



REPUBLIC OF KENYA



KENYA LAW
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**Mutua v Makewa & another (Civil Appeal (Application)
E150 of 2022) [2023] KECA 326 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 326 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E150 OF 2022
AK MURGOR, S OLE KANTAI & JM MATIVO, JJA
MARCH 17, 2023**

BETWEEN

MWANZWII MUTUA APPELLANT

AND

JAMES MATHUVA MAKEWA 1ST RESPONDENT

NZAVI NGULUI 2ND RESPONDENT

(An application arising from the Ruling of the Environment and Land Court at Makueni delivered on 9th February 2022 (C.G. Mbogo, J.) in ELC Case No. 94 of 2017)

RULING

1. This Notice of motion dated March 22, 2022 is brought pursuant to Articles 48, 40 and 159 of the Constitution and rule 5, 2 (b) of the Court of Appeal Rules, 2010 and seeks orders of stay of execution of the trial court's ruling issued on January 28, 2021, in Makueni ELC Case Number 94 of 2017 pending the hearing and determination of the appeal.
2. The motion is premised on grounds that the applicant is the administrator of the Estate of Kyavi Mutua Kyaka (the deceased); that the deceased was member No 149 in Nguu Ranch C.S Limited and was allocated Plot No. 1283 in 1994 which later became Makueni/Nguu/1283 (the suit property); that he had settled on the land measuring ten (10) acres before it was allocated in 1994 to 1995.
3. The applicant's complaint is that the main suit was between the 1st and 2nd respondents and that he was never afforded an opportunity to ventilate his case; that he applied to the Makueni ELC Court, to be joined in the suit but his application was dismissed in the ruling dated February 9, 2022, the subject of the appeal; that the applicant is apprehensive that the 1st respondent may proceed to evict the applicant and his family, and render them homeless; that the applicant has since filed a notice and memorandum of appeal and is awaiting for typed proceedings to enable him file the record of appeal.



4. In the affidavit in support of the application sworn by the applicant on March 22, 2022, the applicant reiterated the grounds and further deposed that; there are orders for eviction against the 2nd respondent which by extension will also affect him and his family since they have also settled on the same property. A Notice of appeal dated July 28, 2021 and a Memorandum of appeal were annexed to the motion which grounds were that the learned judge was in error in finding that the case could not re-open to allow the applicant an opportunity to ventilate his case on merits; in failing to appreciate that denying the applicant a hearing exposed his home to demolition and render him and his family homeless; in refusing to consider the applicant's documentary evidence that showed that the applicant's father was the initial allottee of the suit property, and in disregarding the applicant's submissions in their entirety.
5. When the application came up for hearing, learned counsel for the applicant Mr. Loki stated that he would be relying on the applicant's written submission, which were to the effect that the appeal is anchored on the complaint that the appellant was never heard after eviction orders against him were issued; that if the orders sought are not granted, the appeal will be rendered nugatory as the applicant and his family will have been evicted.
6. In a replying affidavit sworn on March 30, 2022, and in written submissions, the 1st respondent opposed the application and deposed that, the applicant was deceased since April 2021 and therefore, the application was incompetent as he required to be substituted; that the trial court rendered a final judgment, after which, the applicant filed an application to be joined in the suit; that in the impugned ruling, the trial court dismissed the application for the reason that it was functus officio; that thereafter, the 1st respondent obtained an order for eviction against the 2nd respondent, but no order for demolition was obtained against the applicant; that the judge rightly determined that enjoinder and reopening of the case will render the suit subjudice; that the orders of eviction of January 28, 2021 being specific to the 2nd respondent, no prejudice would be suffered by the applicant were stay to be granted, as he is not in possession of the suit property, but is a resident of Kwa Vonzi Kathwenzeni and Nguu Ranch.
7. Counsel relied on this Court's decisions in *James Wangalwa vs Agnes Naliaka Cheseto* (2012) eKLR and *RWW vs EKW* (2019) eKLR.
8. Before proceeding to determine the application, the 1st respondent has deposed that the applicant is deceased, and that the application ought not to proceed without his having been substituted. We have reviewed the motion, but cannot find any documentation that is supportive of that assertion. It is also worthy of note that the applicant's counsel who was in court did not allude to the applicant's demise, and therefore without any concrete basis on which we can rely that would point to his demise, we will proceed and determine the application that is before us.
9. In so far as applications filed under rule 5 (2) (b) of this Court rules are concerned, the threshold requirement to be satisfied are set out in the case of *Republic vs Kenya Anticorruption Commission and 2 others* [2009] eKLR thus;

"The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds their results or success could be rendered nugatory".
10. As to whether the appeal is arguable, the applicant has raised various grounds in the memorandum of appeal including, that the trial judge was in error in declining to re-open the case so as to allow him an



opportunity to ventilate his case on its merits, and in failing to appreciate that denying him a hearing exposed his home to demolition and would render both him and his family homeless.

11. A consideration of the applicant's grounds, would not lead us to conclude that the appeal is arguable. This is because, the applicant was seeking a stay of execution in a suit to which he was not a party, and where a final judgment was rendered, so that the court was, *functus officio*, and incapable of reopening the suit to enjoin him.
12. Furthermore, pursuant to the judgment, the trial court issued orders of eviction against the 2nd respondent, yet the applicant was seeking orders of stay where no orders were made against him. Without having been a party to the suit, and in view of there having been no orders made against the applicant, clearly, the intended appeal is not arguable, and we so find.
13. Consequently, the applicant having failed to satisfy us that the application is arguable, we need not consider the second limb as to whether the application will be rendered nugatory.
14. As such, the notice of motion dated March 22, 2022 is not merited, and is dismissed with costs to the 1st respondent.

It is so ordered.

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

A. K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

