



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutua & 16 others v Kirugu & another (Civil Application  
E216 of 2021) [2023] KECA 1354 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1354 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E216 OF 2021  
DK MUSINGA, HA OMONDI & GWN MACHARIA, JJA  
NOVEMBER 10, 2023**

**BETWEEN**

**GEORGE MULI MUTUA & 16 OTHERS ..... APPLICANT**

**AND**

**NATIONAL BANK OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**PATRICK FREDRICK KIRUGU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for injunction pending an intended appeal  
against the decision in the Environment and Land Court at Nairobi  
(Okong'o, J.) dated 17th June 2021 in ELC Cause No. 199 of 2010)*

**RULING**

1. Before us is a Notice of Motion dated 23<sup>rd</sup> June 2021 and amended on 22<sup>nd</sup> June 2022, brought pursuant to rules 1 (1), 5 (2) and 47 of the Court of Appeal Rules and article 159 (2) (d) of the Constitution. The applicants seek an injunction to restrain the respondents by themselves, their servants or agents from evicting them or interfering with their occupation and possession of the parcel of land known as L.R No. 4929/1 Makuyu, Kuoka Farm, (the suit land), pending the determination of the intended appeal.
2. The background to the application is that, the applicants instituted a suit by way of an Originating Summons dated 30<sup>th</sup> April 2010, being Nairobi ELC Cause No. 199 of 2010- George Muli & 19 others vs David Waweru Ndungu & 3 others, seeking a declaration that they were entitled to the suit land by way of adverse possession, having occupied it since 1994; and an order of permanent injunction to restrain the respondents from evicting them from the suit land or interfering with their quiet possession. It was their contention that they bought the suit land from one David Waweru Ndung'u at a purchase price of Kshs.1.5 million, of which they paid in excess of Kshs.1 million; that upon conducting a search at the land registry, they learnt that the suit land was registered in the name of one



Jeremiah Gathirimu Gikonyo; that later on, the 1<sup>st</sup> respondent claimed that the suit land was his, and that he had owned it since 2009; and that, in any case, both David Waweru Ndung'u and Jeremiah Gathirimu Gikonyo knew that they (the applicants) were occupying the land and they never made any attempt to evict them.

3. It is paramount to mention that both David Waweru Ndungu and Jeremiah Gathirimu Gikonyo were defendants in the suit in ELC, but it seems that the applicants have abandoned any claim against them on appeal, as in the amended motion, the current respondents have been substituted with them.
4. The 1<sup>st</sup> respondent opposed the suit by way of a replying affidavit sworn on 22<sup>nd</sup> October 2010. The averments in that affidavit are similar to those in the affidavit he has sworn in opposition to this application. We shall therefore revisit them later on in this ruling.
5. The 2<sup>nd</sup> respondent opposed the suit vide a replying affidavit sworn on 22<sup>nd</sup> July 2010 by one Damaris Wanjiku Gitonga. Unfortunately, the judgment of the trial court did not indicate the capacity in which Damaris swore the affidavit. She deposed that one Jeremiah Gathirimu Gikonyo was its customer, to whom it granted an overdraft facility on 21<sup>st</sup> December 1989; that he defaulted in repayment, resulting in it exercising its statutory power of sale by public auction on 25<sup>th</sup> January 2008; and that the 1<sup>st</sup> respondent placed a bid of Kshs. 1,010,000, which purchase price was fully paid on 8<sup>th</sup> May 2008.
6. In its judgment, the trial court held that the suit land was registered in the name of David Waweru Ndung'u on 11<sup>th</sup> August 1964 after which he transferred it to Jeremiah Gathirimu Gikonyo on 10<sup>th</sup> November 1978; that Jeremiah Gathirimu Gikonyo charged it to the 2<sup>nd</sup> respondent on 16<sup>th</sup> August 1989, and a second charge on 29<sup>th</sup> November 1991; that only the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs had occupied a portion of the suit land for 12 years from the date Jeremiah Gathirimu Gikonyo became the registered owner, and thus, both had acquired the portions they occupied by way of adverse possession; that the rest of the plaintiffs had not acquired title by adverse possession as at the time Jeremiah Gathirimu Gikonyo had created the second charge they had not moved into the suit land, nor had the statutory period of 12 years run out; that before a title is extinguished by operation of law, the owner of a property is free to use the property as security notwithstanding the fact that the land is occupied by squatters, as at that time, the squatters have no right to the property as against the registered owner; thus, the plaintiffs' rights of adverse possession were subject to the charges. The court then entered judgment in favour of the 8<sup>th</sup> and 10<sup>th</sup> plaintiffs and dismissed the claims by the remaining plaintiffs.
7. Aggrieved, the applicants filed the instant application, which is supported by the grounds on the face of it and an affidavit sworn by the 1<sup>st</sup> applicant on 22<sup>nd</sup> June 2022. He deposes that the applicants have an arguable appeal as the learned Judge erred in fact and in law in failing to hold: that they had proved to have been in open, uninterrupted and continuous occupation of the suit property; that their rights were subject to the existing charges created over the suit property by the 2<sup>nd</sup> respondent; and that the change of ownership, and irrespective of the charges did not affect their acquisition rights by adverse possession. On the argument that the intended appeal will be rendered nugatory if the orders sought are not granted, the applicants contend that, although the ELC had ordered that the status quo be maintained, the 1<sup>st</sup> respondent violated that order, which resulted in violence. This resulted to the demise of certain persons, and hence, there is a real danger that the respondents will evict them if the orders sought are not granted.
8. The 1<sup>st</sup> respondent opposed the application by way of a replying affidavit sworn on 30<sup>th</sup> June 2021, averring that the application is an abuse of the court process; and that he is the registered owner of the suit land, having bought it through a public auction in 2008. He contends that the applicants having been ejected from the neighbouring Muli farm, invaded the suit land where they have remained while carrying out illegal mining activities which have been disapproved by the National Environment



