



**Mutahi v Kithangari & 4 others (Civil Application  
E085 of 2021) [2022] KECA 564 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KECA 564 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E085 OF 2021  
W KARANJA, HM OKWENGU & KI LAIBUTA, JJA  
MAY 13, 2022**

**BETWEEN**

**BENSON GICHOHI MUTAHI ..... APPLICANT**

**AND**

**ALEX NJUE KITHANGARI ..... 1<sup>ST</sup> RESPONDENT**

**MURIIITHI KITHANGARI ..... 2<sup>ND</sup> RESPONDENT**

**PETERSON MUGO KITHANGARI ..... 3<sup>RD</sup> RESPONDENT**

**NJERU TETU ..... 4<sup>TH</sup> RESPONDENT**

**KITHANGARI KING'ANGI ..... 5<sup>TH</sup> RESPONDENT**

*(An application for stay of execution of the orders of the judgment in Environment and Land Court at Meru (L. N. Mbugua, J.) dated 21st July, 2021 in ELC Case No. 75 of 2019)*

**RULING**

1. Benson Gichohi Mutahi (the applicant) filed a suit vide a plaint dated 26th April, 2012 against eight (8) parties, but the 5th party, Mwaniki Kithangari passed on, hence the suit against him abated. The suit against the 3rd and 7th defendants namely Boniface Muthee Njeru and Muriithi Mucharo respectively was withdrawn vide a consent dated 26th November, 2014.
2. The applicant averred to be the registered owner of Land Parcel No. Mbeere/Kirima/3066 measuring about 8.09 hectares (the suit land) and that the respondents had illegally occupied the suit land which was in violation of his constitutional right to property. He sought an eviction order against them or their family members or employees' failure to which they be evicted and an order of permanent injunction prohibiting the respondents from occupying or entering or encroaching, cultivating or interfering with the suit land.



3. The respondents filed their defence and counter-claim dated 2nd July, 2012 denying all the allegations and averred that they are in occupation of the suit property as of right and have carried out substantial development over a period of 50 years. In the counter-claim, they averred that the suit land was a result of sub-division of Parcel No. Mbeere/Kirima/2955, which is a resultant sub-division of the original Parcel No. Mbeere/Kirima/2044, which was owned by the 17 clans, hence they had settled on it as of right. It was agreed that the respondents would not be given other parcels of land elsewhere when the suit land was distributed. Further that the appellant/applicant held the suit land in trust for them. In their counterclaim, the respondents sought the following reliefs:
- a) A declaration that the plaintiff holds portions measuring 10 acres out of Mbeere/Kirima/3066 in trust for the 1st, 2nd, 4th and 8th defendants and 5 acres of Mbeere/Kirima/3066 in trust for the 6th defendant.
  - b) An order that the trust held by the plaintiff in respect of parcel No. Mbeere/Kirima/3066 be determined and that the title be rectified accordingly.
4. The suit was heard by way of viva voce evidence and, in a judgment dated 21st July, 2021 and delivered on 24th September, 2021 the Environment and Land court (ELC) issued the following orders:-
- “ a) Plaintiff’s case is dismissed.
  - b) Defendants counterclaim is allowed.
  - c) An order is hereby issued for the excision of 10 acres out of land parcel Mbeere/Kirima/3066 to be registered in favour of the 1st, 4th and 8th defendants jointly and a further 5 acres is to be excised from the land parcel No. Mbeere/Kirima/3066 and to be registered in the name of the 6th defendant.
  - d) The defendants (1st,2nd,4th,6th and 8th) are to immediately be restored on the suit land in terms of the status quo existing when the suit was filed with costs of the suit and counter-claim.
  - e) The plaintiff is condemned to pay costs of the main suit and the counter claim.”
5. Aggrieved by the said orders, the applicant has filed a notice of appeal dated 27th July, 2021 and a draft memorandum of appeal raising 7 grounds. Simultaneously, he filed a notice of motion application dated 28th September, 2021 under rule 5(2) (b) of this Court’s rules, which is the subject of this ruling. He is seeking in the main an order:
- a) That the honourable court be pleased to issue an order of stay of execution of the judgment issued in Meru ELC 75/2019 by the court on 21.7.2021 pending the hearing and determination of the appeal as filed.
  - b) Costs of the application.

