



**Ngige & another v Nyakairu (Civil Appeal (Application)
E039 of 2022) [2023] KECA 841 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 841 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E039 OF 2022
HM OKWENGU, LA ACHODE & PM GACHOKA, JJA
JULY 7, 2023**

BETWEEN

FRANCIS WAINAINA NGIGE 1ST APPELLANT

WILSON NJUGUNA GAKUHA 2ND APPELLANT

AND

ANN NYAMBURA NYAKAIRU RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an intended appeal from the Judgment and Decree of the Environment and Land Court at Thika (Kemei, J) delivered on 7th December 2021 in Thika ELC Appeal No. 64 of 2019)

RULING

1. We have before us a Notice of Motion dated January 26, 2022.

The motion seeks in the main, an order of stay of execution of the judgment and decree of the Environment and Land Court (ELC) (Kemei, J) delivered on December 7, 2021. It is not clear from the heading on the motion as to who are the applicants.

2. Francis Wainaina Ngige and Wilson Njuguna Gakuha are indicated as the 1st and 2nd appellants while Ann Nyambura is indicated as the respondent. However, in the grounds stated on the face of the motion, it is indicated that the respondent is dissatisfied with the ruling delivered on December 7, 2021 and that unless an order of stay of execution of the said judgment is granted, the appeal will be rendered moot thus exposing the respondents to grave irreparable loss. This implies that the respondent Ann Nyambura Nyakairu is the applicant in the notice of motion who is seeking the order of stay.

3. Surprisingly, the motion is supported by an affidavit sworn by Francis Wainaina Ngige (Ngige) who swears that he is the 1st applicant and that he is swearing the affidavit on his own behalf and on behalf



of the 2nd applicant whom he has not named. Of importance is paragraph 24 and 25 of the affidavit wherein Ngige deposes:

24. That unless this application is allowed pending the determination of the intended appeal, the respondent is likely to evict us from the suit property and dispose it off to third parties as it is clear that her intention was to dispose of the same.
 25. That if the respondent proceeds with the execution of the appeal on record, this appeal will be rendered moot, nugatory and we stand to suffer loss and prejudice.”
4. The matter is further complicated by the notice of appeal dated December 13, 2021, that was filed by Agnes W Njoroge & Co Advocates “for the respondents”. In the notice of appeal, the appellant is indicated as Anne Nyambura Nyakairu and the respondents as Francis Wainaina Ngige and Wilson Njuguna Gakuha. We note that Anne Nyambura Nyakairu swore a replying affidavit on February 10, 2022, indicating that she is the respondent in the motion. We also note that during the hearing of the motion Ms. Agnes Njoroge appeared for the applicant and argued the motion whilst Ms. Ndirangu appeared on behalf of the respondent. The Court of Appeal Rules and specifically the First Schedule provide the format for the filing of a notice of motion and a notice of appeal. The Court must know who the applicant or appellant is, and this is not an issue of second guessing. The jurisdiction of this Court is invoked by the filing of a notice of appeal. Before us is a notice of appeal dated December 13, 2021 filed “for the respondents” by an advocate. The application, the supporting affidavit, and the notice of appeal are self- contradicting and can only be described as a legal mess.
5. Be that as it may, it is disappointing that a motion that has been prepared by a counsel who ought to have known better is so confused. Much as we sympathise with the litigant, we have no option but to reject this application as the same is defective. Accordingly, we strike out the application in its entirety. The advocates, Agnes W. Njoroge & Company, shall personally pay the costs to Anne Nyambura Nyakairu.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

GACHOKA MWANIKI CIArb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