Management Authority (NEMA) and the neighbouring Makuyu Ridge; that in search of redress, they moved to court where an order for maintenance of status quo was issued; that the applicants did not maintain the status quo, as a consequence violence broke out leading to death of some people; and that the 1<sup>st</sup> applicant has even threatened him, and he has reported the threats to the police. He contends therefore that, for the last ten years he has been denied the quiet possession of his property; that the applicants have also failed to substitute the 3<sup>rd</sup> applicant who died in 2015; that in view thereof, the appeal is neither arguable nor would it be rendered nugatory if the orders sought are not granted. It is urged that the application be dismissed with costs.

9. At the hearing of this application on 3<sup>rd</sup> July 2023, learned counsel Mr. Maina appeared for the applicants, while there was no appearance for the respondents despite, service of a hearing notice. The application was canvassed by way of written submissions. Those of the applicants are dated 16<sup>th</sup> January 2023, while for the 1<sup>st</sup> respondent are dated 1<sup>st</sup> July 2021.
10. In highlighting the applicants' submissions, Mr. Maina submitted that the appeal was arguable as the learned Judge misdirected himself in finding that the applicants had not been in quiet and continuous occupation of the suit land for over 12 years, and had not therefore acquired title by adverse possession. According to counsel, change of ownership and presence of a charge on a title does not affect the running of time, and, therefore, fetter the rights of the person in occupation of land or a claim of title by adverse possession. As such, if the applicants were to be evicted from the suit land, then the appeal would be rendered nugatory. Counsel thus urged us to allow the application.
11. We have considered the application, the written submissions by the parties and the applicable law. It is trite law that in an application of this nature an applicant must demonstrate that the appeal is arguable, which is to say that the same is not frivolous, and that the appeal would be rendered nugatory if the orders sought are not granted. See *Stanley Kinyanjui Kangethe vs. Tony Ketter & Others* [2013] eKLR. In determining whether the intended appeal is arguable or not, we are cognizant of the fact that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court.
12. From a perusal of the supporting affidavit, as a draft memorandum of appeal was not attached to the application, we are in agreement with the applicants that the intended appeal is arguable on the grounds: whether the change of ownership affects the acquisition rights by adverse possession; and more importantly, when time starts to run in respect of a charge to such land. We are of the view that these are not frivolous issues, they should be argued fully before the Court.
13. On whether the intended appeal will be rendered nugatory, we find that it has been demonstrated that if the application is declined, the applicants may not regain occupation of the suit land, more so, if other occupiers come in. The net effect of this is that if the applicants succeeded on appeal, it would be difficult to evict illegal occupants, thus rendering the appeal nugatory.
14. We are therefore satisfied that the applicants have satisfied both limbs for grant of relief under rule 5 (2) (b) of the *Court's Rules*. Accordingly, the Notice of Motion dated 22<sup>nd</sup> June 2022 is hereby allowed. The costs of the application shall be in the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**D. K. MUSINGA, (P)**

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**JUDGE OF APPEAL**

**H. A. OMONDI**



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**JUDGE OF APPEAL**

**G.W. NGENYE- MACHARIA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

