



**Mutige Kiboti Company Ltd v County Government of Kakamega (Civil Application 165 of 2020) [2023] KECA 1616 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1616 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION 165 OF 2020  
W KARANJA, LK KIMARU & AO MUCHELULE, JJA  
OCTOBER 27, 2023**

**BETWEEN**

**MUTIGE KIBOTI COMPANY LTD ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF KAKAMEGA ..... RESPONDENT**

*(Being an application for stay of execution under rule 5(2)(b) against the decree and judgment of the ELC Court at Kerugoya (E.C.Cheronon. J) dated 22nd May 2020 in ELC Case No. 157 of 2015)*

**RULING**

1. Before the Environment and Land Court (ELC) in Kerugoya, Mutige Kiboti & Company Ltd. (the applicant) sued The County Government of Kirinyaga (the respondent). The applicant wanted to have the respondent evicted from Land Parcel no. L.R Kabare/Mikarara/136/128 (the suit land); mesne profits from the 1<sup>st</sup> January, 1988 and general damages for trespass. On the other hand, the respondent denied the applicant's claim and through a counter-claim sought an order that the applicant's title to the suit land be revoked and the register be rectified to reflect the respondent's name as the owner.
2. In the judgment of the ELC (E.C.Cheronon, J.) it was held that the applicant's titles to the land parcels No. Kabare/Mikarara/136/126 and 128 were obtained irregularly and or illegally and the only remedy available was to have the titles revoked and the register rectified. The applicant's suit against the respondent was therefore dismissed and the respondent's counter-claim was allowed.
3. Aggrieved by the said decision, the applicant appealed to this Court and contemporaneously filed the Notice of Motion dated 18<sup>th</sup> October, 2021, now under consideration, seeking orders, *inter alia*, that:
  - a. The honourable court be pleased to stay the execution of the judgment/decreed made on 22<sup>nd</sup> May, 2020 in Kerugoya ELC No. 157 of 2015 pending the hearing and determination of Civil appeal, Nyeri C.A No. E158 of 2020.



- b. An order of injunction does issue restraining the respondent whether by itself, its servants, employees, or anybody claiming through it from constructing or otherwise developing the suit properties No.s Kabare/Mikarara/136/126 and Kabare/Mikarara/136/128 pending the hearing and determination of appeal, Nyeri C.A No. E158 of 2020.
4. The applicant's motion is anchored on grounds, inter alia, that the appeal is arguable with chances of success; the respondent has yet to execute the decree though it has fenced off the area, and commenced construction works with the intention of putting up a fire station on the suit land, and in the absence of the orders being sought the appeal will be rendered nugatory.
  5. The application is supported by an affidavit sworn by Justus Murage dated 1<sup>st</sup> October, 2021 in which he deposes that during the pendency of the matter at the ELC, the respondent had started constructing a fire station and that should construction be done on the two plots then the appeal shall be rendered nugatory.
  6. In opposing the motion, Carolyn Kinyua, the County Attorney, has sworn a replying affidavit. She deposes that once the judgment was delivered, the applicant filed a notice of appeal dated 8<sup>th</sup> June, 2020 and thereafter filed a stay of execution application dated 19<sup>th</sup> May, 2021 which was withdrawn on 21<sup>st</sup> October, 2021. In addition, the instant motion is seeking orders against plot No. Kabare/Mikarara/136/126 and Kabare/Mikarara/136/128 whereas in their plaint the applicant sought eviction against one plot L.R Kabare/Mikarara/136/126. Further, that registration of the title has already been done in the respondent's name, therefore, the motion has been overtaken by events.
  7. In addition to the above, it is deposed that the applicant has failed to demonstrate how the respondent, being a reputable government entity, would not compensate the applicant by way of an alternative parcel of land and that the public stands to suffer irreparable damage in the event stay or injunction orders are issued.
  8. Both parties filed submissions in support of their rival positions. We have considered the said submissions and the authorities cited to us by both counsel, and we do not need to paraphrase the same here for purposes of this ruling.
  9. It is necessary, however, to repeat that for the application to succeed, the applicant needs to demonstrate the twin principles of arguability and the nugatory aspect. On the appeal being arguable it is submitted that the grounds raised are arguable for the reason that the respondent issued clearance certificates, collected rates, and rents for the plots and that it approved its transfer. It is submitted that if a stay is not granted the appeal may be rendered nugatory since the respondent had already started fencing off the plots and commenced construction.
  10. The applicant further urges that it has demonstrated that the irreparable loss cannot be compensated by way of damages in the absence of a stay. This is because the applicant is a company with shareholders and they had already lost business profits from the respondent's use of the land as a marketplace irrespective of having an agreement that the respondent would get an alternative place. We have been urged to allow the application.
  11. On the other hand, in its written submissions dated 1<sup>st</sup> March, 2023 counsel for the respondent urges that the motion has been overtaken by events and the decree has already been executed by the construction of a fire station on the suit property which was possible by the funding of the World Bank. In addition, the applicant shall not suffer any prejudice in the absence of stay orders since it has never occupied the suit property and it is the public who would suffer more if the stay is granted, therefore the application should be dismissed with costs.



12. During the virtual hearing of the motion on 7<sup>th</sup> of March, 2023, learned counsel Miss. Wambui was present holding brief for Mr. Maina Kagio for the applicant whereas Mr. Muchira was present for the respondent. It became clear that the title to the suit property has already been registered in the respondent's name, and counsel for the applicant still insisted that we proceed with the application on an order for injunction to stop any further developments on the suit property.
13. We have looked at the 8 grounds of appeal raised in the memorandum of appeal. We are cognisant of the fact that the applicant needs only to demonstrate one arguable ground and not a multiplicity of them and that it should not be necessarily one that will succeed, but one which ought to be argued fully before the Court and one which is not frivolous. See *Damji Pragji Mandavia vs. Sara Lee Household & Body Care(K) Ltd.*, Civil Application No. Nai 345 of 2004 and [\*Joseph Gitahi Gachau & Another vs. Pioneer Holdings \(A\) Ltd. & 2 others\*](#), Civil Application No. 124 of 2008. We are not persuaded that the appeal is frivolous. The first limb has, therefore, been demonstrated.
14. Turning to the second limb on whether the appeal shall be rendered nugatory in the absence of an injunction, it depends on whether what is being stayed or injuncted if allowed to happen is reversible and if it is not reversible, can the same be compensated by way of damages. See [\*Nguruman Limited vs. Jan Bonde Nielsen and 2 others\*](#) [2014] eKLR.
15. The applicant urged that the respondent commenced fencing and construction on the suit property which is the subject of the appeal. The applicant is apprehensive that if the same is not stayed then they shall suffer irreparable damage and that it could not be compensated by way of damages.
16. The respondent's counsel urged that the applicant had failed to demonstrate how the respondent being a government entity would fail to give an alternative plot in the event the appeal does not succeed. Although the applicant did not avail to the Court evidence in respect of the current position on the suits land, there was no dispute that construction had commenced on the suit property and was at an advanced stage. It was also conceded that the title to the suit land had already been transferred to the respondent.
17. We hold the view, therefore, that an order of injunction will not serve any useful purpose. We also find that the respondent can compensate the applicant by way of damages in the event the appeal fails. The applicant having failed to demonstrate the nugatory aspect, this application fails and the same is hereby dismissed with costs in the appeal.

**DELIVERED AND DATED AT NYERI THIS 27<sup>TH</sup> DAY OF OCTOBER 2023**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

**A. O. MUCHELULE**

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**JUDGE OF APPEAL**

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



**DEPUTY REGISTRAR**

