



REPUBLIC OF KENYA



**Milgo & 30 others v Disa Enterprises Limited & 4 others (Civil Application
E190 of 2024) [2024] KECA 1603 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1603 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E190 OF 2024
DK MUSINGA, JW LESSIT & A ALI-ARONI, JJA
NOVEMBER 8, 2024**

BETWEEN

- CECILIA CHERUNO MILGO 1ST APPLICANT**
PAUL NDOLO NDUU 2ND APPLICANT
MARY MUMBUA MUINDI 3RD APPLICANT
ANN WANJIKU MUGO 4TH APPLICANT
MOSES WAMALWA 5TH APPLICANT
CHARLES MAINA KAMAU 6TH APPLICANT
BENJAMIN ONSONGO ARORI 7TH APPLICANT
BENSON MWONGELA LIKUANYE 8TH APPLICANT
PAUL NDOLO NDUU 9TH APPLICANT
GIBSON KAMAKIA MWANGI 10TH APPLICANT
JAIRUS MUSA MUSYOKA 11TH APPLICANT
FRANCIS MUNYAMBU 12TH APPLICANT
SIMON MUCHERU MURITU 13TH APPLICANT
STEWART MUNYANGASA MUASYA 14TH APPLICANT
ACHIENG ATAK 15TH APPLICANT
HENRY NYABUTO MONGARE 16TH APPLICANT
GREGORY KAMILWA KITEME 17TH APPLICANT
JULIUS MUTHAMA 18TH APPLICANT
JACINTA NGENDO 19TH APPLICANT



PEACELOVE PAUL ESHIKUMO	20 TH APPLICANT
YUDAH ONYANGO	21 ST APPLICANT
NICHOLAS GACHARI	22 ND APPLICANT
BENARD OGONDA	23 RD APPLICANT
SAIKA MAKONGE JUA KALI ASSOCIATION	24 TH APPLICANT
MATHEW AYAL	25 TH APPLICANT
GAUDENCE MWANZIGE	26 TH APPLICANT
ROSEMARY WANGECI NJONJO	27 TH APPLICANT
URBANUS KIOKO MBITHI	28 TH APPLICANT
JENNIPHER NDUNGE MUOKA	29 TH APPLICANT
JOSEPH MUNYANGA	30 TH APPLICANT
PETER NJUGUNA	31 ST APPLICANT

AND

DISA ENTERPRISES LIMITED	1 ST RESPONDENT
CHIEF LAND REGISTRAR	2 ND RESPONDENT
DIRECTOR OF SURVEY	3 RD RESPONDENT
THE HON ATTORNEY GENERAL	4 TH RESPONDENT
NATIONAL LAND COMMISSION	5 TH RESPONDENT

(Being an application for stay of execution pending appeal of the Judgment and Decree of the Environment and Land Court at Nairobi - Milimani (Mogeni, J.) delivered on 22nd February 2024 in ELC Case No. 478 of 2018)

RULING

1. Before this Court is a Notice of Motion dated April 16, 2024, brought by the applicants under the provisions of rule 5(2)(b) of the Rules of this Court. The applicants seek a stay of execution of the judgment issued by the trial court on February 22, 2024 in ELC Case No. 478 of 2018 pending hearing of an intended appeal from the said judgment, and maintenance of the status quo in respect of properties known as LR. No. 209/11620 and LR No. 209/116199 pending hearing of the intended appeal.
2. A brief background of the application is that the 1st respondent instituted suit against the applicants, to wit, Nairobi ELC Case No. 478 of 2018, over the ownership and occupation of a property known as LR No. 209/11620, Saika Estate, Nairobi (hereinafter referred to as “the suit property”). The 1st respondent contended that it was the rightful proprietor thereof, and that the applicants had without any colour of right entered into and occupied the suit property, which actions were in breach of its constitutional right to private property. Among the orders sought in the suit was an order directing the applicants to vacate therefrom, an order of a permanent injunction restraining the applicants or



