make definitive findings of either facts or law at this point, we can say that we are not persuaded that the intended appeal is arguable. It follows that arguability has not been demonstrated.
13. It is trite that for an application such as this one to succeed an applicant must demonstrate both arguability and nugatory aspect, and demonstrating only one of them will not help. Having failed to demonstrate arguability, we need not go into the second limb on nugatory aspect.
14. Our conclusion of the matter is that the application before us fails to meet the threshold set for the granting of applications under Rule 5(2)(b) of the *Court of Appeal Rules*. We find no merit in this application and dismiss it accordingly with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF OCTOBER 2024**

**W. KARANJA**

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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**

