



REPUBLIC OF KENYA



**Mugambi & 5 others v Gakundi & 7 others (Civil Application  
88 of 2021) [2022] KECA 752 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KECA 752 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION 88 OF 2021  
HM OKWENGU, F SICHALE & A MBOGHOLI-MSAGHA, JJA  
JUNE 24, 2022**

**BETWEEN**

**ZIPPORAH KARIGU MUGAMBI ..... 1<sup>ST</sup> APPLICANT  
JOHN MWATHI M'MUGAMBI ..... 2<sup>ND</sup> APPLICANT  
JEREMIAH MURAUKO MUGAMBI ..... 3<sup>RD</sup> APPLICANT  
BEATRICE GACUNKU ..... 4<sup>TH</sup> APPLICANT  
DAVID MUTUGI KARIGU ..... 5<sup>TH</sup> APPLICANT  
JOSEPHAT NJERU KIAYA ..... 6<sup>TH</sup> APPLICANT**

**AND**

**SABERA GAKUNDI ..... 1<sup>ST</sup> RESPONDENT  
BEATRICE KATHAMBI ..... 2<sup>ND</sup> RESPONDENT  
CHARITY KAINDI ..... 3<sup>RD</sup> RESPONDENT  
VIRGINIA MUTHONI ..... 4<sup>TH</sup> RESPONDENT  
JOHN KIMATHI ..... 5<sup>TH</sup> RESPONDENT  
ALICE KARIMI ..... 6<sup>TH</sup> RESPONDENT  
JAMES MUTUGI MWITHI ..... 7<sup>TH</sup> RESPONDENT  
GERALD MUGAMBI ..... 8<sup>TH</sup> RESPONDENT**

*((An application for stay of execution of the judgment of the Environment and Land Court of Kenya at Chuka (P.M. Njoroge, J) dated 25th May, 2021 in Chuka ELC 1 of 2019 (OS)*



## RULING

1. On the 25<sup>th</sup> May, 2021, the Environment and Land Court at Chuka (the ELC) (Njoroge, J), delivered a judgment in which it was ordered that Zipporah Karigu alias Karigu M’Mugambi Ngiti and John Mwathi M’Mugambi, the 1<sup>st</sup> and 2<sup>nd</sup> applicants be jointly awarded 0.61 hectares (approx. 1.5 acres) out of land parcel No. South Tharaka/Tunyai “A”/390, and that the balance of land parcel No. South Tharaka/Tunyai “A”/390 be awarded to the family of Sabera Gakundi Mwithi (the respondents herein), to hold in equal shares.
2. The 1<sup>st</sup> applicant is mother to the 2<sup>nd</sup> to 6<sup>th</sup> applicants who are aggrieved by the judgment of 25<sup>th</sup> May 2021 and have now moved to this Court under Rule 5, 75 and 82 of the Court of Appeal Rules seeking an injunction against the respondents, by themselves, their agents or servants, from interfering, charging, leasing, pledging, transferring, alienating, or in any other manner dealing with parcel of land South Tharaka/Tunyai “A”/390 pending the final hearing of the appeal. Secondly, that a stay of execution do issue, and any action on the judgment and decree of the ELC at Chuka dated 25<sup>th</sup> May, 2021 be prohibited until the final hearing and disposal of the appeal.
3. The litigation leading to the motion before us is rather convoluted. It commenced with ELC No 225 of 2017 which was filed by James Mutugi Mwithi (7<sup>th</sup> respondent) against Daniel Mugo Mwangi on 5<sup>th</sup> April 2017. That suit was dismissed through a ruling dated 13<sup>th</sup> November, 2018 after the Court rejected an application to amend the name of the defendant that was wrongly indicated as Daniel Mugo Mwangi instead of Dedan Mugo Mwangi.
4. Subsequently, on 22<sup>nd</sup> January 2019, the 7<sup>th</sup> respondent filed another suit ELC No. 1 of 2019 (OS), against Dedan Mugo Mwangi in which he claimed to have acquired South Tharaka/Tunyai “A”/390 by way of adverse possession as he had lived on the suit property for more than 20 years. That suit was served on the Dedan Mugo Mwangi by way of substituted service and was not defended. In a judgment delivered on 30<sup>th</sup> July 2019 the Court gave judgment declaring South Tharaka/Tunyai “A”/390 to have devolved on the family of Sabera Gikundi Mwanthi (1<sup>st</sup> respondent) and members of her family who included 7<sup>th</sup> respondent, to hold as equal proprietors in common and the Land Registrar was ordered to effect the change.
5. Thereafter the applicants filed ELC 20 of 2019 (OS), against the respondents seeking to have the title for South Tharaka/Tunyai “A”/390 (the suit property) issued to the respondents cancelled and the land ordered to revert to the former titles. In addition, that a declaration issue that the applicants were entitled to different portions of the suit property by virtue of adverse possession having enjoyed open and continuous use of the property for over 12 years. In the alternative the applicants sought a declaration that the respondents were holding 18 acres of the suit property in trust for the applicants in a different portion of the suit property.
6. By an application dated 30<sup>th</sup> August, 2019, the applicants sought inter alia to have the judgment dated 30<sup>th</sup> July, 2019 reviewed and set aside and orders of inhibition issued restraining dealings on South Tharaka/Tunyai “A”/390 until the applicants’ suit was heard and determined; and further that the respondents be restrained from evicting the applicants from the suit property. The applicants claimed that they were not included in the respondents’ suit even though they have been in possession of part of the suit property, and this information was withheld from the court.
7. By a ruling delivered on 5<sup>th</sup> May 2020, the ELC granted the applicants’ motion. Subsequently ELC No. 1 of 2019 and ELC No. 20 of 2019 were consolidated and heard together and a judgment dated 25<sup>th</sup>



