



**Magua v Munene & 3 others (Civil Appeal (Application)
E589 of 2024) [2024] KECA 1751 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1751 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E589 OF 2024
F TUIYOTT, AO MUCHELULE & GV ODUNGA, JJA
DECEMBER 6, 2024**

BETWEEN

MOSES CHEGE MAGUA APPLICANT

AND

IAN MUKORA MUNENE 1ST RESPONDENT

LAND REGISTRAR, NAIROBI CENTRAL 2ND RESPONDENT

**NICK BIKETI MALENYA T/A BIKETI & COMPANY
ADVOCATES 3RD RESPONDENT**

JOSEPH GITAU KUNGU 4TH RESPONDENT

(Being an application pending the hearing and determination of the appeal for Injunction and/or restraining order against the ruling and order of the Environment and Land Court at Nairobi (M.D. Mwangi, J.) dated 12th July 2024 in ELC Case No. E231 of 2021)

RULING

1. Before the Environment and Land Court (ELC) at Nairobi, the applicant, Moses Chege Magua, and the 4th respondent, Joseph Gitau Kungu, filed a suit claiming to be the registered proprietors of all that property known as Land Parcel No. 89/42 (the suit property) measuring about 21.77 Hectares by way of lease from the Government of Kenya as from 1st June 2000. Their case was that, despite this lease, the 1st respondent, Ian Mukora Munene, had either by himself and/or his agents and servants been cultivating or leasing the suit property to unknown persons; and that despite efforts, he had refused and/or ignored requests to vacate. The suit was filed to have him evicted from the suit property and he be ordered to pay general damages for loss of user.



2. Along with the plaint was filed a notice of motion seeking a temporary injunction restraining the 1st respondent, his agents and servants, from entering the suit property, or from leasing or cultivating it or constructing any structures thereon.
3. The 1st respondent swore a replying affidavit to oppose the motion. He swore that the suit property had been excised from LR No. 89/2 which comprised 111.5 acres. The original land had been purchased from Ngenda Estate Limited by Munene Estates Limited which had been founded by the 1st respondent's parents, Samuel Munene Gitau and Winne Wanjiru Munene, each having one share. When they died, the original land was subdivided into three portions, namely LR No. 89/39, 89/37 and 89/38. LR 89/38 was sold off to settle company debts. Following a court order issued on 16th May 2014, 20 acres of LR No. 89/39 was sold to Lifestyle Homes Limited. This resulted in LR Nos 89/40 and 89/41. Subsequently, the remaining portion of LR No. 89/39 became LR No. 89/42 which is contained in an indenture registered on 24th May 2018 in the name of Munene Estate Limited. This is the suit property. The property was later amalgamated with parcel No. 6755/2 and then subdivided into 230 portions which were equally distributed to the 1st respondent and his siblings following Nairobi Succession Causes Nos. 1511 of 2007 and 846 of 2003 that were filed when their parents died. The 1st respondent denied that the suit property belonged to the applicant or 4th respondent.
4. Vide a letter dated 8th November 2021 signed by M/s Biketi & Co. Advocates for the applicant and 4th respondent and M/s. Judy Thongori & Co. Advocates, the court was informed of a consent that they had signed to settle the suit in the following terms:-
 - “ 1) The title no. I.R 226750/1 registered on 24th February 2021 to Moses Chege Magua and Joseph Gitau Kungu be and is hereby cancelled and/or revoked as the said property is owned by and registered in the name Munene Estates Limited.
 2. The plaintiffs' Advocates Biketi & Company Advocates do surrender the original title for No. L.R 226750/1 registered in the names of Moses Chege Magua and Joseph Gitau Kungu to the Chief Land Registrar Nairobi Central for the cancellation and or revocation within 3 days of the execution of this consent.
 3. No orders as to costs.”
5. On 10th November 2021, the consent was adopted as an order and decree of the court.
6. On 16th November 2024 the law firm of Owang & Associates filed a notice of motion dated 14th March 2024 on behalf of the applicant seeking, among other prayers, an order to set aside or vary the decree issued on 18th November 2021 and all prior and subsequent orders issued, and that the entire proceedings to the suit be declared nullity ab initio due to fraud. The application was substantially premised on the allegation that the law firm of Biketi & Co. Advocates which instituted the suit had no instructions or authority from the applicant and 4th respondent, and that the two had no knowledge of the suit land and had not issued any instructions or authority for it to be settled; that the applicant and the 4th respondent had not participated in the proceedings leading to the settlement. The application was founded on the supporting affidavit by the applicant.
7. The 1st respondent, through M/s. Judy Thongori & Co. Advocates, filed grounds of opposition to oppose the application. It was indicated that the application had been overtaken by events as the decree had been executed and the suit property distributed following the succession causes. The 1st respondent



