



REPUBLIC OF KENYA



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**Miriti v Kaburo (Civil Application E075 of 2022)
[2023] KECA 639 (KLR) (6 April 2023) (Ruling)**

Neutral citation: [2023] KECA 639 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E075 OF 2022
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
APRIL 6, 2023**

BETWEEN

DOUGLAS MIRITI APPLICANT

AND

ELIZABETH KABURO RESPONDENT

*(Being an application for stay of execution of the judgment and decree
of the Environment and Land Court at Meru (Nzili, J.) delivered
on 28th September, 2022 in Constitutional Petition No. 10 of 2015)*

RULING

Background

1. Before us is a notice of motion dated October 4, 2022 filed by Douglas Miriti (the applicant) expressed to be brought under Rules 5(2)(b) and 42 of the [Court of Appeal Rules, 2010](#). The application seeks orders in the main:
 - a. that this Court be pleased to stay the execution of the judgment and all consequential orders in Meru Environment & Land Court (ELC) (Nzili, J) in Constitutional Petition No 10/2015 and stay the order of cancellation of the applicant's title to LR No Ankamia/12820 pending the hearing of this application, inter partes; and
 - b. that this Court be pleased to stay execution of the judgment/decree in Meru ELC Constitutional Petition No 10/2015 ordering the cancellation of the applicant's title to the suit property pending the hearing and determination of the intended appeal to this Court.
2. The application is based on the grounds, inter alia:
 - a. that the respondent's rights under Article 20, 22, 23, 40 and 47 of [Constitution](#) were violated by the applicant herein in lodging of AR Objection No 1443 regarding land parcel 2911 and



eventually hearing and determining the same to the extent that it affected Land parcel No 11351 without involving the petitioner (now respondent).

- b. a declaration that creation of parcel No 12820 by the 2nd respondent in favour of the 1st respondent from the petitioner's land parcel No 11351 to the detriment of the petitioner's rights and the implementation on the ground was invalid null and void and unconstitutional. Any subsequent titles thereof are hereby declared cancelled or invalidated;
 - c. costs to the petitioner;
 - d. that in view of the impugned judgment/decreed the applicant's title to land parcel No Ankamia/12820 is in grave danger of being cancelled as invalidated by the Land Registrar if the orders sought are not granted in the first instance;
 - e. the applicant being aggrieved by the judgment of the High Court is in the process of filing an appeal to court and has filed a notice of appeal; and
 - f. the applicant's appeal has very high chances of success.
3. A brief background will put the application in context. Elizabeth Kaburo, the respondent, being the owner of a Parcel No 11351 Ankamia Adjudication Section (the suit property) through an amended petition dated January 22, 2022 sued the applicant, the Land Adjudication Officer, Tigania West District and the Hon. Attorney General for breaching her rights under Articles 27,28,40,47 and 50 of Constitution in that the objection filed by the applicant was heard and determined in her absence leading to his being given 0.97 acres of the suit property. The respondent sought a declaration that her right to land ownership as guaranteed in Constitution had been violated and a declaration that the suit property belongs to her and that the applicant, the Land Adjudication Officer, Tigania West District and the Hon. Attorney General be directed to facilitate and effect the changes in her name.
4. The applicant in his replying affidavit and reply to petition opposed the petition and denied any alleged violations of the respondent's rights. He confirmed filing an Adjudication Register Objection which was duly heard in the presence of the respondent as well as her father, Benjamin M'Aburuki. He stated that the Land Adjudication Officer, Tigania West District who was the 2nd respondent in the petition heard and determined the dispute within the confines of the law.
5. Upon hearing the petition, the ELC found that the respondent's land was taken away without her being heard; and that the Adjudication Register was determined without reference to her. The learned Judge issued the following orders:
- a. A declaration be and is hereby issued that the petitioners rights under Articles 20,22,23,40 and 47 of Constitution were violated by the respondents in the lodging of an A/R objection No 1443 regarding Parcel No 2911, and eventually hearing and determining the same to the extent that it affected Parcel No 11351 without involving the petitioner.
 - b. Declaration that the creation of Parcel No 12820 by the 2nd respondent in favour of the 1st respondent from the petitioners Parcel No 11351 to the detriment of the petitioner's right and its implementation on the ground was invalid, null, void and unconstitutional. Any subsequent titles thereof are hereby declared cancelled or invalidated.
 - c. Costs to the petitioner."