The grounds in support of the motion are that: he is dissatisfied with the entire judgment; he is apprehensive the respondents may re-enter the suit land which he has extensively developed which will be detrimental to him; the subject matter of the appeal be preserved and his rights be preserved; he has an arguable appeal which may be rendered nugatory in the absence of stay; the application has been filed without undue delay and it would be in the interest of justice the motion be allowed.



6. He has sworn an affidavit dated 28th September, 2021 in support of the motion, in which he largely reiterates the said grounds. The applicant has urged this Court to find that he has an arguable appeal, which is not frivolous, and that the Court should, therefore, exercise its discretion in his favour and grant stay. The issue as to the existence of a Trust had been raised as one of the arguable points. In regard to the nugatory aspect, the Court has been urged to find that the respondents may proceed and have the land registered in their names rendering his appeal nugatory. In his oral highlights, Mr. Odera learned counsel for the applicant, urged that in the absence of stay, the suit property would have already changed hands. However, counsel informed the Court that the applicant had taken a loan facility and offered the suit land as security and, therefore, it would not be possible for the land to be transferred to another party.
7. The respondents have filed their replying affidavit dated 30th November, 2021 through Muriithi Kithangari, the 2nd respondent. He deposes that the applicant herein filed the same motion before the ELC seeking the same orders. The court granted interim stay on 11th August, 2021 on condition that he deposits Ksh. 800,000 as security within 21 days failing which the stay orders would lapse. He failed to comply and instead filed another application seeking to review the order of the court and later an application seeking time within which to enlarge time to deposit the security ordered on 11th August, 2021. At the time of filing this response, the ELC had ordered that the three pending applications be heard by way of written submissions, and the ruling was yet to be delivered. The Court was urged to find that they had not met the threshold to warrant the grant of stay orders. The respondents neither filed written submissions nor did they attend Court for the hearing of the application.
8. Upon considering the motion before us along with the rival affidavits, the written and oral submissions of the applicant's counsel and the law, what is required of us now is to determine whether the appeal or intended appeal is arguable and whether, if successful, it would be rendered nugatory absent stay.
9. The principles that apply in applications under Rule 5(2)(b) of this Court's rules are well settled. An applicant must show that the intended appeal or the appeal is arguable, and secondly, that the appeal or intended appeal, if successful, would be rendered nugatory if stay is not granted. The purpose of this rule is to preserve the substratum of the appeal. These principles were succinctly set out in *Stanley Kang'ethe Kinyanjui v. Tony Ketter* [2013] eKLR. Further, the applicant need not demonstrate a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the appeal will necessarily succeed, as was held by this court in *Anne Wanjiku Kibeh v. Clement Kungu Waibara & IEBC* [2020] eKLR. The applicant's main contention is that the court erred in finding that he was holding the suit property in trust for the respondents, yet the respondents did not belong to the Mururi clan. We are certain that the above issue is not idle. The intended appeal therefore, passes the first test on arguability.
10. On the nugatory aspect, the applicant has to establish that, in the absence of stay, and if the order is executed, the same will not be reversible. The applicant urged that the respondents will have the suit land registered in their names, move into the suit land and sub-divide the same to his detriment. As stated earlier, it has been conceded that the property is already charged to a financial institution and it cannot, therefore, be transferred to anybody else before the title is discharged upon payment of the loan. As things stand, the applicant has the control and authority over the land in question. From the replying affidavit filed by the respondents, they deposed that the applicant has already evicted them from the suit land. That deposition has not been controverted. There is indeed nothing for us to stay. Having failed to demonstrate the nugatory aspect, it becomes obvious that this application fails to meet the threshold set for applications of this nature to succeed. Accordingly, we dismiss this application with costs to the respondents.



DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022.

W. KARANJA

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

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

*Signed*

DEPUTY REGISTRAR

