



**Kimani & 2 others v Mburu & 5 others (Civil Application
E038 of 2023) [2023] KECA 1622 (KLR) (17 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1622 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E038 OF 2023
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
NOVEMBER 17, 2023**

BETWEEN

**JAMES MUTHEE KIMANI 1ST APPLICANT
JOHN MARAKA KIMANI 2ND APPLICANT
PETER KARIUKI KIMANI 3RD APPLICANT**

AND

**EUNICE WAWIRA MBURU 1ST RESPONDENT
NANCY WANJAGI MBURU 2ND RESPONDENT
JOSEPH MBURU KIMANI 3RD RESPONDENT
JAMES KARIUKI MBURU 4TH RESPONDENT
JOHN KIMANI MURU 5TH RESPONDENT
JANET WAMBUI MBURU 6TH RESPONDENT**

(Being an application for an injunction pending the hearing and determination of an intended appeal from the judgment and decree of the Environment and Land Court at Kerugoya (J.M. Mutungi, J.) dated 17th February 2023 in E.L.C. Case No. E001 OF 2020)

RULING

1. On 17th February 2023 the learned J.M. Mutungi, J. of the Environment and Land Court (ELC) at Kerugoya dismissed with costs a suit that the applicants, James Muthee Kimani (1st applicant), John Maraka Kimani (2nd applicant) and Peter Kariuki Kimani (3rd applicant) had filed against the respondents, Joseph Mburu Kimani (1st respondent), Eunice Wawira Mburu (2nd respondent), Nancy Wanjagi Mburu (3rd respondent), James Kariuki Mburu (4th respondent), John Kimani Mburu (5th



- respondent) and Janet Wambui Mburu (6th respondent), claiming that the 1st respondent had been registered to hold land Parcel Gichugu/Settlement Scheme/835 in trust for himself and the applicants; but that, he had instead subdivided it into nine (9) portions (Gichugu/Settlement Scheme/4806 to 4814) which he had registered into his name and into the respective names of the other respondents. They sought that the ELC declares that a trust existed; the new titles be cancelled and the land reverts into Gichugu/Settlement Scheme/835; and the same be shared equally between the applicants and the respondents.
2. The respondents filed a joint defence in which it was denied that parcel Gichugu/Settlement Scheme/835 was held in trust. It was pleaded that the applicants had no claim to the land, or any part of it, and that they were mere trespassers. In the counterclaim that was filed, it was sought that the applicants be evicted.
 3. In the judgment, it was found that Parcel 835 originally belonged to the deceased father of the 1st respondent; that the 2nd respondent was married to the deceased and they got a child (the 1st respondent); then the 2nd respondent left the deceased and got married elsewhere and bore the applicants; that by the time of the death of the deceased she had been remarried; that it was the deceased who got the land to be registered in the name of the 1st respondent in absolute terms; that the applicants were not the deceased's children, and had no claim to the land; and that their settlement on the land amounted to trespass.
 4. What is before us is an application under Rule 5(2)(b) of the *Court of Appeal Rules*, sections 3A and 3B of the *Appellate Jurisdiction Act* and Article 159(2) of the *Constitution* in which the applicants are seeking a temporary injunction pending the hearing and determination of the appeal that they filed to this Court after they were aggrieved by the decision of the ELC. In support of the application, the 2nd applicant swore an affidavit, on his behalf and on behalf of the applicants, to state that they had filed a notice of appeal dated 17th March 2023 ("J.M.K. 11"); that the appeal raised arguable grounds and had high chances of success; they had lived on the suit land for over 25 years and that if they were evicted they would suffer irreparably and the appeal would be rendered nugatory; and that the appeal had been brought without unreasonable delay.
 5. The 1st respondent filed a replying affidavit on his behalf and on behalf of the other respondents to oppose the application. According to the respondents, the applicants had not filed any appeal and therefore the application was an abuse of the process of the court and ought to be dismissed. It was deponed that the 1st and 3rd applicants had obeyed the judgment and had left the parcel of land but that it was the 2nd applicant who had refused to vacate.
 6. We find that this is an easy application to determine. This is because, the jurisdiction of this Court under Rule 5(2)(b) of the *Court of Appeal Rules* can only be invoked upon the filing of a notice of appeal (See *Multichoice (Kenya) Ltd -v- Wananchi Group (Kenya) Limited & 2 Others* [2020]eKLR). Rule 5(2)(b) is essentially a tool to preserve and safeguard the substratum of a pending appeal (See *Teachers Service Commission -v- Kenya National Union of Teachers & 3 Others* [2015]eKLR). Where the applicant has not filed a notice of appeal, he cannot benefit from the powers of this Court under the *Rule*. The Court will not have the jurisdiction to grant him the orders of stay or injunction.
 7. In this application, the impugned judgment was rendered on 17th February 2023. Under Rule 77(2) of this *Court's Rules*, the applicants had 14 days to file a notice of appeal, now that they say they were aggrieved by the decision of the learned Judge. The annexed notice of appeal was filed on 17th March 2023. That was well after the fourteen (14) days had passed. There is no indication that extension of time was sought, or granted. It means that there was no competent notice of appeal to form the basis of the application under Rule 5(2)(b).



8. The consequence is that the application by the applicants is misconceived and incompetent. It is dismissed with costs.

DATED AND DELIVERED AT NYERI THIS 17TH DAY OF NOVEMBER 2023.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

