



**Attorney General & another v Kung'u (Civil Application  
E342 of 2021) [2023] KECA 192 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 192 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E342 OF 2021  
HM OKWENGU, AK MURGOR & J MOHAMMED, JJA  
FEBRUARY 17, 2023**

**BETWEEN**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> APPLICANT**

**PRINCIPAL SECRETARY, MINISTRY OF LANDS AND  
SETTLEMENT ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DAVID MUHANG'I KUNG'U ..... RESPONDENT**

*(Being an application for stay of execution and Ruling dated 6th July 2021 dismissing the applicants' notice of motion dated 8th April 2019 seeking stay of execution of the Court's judgment and Review of the Judgment and Orders of the Environment and Land Court of Kenya at Nairobi (Kossy Bor, J.) delivered on 16th April 2018 in Civil Case No. 893 of 2015)*

**RULING**

1. By a notice of motion dated 27<sup>th</sup> September 2021 the Attorney General on his own behalf and the Principal Secretary, Ministry of Lands and Settlement, moved this Court under Sections 3A, 3B and Rule 5 (2)(b) of the *Court of Appeal Rules*, 2010. The Attorney General sought in the main an order of stay of execution of the judgment and decree of the Environment and Land Court (ELC) (Kossy Bor, J.) dated 16<sup>th</sup> April 2018, and the Ruling of the ELC dated 6<sup>th</sup> July 2021, pending the hearing and determination of the applicants' appeal against the Ruling. In the said Ruling, the ELC dismissed the applicants' notice of motion dated 8<sup>th</sup> April 2019 that was seeking to have the judgment of 16<sup>th</sup> April 2018 reviewed.
2. The notice of motion dated 27<sup>th</sup> September 2021 is said to be supported by grounds stated on the motion and an affidavit sworn by Kennedy Githunguri Njenga, the Director of Land Adjudication and Settlement. Unfortunately, no such affidavit is annexed to the motion nor were we able to trace any in the E-portal.



3. According to the grounds stated in the motion, the applicants are aggrieved by the judgment of the ELC as it has the effect of awarding the respondent the entire Karati Settlement Scheme comprising 49.5 hectares (suit property), which had not been allotted to the respondent. It is the applicant's position that there are private and public entities in occupation of the Karati Settlement Scheme including schools, health facilities, police station, and playground, and that the land does not actually belong to the respondent; that although it is not disputed that the respondent was given an offer of land, the acreage is disputed; that additional material was produced before the *ELC* and an application made for review of the judgment but the ELC rejected the application. The applicants believe that they have an arguable appeal, and that unless the orders sought are granted, the intended appeal will be rendered nugatory as the respondent may execute the judgment which would be contrary to public interest.
4. The applicants have also filed written submissions in which they have cited several authorities including the Supreme Court decisions in *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others* [2014] eKLR; and *Charter House Bank Limited v Central Bank of Kenya* [2007] eKLR, for the proposition that they have an arguable appeal that is likely to be rendered nugatory unless the orders sought are granted. The applicants refer to the grounds of appeal set out in the draft memorandum of appeal, in support of their contention that they have an arguable appeal.
5. On the nugatory aspect, the applicants maintain that if the respondent executes the judgment of 16<sup>th</sup> April 2018, it will result in the eviction of private persons occupying the suit property and renovation of their structures and buildings erected thereon, and this will result in harm that cannot be adequately compensated by an award of damages.

The applicants maintain that the granting of the order of stay of execution would serve the greater public interest, while the respondent will not suffer any prejudice if the stay is granted, as his possession of the area of the suit property that he is in occupation, will not be disturbed.

