



REPUBLIC OF KENYA



**KENYA LAW**  
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**Munge v Munge (Civil Appeal (Application) 36 of 2020)  
[2023] KECA 75 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 75 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 36 OF 2020  
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA  
FEBRUARY 3, 2023**

**BETWEEN**

**PATRICK KARIGE MUNGE ..... APPLICANT**

**AND**

**RAPHAEL ARC KARIGE MUNGE ..... RESPONDENT**

*(An application for injunction pending the hearing and determination of the appeal against the Judgment and Decree of the Environment and Land Court of Kenya at Nairobi (Kosy Bor, J.) delivered on 6th December 2018 in ELC Case No. 560 of 2014 (O.S))*

**RULING**

1. The application dated October 27, 2022 brought under rule 5(2)(b) of this [Court's Rules](#) seeks an interim order of injunction to restrain the respondent, his agents and/or employees from selling or transferring the parcels of land known as LR Nos 8107/2, 8107/3, 8107/4, 8107/5, 8107/8 and 8207/9 (the suit properties) or interfering with the titles in any manner pending hearing and determination of the appeal.
2. In his affidavit in support of the application, the applicant stated that, on December 6, 2018, the Environment and Land Court dismissed a suit that he had filed seeking to be declared the owner of the suit properties under the doctrine of adverse possession. Being aggrieved by that decision, he filed an appeal to this court, and the record of appeal was served upon the respondent's advocates on February 7, 2020. However, on December 23, 2019, the applicant was evicted from the suit properties, pursuant to a court order issued by the Chief Magistrates' Court at Milimani in Misc Application No 1328 of 2019.
3. The applicant is apprehensive that the respondent may dispose of the suit properties before the appeal is heard and determined as he has put up signs thereon advertising them for sale. The appellant avers that in the event that the suit properties are sold, the appeal, if successful, shall be rendered nugatory.



- The applicant urges us to grant the order sought, contending that the appeal is arguable. He has exhibited a copy of the memorandum of appeal for our perusal.
4. The respondent is the biological father of the applicant and is the registered owner of the suit properties. In 1992, the respondent allowed his son, (the applicant), to stay on the suit properties, but after some years the applicant filed suit, ELC No 560 of 2014 (OS), seeking a declaration that he had acquired prescriptive rights over the suit properties by virtue of long and continuous stay thereon for a period exceeding 12 years.
  5. The suit was dismissed in December 2018 and, subsequently, the respondent obtained an eviction order that was executed on December 23, 2019 before the applicant instituted the appeal in 2020.
  6. In view of the foregoing, the respondent stated that the application is “an afterthought brought out of malice, ill will, mistake and/or intimidation to coerce me to give him inheritance while I am still alive and strong, which I find absurd, unafrican and against the Kenyan law.”
  7. The respondent believes that the appeal has no chance of success, and that the applicant has not demonstrated that he would suffer any injury if the orders sought are not granted. The respondent added that he had commenced development of apartments on LR Nos 8107/2, 8107/3, 8107/4 and 8107/5 by constructing a show house and then proceeded to sell the apartments off plan to finance the development. He will therefore suffer substantial financial loss if this court grants an order of injunction as sought.
  8. For those reasons, the respondent urged us to dismiss the application.
  9. We have perused the application, the affidavits and submissions filed by the parties. The principles that guide this court in a rule 5(2)(b) application are well settled. An applicant must first demonstrate that the appeal or intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory.
  10. On the first limb, we are well aware that an arguable appeal need not be one that must succeed, but raises at least one ground that warrants the court’s interrogation. However, it is not enough for an applicant to merely exhibit a memorandum of appeal or a draft memorandum of appeal and contend that the appeal or intended appeal is arguable. For this low threshold to be attained, an applicant must establish at least one sufficiently plausible ground that is likely to succeed upon the hearing of the appeal, and have the effect of overturning the impugned decision.
  11. We have perused the impugned judgment and the memorandum of appeal. The gravamen of the appeal is the trial court’s finding that the applicant did not establish that he was in adverse possession of the suit properties. We are not persuaded that the appeal is arguable. Firstly, the trial court found that the applicant had not been in continuous uninterrupted adverse occupation of the suit properties for a period exceeding 12 years. He entered the suit properties in 1992 with his father’s permission. The documents before us further show that, in 1998, the house he was living in was burnt down and he moved out. It was not clear to the trial court when he returned. Secondly and most importantly, in *Samuel Miki Waweru v Jane Njeri Ruchu*, [2007] eKLR, this court held:

“It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise.”
  12. The applicant is a son of the respondent and was allowed by his father to occupy the suit properties while his father was residing abroad. That kind of occupation, even if it was for a period exceeding 12 years, cannot be said to have been adverse to the respondent’s title and interest over the suit properties.



That is an incontestable legal position. Indeed, he was not in occupation of the suit properties as of right to support a claim in adverse possession. No such right accrues in favour of a licensee.

13. As we are satisfied that the appeal is not arguable, therefore, the applicant has failed to satisfy the first principle of having an arguable appeal. Accordingly, it is not necessary for us to consider whether the intended appeal will be rendered nugatory. In the circumstances, we must dismiss this application with costs to the respondent, which we hereby do. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2023.**

**D. K. MUSINGA, (P)**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