- filed a replying affidavit to depone that the consent had been reached and recorded after the applicant and 4th respondent conceded that the suit property belonged to Munene Estates Limited, and that, subsequently, they had surrendered the fake title that they were holding to the Nairobi Lands Registry which had cancelled it.
8. Interestingly, the 4th respondent, in a change of heart, swore an affidavit dated 13th June 2023 to admit that him and the applicant had instructed Biketi & Company Advocates to file the suit; had instructed the firm to negotiate a settlement; had instructed that the consent be recorded; and that the terms of the consent had been explained to them before it was recorded.
 9. The application was canvassed before the learned M.D. Mwangi, J. who, upon considering the same, on 12th July 2024 decided that it was not merited, and dismissed it with costs. The court found that the allegations by the applicant and the 4th respondent that they had not instructed the firm of Biketi & Co. Advocates to file the suit and subsequently enter into the consent, or that the consent was founded on fraud, were without basis.
 10. It is this decision that led the appellant to file the notice of appeal and the appeal, demonstrating his intention to challenge the ruling before this Court, and, following it, filed the instant notice of motion under rule 5(2)(b) of the Court of Appeal Rules. The motion sought that the 1st respondent, and all those acting under him, be restrained from entering or remaining in the suit property, and that the 2nd respondent (Land Registrar, Nairobi Central) be restrained from registering any documents alienating or encumbering the suit property, pending the hearing and determination of the appeal.
 11. In the affidavit that the applicant swore to support the motion, he deponed that he was the registered proprietor of the suit property, and that he was not aware of any competing claim from the 1st respondent, or any other person. He reiterated that he never instructed the filing of the suit before the trial court and never participated in the entry of the consent order. He stated that all the signatures attributed to him were forgeries, and that he has since obtained forensic examination report to that effect. Lastly, his case was that he has in his custody the original certificate of title and lease of the suit property, and that it was not true that he had surrendered them to either the 2nd or 3rd respondents (Nick Biketi Malenya t/a Biketi & Co. Advocates) for cancellation and/or revocation.
 12. In the replying affidavit sworn by the 1st respondent, he reiterated that the applicant did not own the suit property at any time, and that, in any case, the property no longer existed following its distribution vide the succession causes. Further that, there has been no demonstration that the appeal is arguable as the 4th respondent had conceded that they (he and the applicant) had instructed the 3rd respondent to file and, later, compromise the suit on admission that the suit property belonged to Munene Estates Limited, and not to them.
 13. In the notice of motion, the applicant stated that if stay is not granted, he will be dispossessed of the suit property and that would violate his constitutional right to property. On his part, the 1st respondent stated that the applicant has never been in possession of the suit property, and therefore there was nothing to be lost.
 14. We have considered the application, the response and the submissions. We have done this against the jurisdiction of this Court under Rule 5(2)(b) of the Court of Appeal Rules. This is a discretionary jurisdiction guided by well distilled principles. The applicant has to show that he has an arguable appeal, and that, unless he is granted stay, his appeal, if successful, will be rendered nugatory (see *Trust Bank Ltd & Another -vs- Investech Bank Ltd & 3 Others* [2000]eKLR).



15. In our view, the appeal will be decided on the question whether or not the applicant and the 4th respondent had instructed the 3rd respondent, first, to file the suit, and, second, to settle the suit through the consent. We are not the Court that will determine this question, and do not wish to make any conclusions that may embarrass that Court. However, considering that initially the applicant and the 4th respondent were together in the claim that the 3rd respondent had filed and settled the suit without their knowledge or authority, and that the 4th respondent had since shifted from that position to say that indeed they had given their instructions to the 3rd respondent to file and settle the suit, and conceded that they had no claim to the suit property, we doubt that the appeal raises any arguable issue.
16. But more important, it is evident that the decree subject of the appeal was executed and the suit property distributed to the 1st respondent and other people. Clearly, from the applicant's own affidavits throughout the dispute, his complaint was that the 1st respondent and others had forcefully occupied the suit property and he had wanted them evicted. He was, therefore, not in occupation at the time of the hearing of the suit in the trial court. One, the application has been overtaken by events, and, secondly, the appropriate prayer should have been that of mandatory injunction to put the applicant into possession after removing the 1st respondent. That was neither sought nor proved. Thirdly, the appeal will not be rendered nugatory if the applicant was never in occupation, and where there is no demonstrated claim that the 1st respondent seeks to dispose of the suit property.
17. In all, we find the application unmerited and dismiss it with costs.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER 2024

F. TUIYOTT

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

