



AWN (Erroneously Sued as AWN) v MWN (Civil Application E406 of 2022) [2023] KECA 140 (KLR) (17 February 2023) (Ruling)

Neutral citation: [2023] KECA 140 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E406 OF 2022
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
FEBRUARY 17, 2023**

BETWEEN

**AWN APPLICANT
ERRONEOUSLY SUED AS AWN**

AND

MWN RESPONDENT

(An application for orders of stay of execution pending the lodging, hearing and determination of an intended appeal from the Judgment and Decree of the Environment and Land Court at Nairobi (Mwangi, J.) delivered on 27th September 2022 in ELC Appeal No E303 of 2019)

RULING

1. The application before us is dated November 8, 2022 and brought under rule 5 (2)(b) and 42 of the [Court of Appeal Rules](#).
2. A brief recount is that the respondent filed a suit in the Environment and Land Court (ELC) seeking eviction of the applicant. The same proceeded to trial and the court entered judgment in favor of the respondent by issuing an eviction order against the applicant and directing her to vacate the suit land, LR Ngong/ Ngong/ xxx within 45 days of the judgment, failure to which she would be forcefully removed. The respondent was also awarded a sum of Kshs 1,000,000 as general damages for trespass, and costs. Aggrieved, the applicant filed the instant application by which she seeks a stay of the said judgment and decree pending hearing and determination of an intended appeal.
3. The application is supported by her sworn affidavit in which she avers that she is the 2nd wife of the late WNK, and the legitimate and rightful owner of the suit land by virtue of it being matrimonial property and/or property of the estate of WNK; and that the court (ELC) prematurely closed her case as a result of which she was unable to adduce any documents or defend her case. It is further her case that the ELC had no jurisdiction to determine the suit since the suit land forms part of matrimonial property, and



that there exists a matrimonial dispute currently pending before this court; that she has an arguable appeal which has a good chance of success to the extent that she was not represented by counsel in the ELC, and did not produce any documents in support of her case; that, unless the orders of stay of execution and/or maintenance of the status quo are granted, she will suffer irreparable damage as she risks being left destitute and homeless, being the person in possession and occupation of the suit land; and that premised on the latter ground, the intended appeal will be rendered nugatory if the orders sought are not issued.

4. The respondent opposed the application vide her replying affidavit sworn on November 15, 2022. She asserts that the applicant has never been registered as the proprietor of the suit land; that the same had been registered in the joint names of her husband (deceased) and herself, which title reverted to her when he (deceased) died; that the applicant's title document attached to the application is a forgery; the suit property cannot be deemed to be matrimonial property as the applicant was legally married to another man whom she divorced and a decree nisi issued in 2010 whilst her husband died in 2009; that she (respondent) had previously filed a suit in the High Court, being HCCC No 624 of 2009, seeking the applicant's eviction and, in a judgment rendered in 2009 by Waweru, J, the court ordered the eviction of the applicant and that the applicant, instead of complying with the said orders, opted to file a suit in the Chief Magistrates' Court at Kajiado, Case No 41 of 2010, which issued orders enabling her to remain in possession, though the suit was finally dismissed for want of jurisdiction.
5. We add that the applicant had filed an objection in the succession cause in the High Court, being Succession Cause No 2338 of 2009 claiming that she was a second wife of the deceased, but the court held that she was not, and that she was in occupation of the suit property illegally. The applicant sought stay of the eviction order pending appeal, which application was dismissed. According to the respondent, the intended appeal is frivolous as the applicant fully participated in the trial to the extent that she cross examined her; that it was only at the point of filing submissions that she brought in an advocate who agitated that the hearing starts de novo; that granting of the orders sought would be prejudicial to her, as the applicant has been occupying her land without paying rent, and has been cutting down mature trees to her detriment; and that she has no desire to dispose of the suit land and, even if the applicant is successful in the appeal, she would have the right to reclaim the land from her. As such, the appeal would not be rendered nugatory upon success of the intended appeal. She urges that the application be dismissed.
6. Contemporaneously with the replying affidavit, the applicant filed a preliminary objection to the application, arguing that the application was res judicata, and hence an abuse of the court process as the respondent filed a similar application before the ELC, which is pending for delivery of a ruling on January 19, 2023.
7. The application came for hearing before us through GoTo Meeting virtual platform on the January 17, 2023. The applicant was absent while learned counsel, Mr Mbigi, was present for the respondent, and who sought to rely entirely on his written submissions dated January 13, 2023. The applicant filed written submissions dated January 11, 2023.
8. The parties' submissions basically reiterated the averments in the affidavits in support of, and opposition to, the application. We do not wish to rehash them, save to add that the applicant further advanced the assertion that the eviction orders were issued ex parte and in her absence; that the respondent fraudulently transferred the suit land into her name after the deceased's death, and that she is a lawful wife of the deceased.
9. We have considered the application, the affidavit in support of, and opposition to, the application, the preliminary objection, the respective submissions and law. The principles for granting a stay of



execution under rule 5 (2)(b) of the rules of this Court are well settled, we must be satisfied of the twin guiding principles that the intended appeal is arguable, and that unless a stay or injunction is granted, the appeal, if successful, would be rendered nugatory. See Githunguri v Jimba Credit Corporation Ltd (No 2) (1988) KLR 838.

10. The applicant contends that she was not represented by a counsel and did not defend the suit and, thus, the judgment was issued prematurely. She claims entitlement to the suit land by virtue of the claim that she is a wife to the deceased, Wallace Nderu Kamau, and that a Chief's letter dated October 27, 2014 listed her as such.
11. By virtue of a judgment delivered on September 22, 2017 in High Court Succession Cause No 2338 of 2009, the court (Muigai, J) held that she was not a wife of the deceased, and that the suit property Ngong/Ngong/xxx was jointly purchased and registered in the deceased and the respondent's names, thus by operation of law, upon demise of one of the joint owners, the property reverted to the surviving joint owner, the respondent. It was also held that the suit property did not form part of the estate of the deceased and was therefore not available for distribution. This judgment, though alleged to have been appealed, has never been set aside and still stands. As such, the applicant cannot claim to be a wife of the deceased whereas a court of competent jurisdiction already determined that she was not. It is also common ground that a Chief cannot legitimize a marriage, and a Chief's letter does not make one a wife. The applicant cannot therefore rely on the chief's letter to claim that, by the mere fact that it listed her as a wife of the deceased, she reserved the right to claim his properties. A claim must be established by evidence and nothing less.
12. We have also perused the ELC judgment that is subject of the intended appeal. The applicant entered appearance, but never filed a statement of defence despite having engaged two different advocates during the pendency of the suit. Indeed, when the matter came up for hearing, she chose to represent herself and the court was indulgent as to allow her to participate in the hearing by cross examining the respondent, and even taking her testimony despite not having filed a defence. We fail to see how, in such an instance, she was prejudiced by conducting the matter in person. Her claim that she was unheard is untrue and cannot hold. Notably too is that the principle of the sanctity of a title holds. The respondent is the current registered proprietor of the suit land, and we fail to discern that the appeal is arguable. If there is no arguable appeal, it follows that nothing is likely to be rendered nugatory if the orders sought are not granted.
13. The upshot of the foregoing is that we decline to grant an order of stay of execution as prayed. The notice of motion dated 8th November 2022, is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY FEBRUARY, 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