- any person claiming under them from trespassing and/or interfering with the 1st respondent's rights to the suit property, and general damages for trespass thereon.
3. The applicants through their separate defences and counterclaims denied the 1st respondent's assertion that it was the rightful owner of the suit property. They challenged the process through which the suit property was allocated to the 1st respondent by the Commissioner of Lands, alleging fraud in the entire allotment process. They also gave details of how they acquired ownership and possession of the suit property, which was mainly through purchase from Saika Makonge Jua Kali Association, the original allottee. In addition, they contended that having been in occupation thereof for a period of more than 12 years, they had acquired title to their respective portions of land within the suit property by way of adverse possession. They sought, inter alia, a declaration that they were the legal and beneficial owners of the respective portions which they were occupying.
 4. After a full hearing, the trial court delivered judgment on 22nd February 2024. The salient findings were that the suit property was allotted to the 1st respondent and that after complying with the terms in the allotment letter, it was duly issued with a Certificate of Title, which was duly produced before the court. The trial court noted that save for electricity and water bills, none of the applicants produced before it any title or copy of title as proof that they were the legal and rightful owners of the suit property. It was further held that the allegations of fraud and illegality against the 1st respondent had not been specifically pleaded, and neither were the said allegations proven. In essence, therefore, the 1st respondent having followed the legal process in acquiring title to the suit property, its title thereto conferred upon its indefeasible rights to the suit property.
 5. In the end, the trial court held that the 1st respondent had proved its claim. The counterclaims by the applicants were found unmeritorious and were accordingly dismissed. The dispositive orders issued by the trial court included an order directing the applicants, their families, agents, assigns and employees to vacate the suit property; a permanent injunction restraining the applicants and/or any person claiming under them from constructing, trespassing or in any way interfering with the 1st respondent's rights to the suit property; a permanent injunction restraining the applicants from remaining on or continuing in occupation of the suit property; an order directing the applicants to restore the suit property to its original undeveloped state; and general damages for trespass, which the court assessed at Kshs.100,000.
 6. Being dissatisfied with the entire decision of the trial court, the applicants intend to file an appeal before this Court as evinced by the notice of appeal dated 5th March 2024.
 7. The applicants contend that their intended appeal is arguable on the strength of the grounds contained on the face of the application and the affidavit in support sworn by Benson Mwangela Likuanye, the 8th applicant, who describes himself as a home owner within the suit property and the secretary of Saika Makonge Jua Kali Association.
 8. Although the applicants have not annexed a draft memorandum of appeal, the grounds upon which they challenge the decision of the trial court as can be gleaned from the application and the affidavit in support include: basing its decision on Deed Plan No. 165785 instead of Deed Plan No. 150509 upon which the 1st respondent's claim was premised; failing to find that the 1st respondent had not discharged its burden of proof when it failed to produce Deed Plan No. 150509; failing to find that the 1st respondent had not discharged its burden of proof when it failed to produce beacon certificates and/or cadastral survey plans or a licensed surveyor's report that showed that the applicant's dwellings were on the suit property; failing to find that some of the applicants were not occupying the suit property and were therefore wrongly sued; failing to find that the 1st respondent had in its suit omitted several occupants of the suit property who are adversely affected by the impugned decision without according them a fair hearing; and failing to address the question of law whether or not the Government Lands



Act was the principal statute under which the Letter of Allocation in favour of the 1st respondent was issued, and whether the said allocation was done in accordance with the said Act.