6. The respondent has also filed written submissions in which he urges the Court to dismiss the applicants' motion and allow him to enjoy the fruits of his litigation. He maintains that the intended appeal has no chance of succeeding. He relies on *Kenya Shell Limited v Kibiru* [1986] KLR 410, contending that the intended appeal would not be rendered nugatory as there is no evidence of substantial loss to the applicants. He argued that the threshold for granting orders of stay under Rule 5(2)(b) of the *Court of Appeal Rules* has not been met. He urges the Court that the public policy principle that there must be an end to litigation must triumph over the equally weighty principle that justice must be done and be seen to be done, and therefore the applicants should not be allowed to re-open the litigation but the respondent as a successful litigant, must be allowed to enjoy the fruits of his judgment.
7. During the hearing of the application that proceeded by way of Go- To-Meeting online platform, Mr. Eregi, State counsel was present for the applicants, while the respondent was present in person. Although the respondent indicated that he had filed a replying affidavit, we were not able to locate any in the E-portal.
8. We have considered the application and the contending arguments.

The application being one under Rule 5(2)(b) of the *Court of Appeal Rules*, the threshold to be met by an applicant have been stated by this Court in many decisions. The applicant must satisfy the Court that he has an arguable appeal and that unless the order of stay of execution is granted, the appeal if successful will be rendered nugatory. (See *Ruben & 9 others v Nderito & Another* [1989] KLR 455; and *Republic v Kenya Anti-Corruption Commission & 2 others* [2009] KLR 31).



9. The background to the applicants' motion is that following a suit that was filed by the respondent against the applicants, the ELC on 16<sup>th</sup> April 2018 delivered a judgment in which it found that the respondent had bought 49.5 hectares and had been in occupation of the suit property but that the Government without following the procedure for compulsory acquisition, had resettled squatters on part of the land. The learned Judge therefore directed the applicants to ascertain the portion of the suit property on which the squatters had been resettled and issue a title deed to the respondent for the remainder of the land which he was occupying, and to compensate the respondent for the portion of the suit property which was allocated to the squatters.
10. Following an application that was made by the applicants for stay of execution of the judgment of 16<sup>th</sup> April 2018 and setting aside of the Judgment and orders ensuing therefrom, the learned Judge delivered a ruling on 6<sup>th</sup> July 2021 in which she dismissed the application for review and upheld the previous judgment. In the current motion, the applicants now seek to stay execution of the judgment and decree, as well as the ruling and orders given by the Court on 6<sup>th</sup> July 2021 dismissing the applicants' notice of motion for review of the judgment.
11. We have examined the grounds which the applicants intend to canvass in the intended appeal as stated in paragraph 10 of their written submissions. The grounds basically fault the learned Judge for disallowing the application for review. The grounds do not address the judgment of 16<sup>th</sup> April 2018. Indeed, there is no appeal that has been filed against that judgment. That being the position, there is no justification for the Court staying the judgment.
12. As regards the ruling of 6<sup>th</sup> July 2021, the learned Judge dismissed the applicants' motion and therefore the decree is a negative order which is not capable of execution. Moreover, the decree arising from the judgment of 16<sup>th</sup> April 2018, was basically as follows:
  - “(i) That the plaintiff has established that he bought 49.5 hectares and has been in occupation of the suit property.
  - (ii) That the defendants are directed to ascertain the portion of the suit property on which they have resettled squatters and issue a title deed to the plaintiff for the remainder of the land, which he currently occupies.
  - (iii) That if the government wishes to acquire the suit property for purposes of developing a township, then it will have to pay just compensation to the plaintiff for the part of the suit property that may be required for the settlement scheme under the *Land Act*.
  - (iv) That the defendants are directed to compensate the plaintiff for the portion for the suit property which was allocated to squatters.
  - (v) That the plaintiff will have the costs of the suit.”
13. It is apparent from the decree as above reproduced, that the learned Judge did not issue any order of eviction against any third party said to be in occupation of the scheme. To the contrary, the learned Judge directed that the portion they occupy be ascertained and a title deed be issued to the respondent for the remainder of the land. We do not see how the execution of this decree will render the applicants' appeal against the ruling of 6<sup>th</sup> July 2021 nugatory.
14. For these reasons, we find no merit in the applicants' motion. It is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2023.**



**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