May 2021 delivered as earlier stated. This is the judgment that the applicants have filed an appeal against and upon which the applicants motion for orders for stay of execution and injunction is anchored.

8. The grounds relied upon by the applicants in support of the motion are that since the passing of the decree, the respondents have been harassing the applicants to vacate the disputed land and have now extracted the decree creating apprehension that they will execute the decree and the applicants evicted, and that there is a danger that the suit land may be disposed of. The applicants also state that it is in the interest of justice for the court to grant the orders sought to give them an opportunity to have their appeal that is not frivolous, heard.
9. The respondents opposed the applicants' motion through a replying affidavit sworn by the 7<sup>th</sup> respondent on behalf of the other respondents. They took the position that the application is incompetent as it is filed by advocates who are not properly on record. Secondly, that the property which the motion seeks to preserve, that is, Tharaka/Tunyai "A"/390, is non-existent as the judgment was executed and the property was subdivided into seven parcels.
10. The motion before us being one under Rule 5(2)(b) of the *Court of Appeal Rules*, the guiding principles are now well known. In the case of *Attorney General vs Okiya Omtatah Okoiti & Another* [2019] eKLR this Court reiterated as follows:

“The principles for our consideration in the exercise of our unfettered discretion under Rule 5(2) (b) to grant an order of stay are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory.”

11. Earlier in *Stanley Kangethe Kinyanjui Vs. Tony Ketter & 5 Others* [2013] eKLR this Court had expounded the principles for considering an application under Rule 5(2)(b) of the Court of Appeal Rules as follows:

- vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
- viii. An applicant must satisfy the Court on both the twin principles.
- ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
- xi. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.
- xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”



12. The issue that we have to determine is whether the applicant has met the threshold for grant of the orders injunction and stay of execution by establishing that they have an arguable appeal and that absent the orders sought, their appeal will be rendered nugatory.
13. The applicants have exhibited a memorandum of appeal that they have filed in the appeal against the respondents. The six grounds contained in the memorandum of appeal shows inter alia that, the applicants intend to challenge the manner in which the trial court conducted the hearing of the two suits simultaneously and delivered judgments on 30<sup>th</sup> July, 2019 then set aside the two judgments, consolidate the two suits and issued a third judgment dated 25<sup>th</sup> May 2021. We have set out the background to the applicants' motion and it is clear that the appeal has a convoluted background. The applicants also contend that the trial court violated the rules of natural justice, did not give reasons in the judgment for its determinations, and the decision was against the weight of evidence. Having examined the record of appeal that is also annexed and the contending affidavits filed by the respective parties, we find that the grounds posited demonstrate that the applicants have an appeal that is arguable and not frivolous. The issues raised by the respondents regarding the competence of the appeal is an arguable issue to be addressed in the appeal and not in this motion.
14. As regards the nugatory aspect, the subject of the litigation is land of which the applicants are in possession. The respondents are pushing for execution of the judgment of 25<sup>th</sup> May 2021 which entails eviction of the applicants from the suit property. The threat of eviction is therefore real. If the eviction takes place nothing will prevent the respondents from disposing of the land and this will render the applicants appeal, if successful, nugatory as it may be difficult to recover the property from a third party. The issue whether Tharaka/Tunyai "A"/390 exists or not is also an arguable issue to be canvassed in the appeal. For the purpose of the motion before us, it is sufficient that the decree provides for the award of this land between the respondents and the applicants, and there is no evidence that the land has been disposed of.
15. For the above reasons, we are satisfied that the applicants motion is merited and that they have met the threshold for granting the orders sought. Accordingly, we grant the motion and issue orders as follows:
  - i. That an injunction shall issue restraining the respondents, by themselves, their agents or servants, from interfering, charging, leasing, pledging, transferring, alienating, or in any other manner dealing with parcel of land South Tharaka/Tunyai "A"/390 pending the hearing and final disposal of the appeal.
  - ii. Secondly, that an order of stay of execution shall issue, staying execution of the judgment and decree of the ELC at Chuka dated 25<sup>th</sup> May, 2021 pending the hearing and final disposal of the appeal.
  - iii. That the costs of the motion shall be in the appeal It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE, 2022.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**



**A. MBOGHOLI MSAGHA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