9. Regarding the nugatory aspect, it is contended that the stay of execution granted by the trial court has already lapsed and that the 1st respondent has already served the applicants with a draft decree seeking, inter alia, demolition of their structures, houses and other developments on the suit property. They contend that upon issuance of the said decree, the 1st respondent is likely to demolish and evict them from their homes which will occasion upon them irreparable harm and damage, especially noting that they have lived on the suit property for over 25 years and have invested all their livelihoods thereon. In this regard, they challenge the 1st respondent's financial ability to compensate them if the 1st respondent were to execute the said decree. In sum, they contend that if execution were to proceed, the intended appeal would be rendered nugatory since the subject matter would have been destroyed.
10. The application is opposed by the 1st respondent through a replying affidavit sworn by Anthony Masibo Diffu, its director. It is averred that the intended appeal is not arguable, and that in an attempt to demonstrate arguability, the applicants have introduced new issues that were not canvassed and new evidence that was not adduced before the trial court, which issues and evidence are totally inadmissible at this stage.
11. Regarding nugatory aspect of the intended appeal, it is averred that should this Court be minded to grant the orders sought in the application, then it should direct the applicants to furnish security of Kshs.40,000 per month in an interest earning account to be opened in the joint names of the advocates for the applicants and the 1st respondent. This amount is intended to secure the anticipated loss of mesne profit should the intended appeal fail. In the alternative, the 1st respondent deposes that the applicants should be ordered to deposit the sum of Kshs.44,640,000 in an interest earning account in the joint names of the advocates to secure the anticipated loss or mesne profit should the intended appeal fail. The sum of Kshs.44,640,000/- is arrived at as follows: 31 applicants x 40,000/- (estimated mesne profit) x 3 years (being the estimated period the appeal is likely to take).
12. At the hearing of this application, the applicants were jointly represented by Mr. Okonjo and Ms. Nelima. Mr. Olunya was present for the 1st respondent. There was no representation for the other respondents, despite service of hearing notices upon them. Counsel made brief oral highlights of their clients' respective written submissions. Mr. Okonjo reiterated that the 1st respondent did not discharge the burden of proof on the question of ownership. He further submitted that at least 15 out of the 31 applicants who were condemned by the judgment of the trial court do not reside on the suit property, and that execution of the said judgment would occasion irreparable loss and damage.
13. On his part, Mr. Olunya contended that the intended appeal is not arguable, and said that none of the applicants had produced copy of a title to assert ownership to the suit property. Regarding the claim for adverse possession, he contended that the applicants had not satisfied the principle of animus possidendi, that is, intent to possess. In essence, it was submitted that the trial court made correct findings and therefore the intended appeal is not arguable.
14. Regarding the nugatory aspect, counsel reiterated his client's plea for furnishing security for the due performance of the decree. He also told the Court of attempts by the 1st respondent to have the dispute settled amicably by getting the applicants to purchase their respective portions which they occupy so that they could be allowed to remain on the suit property.
15. We have considered the application, the replying affidavit and the submissions, as well as the applicable law. It is trite law that in an application of this nature an applicant must satisfy this Court that the appeal or the intended appeal is arguable, and that unless the orders sought are granted, the appeal,



if successful, shall be rendered nugatory. See Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR. Even one arguable ground of appeal will suffice. See Damji Pragji Mandavia vs Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.

16. Looking at the issues which the applicants intend to raise in their intended appeal, we are satisfied that the intended appeal is arguable. We need not say much on arguability at this stage, lest we embarrass the bench that shall eventually hear the appeal.
17. On the nugatory aspect, there are competing interests between the applicants and the 1st respondent. On the one hand, the 1st respondent is entitled to enjoyment of the fruits of its judgment. On the other hand, the applicants are apprehensive that execution of the decree would entail demolition of their houses and their eviction from the suit property, will occasion them irreparable loss and damage. They contend that the damage so caused would not be sufficiently compensated in damages and that in any case, the 1st respondent is not in a position to compensate them in the event their intended appeal is successful.
18. We have considered the competing interests between the parties and the need to preserve the substratum of the intended appeal. There is no doubt in our minds that if the 1st respondent executes the said decree, the houses and the developments of the applicants resting on the suit property will be demolished. These actions will, no doubt, permanently alter the character of the suit property. It is averred that some of the applicants have lived on the suit property for more than 25 years and destruction of their homes will most definitely occasion them irreparable loss. In any case, and without prejudice to the foregoing, the 1st respondent did not controvert the allegation by the applicants that it would not be able to compensate them in the event that the intended appeal is successful. The onus lay squarely upon the 1st respondent to rebut the said allegation. The applicants have therefore demonstrated that unless an order of stay of execution is granted, their intended appeal, if successful, shall be rendered nugatory.
19. The applicants have satisfied the twin principles which the court considers in applications brought under rule 5(2) (b) of its Rules. Consequently, we grant the prayers set out in the notice of motion dated April 16, 2024. The costs of the application shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

D. K. MUSINGA, (P.)

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