6. Aggrieved by that judgment, the applicant filed a notice of appeal and the instant application. He has filed written submissions which are undated reiterating the averments in his supporting affidavit and which do not touch on the points of law on the applicable principles in an application under Rule 5 (2) (b) of the *Court of Appeal Rules*.
7. On her part, the respondent filed a replying affidavit in which she opposed the application and deponed that there is no memorandum of appeal attached to the instant application and that the applicant has not met the conditions required in an application of this nature; that the applicant has not suggested or offered any security as required. Such security ought to be offered at the time of filing the application to ensure that in the event the application succeeds, she does not suffer prejudice. Further, that she stands to suffer irreparable loss and prejudice as the applicant has been in occupation of the suit property illegally; and that if the impugned judgment and orders are executed she can adequately compensate the applicant in the event that the intended appeal succeeds. The respondent further deponed that this is an old matter that has been in court for over seven years and justice demands that a successful party in litigation be allowed to enjoy the fruits of his or her judgment; and that the applicant is hell bent on denying her the same. She urged us to dismiss the application with costs.
8. On arguability, counsel for the respondent submitted that the applicant has failed to satisfy this limb as there is no draft memorandum of appeal attached to the instant application and as such this Court cannot establish whether the applicant has an arguable appeal or not. On the question whether the intended appeal will be rendered nugatory, it was submitted that should the title to the suit property be cancelled, the cancelled title can be reversed to its original state and any developments on the suit property can be compensated in monetary terms. Further, that in the event that the appeal succeeds, the applicant can be compensated in terms of costs; and that the suit will therefore not be rendered nugatory if the orders sought are not granted and the intended appeal succeeds.
9. On the aspect that the applicant has not satisfied the twin principles as required, the cases of *Raphael Kakene Muloki & anor v Cabinet Secretary of Land & 2 others* [2021] eKLR and *Kenya Industrial Estate Limited & anor v Matilda Tenge Mwachia* [2021] eKLR were relied on.
10. At the hearing of the application, Mr. Anampiu, learned counsel for the applicant highlighted his written submissions. The respondent's advocate, learned counsel Mr. Kaume, also highlighted his submissions on behalf of the respondent. Both submissions rehashed the affidavits filed in support of the respective positions of the parties.

Determination

11. We have considered the application, the grounds in support thereof, the submissions and the law. The jurisdiction under Rule 5(2) (b) of the courts *Rules* is discretionary and guided by the interest of justice. Court's Rul principles t this nature are well settled. An applicant must satisfy the court that the appeal or intended appeal is arguable and that unless the court grants the order(s) sought, the appeal, if successful, will be rendered nugatory.

See *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR.
12. On the first principle, as to whether or not the appeal is arguable, while the applicant has not annexed a memorandum of appeal we discern from the record that the issue of ownership of the suit property is contested. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.



13. On the nugatory aspect, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (*supra*) this Court stated that:

“ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

14. In determining whether or not an appeal will be rendered nugatory, this court has to consider the conflicting claims of both parties and each case has to be determined on its own merits. In the instant application, the applicant is apprehensive that execution is imminent. Nothing is however attached to show that execution has commenced. Counsel for the respondent submitted that in case there is cancellation of title, the process is reversible and the developments made by the applicant on the suit property can be quantified and compensated in monetary terms. In the circumstances, we find that the intended appeal will not be rendered nugatory, if stay is not granted.

15. In conclusion, we determine that the applicant has not satisfied both limbs of the requirements under Rule 5(2)(b) of this Court’s *Rules*. The notice of motion dated October 4, 2022 is consequently dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 6TH DAY OF APRIL, 2023

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

