



Gathambo (Suing as Legal Representative of the Estate of Gathambo Gacheche - Deceased) v Gacheche (Sued as the Administrators of the Estate of Gacheche Hosea (Deceased) & 2 others (Civil Application E070 & E074 of 2021 (Consolidated)) [2022] KECA 652 (KLR) (8 July 2022) (Ruling)

Neutral citation: [2022] KECA 652 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E070 & E074 OF 2021 (CONSOLIDATED)
DK MUSINGA, AK MURGOR & S OLE KANTAI, JJA
JULY 8, 2022

BETWEEN

ALICE NYAKINYUA GATHAMBO APPLICANT
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF GATHAMBO
GACHECHE - DECEASED

AND

ELIZABETH MUTHONI GACHECHE, JEANE WANJIKU GACHECHE &
ANDREW GATHAMBO GACHECHE (SUED AS THE ADMINISTRATORS OF
THE ESTATE OF GACHECHE HOSEA (DECEASED) 1ST RESPONDENT
DISTRICT LAND REGISTRAR - NYERI 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT

(Being an application against the Ruling of the Environment and Land Court of Kenya at Nyeri (Angima, J.) dated 28th July, 2021 in ELC Cause No. 17 of 2019)

RULING

1. In a ruling delivered by the Environment and Land Court (ELC) at Nyeri (Angima, J.) on 28th July, 2021, a preliminary objection taken by the 1st respondent's (Elizabeth Muthoni Gacheche, Jeane Wanjiku Gacheche and Andrew Gathambo Gacheche (sued as administrators of the estate of Gacheche Hosea (deceased) was upheld, the applicant's (Alice Nyakinyua Gathambo) notice of motion was disallowed, the applicant's originating summons was struck out as being incompetent and the 1st respondent was awarded costs of the preliminary objection and the respondents awarded costs of an application which was dated 18th February, 2021.

A brief background to the matter that was before ELC will suffice.



2. In the originating summons the applicant applied that the ELC issue and grant an order rectifying the record pertaining to land parcel No. Kirimukuyu/Kiria/638 (the suit property) registered in the name of Gacheche Hosea (deceased) and then to one of the respondents (Andrew Gathambo Gacheche); that the court issue an order compelling the 2nd respondent (District Land Registrar – Nyeri) to cancel some entries in the register transferring the suit property to the said Andrew Gathambo Gacheche to enable succession proceedings to be undertaken. It was stated amongst other things that upon the death of Gacheche Hosea (the deceased), the 1st respondent had taken out letters of administration where the suit property had been listed as part of the estate of the deceased; grant was confirmed on 13th June, 2020 but according to the applicant the deceased was only entitled to a portion of the suit property.
3. The 1st respondent took a preliminary objection contending that the suit was res judicata and bad in law as the matters in issue in the suit were also directly and substantially in issue in two previously decided cases being Nairobi High Court Succession Cause No. 1869 of 1999, in the matter of the Estate of Gacheche Hosea (deceased) and in Nyeri CMCC No. 196 of 2018 (originally Nyeri ELC No. 67 of 2017, *Alice Nyakinyua Gathambo v Elizabeth Muthoni Gacheche & 2 Others*). The ELC considered the preliminary objection and as we have seen the objection succeeded.
4. The applicant in both applications (Civil Application No. E070 of 2021 (the first application) and (Civil Application No. E074 of 2021 - the second application) makes the following prayers:
5. The first application is said to be brought under rules 5 (2) (b), 40(b) and 47(5) of the *Court of Appeal Rules* and rule 3 (1) and (2) of the *High Court (Practice and Procedure) (Jurisdiction Act* Cap 9 Rule 20 (1) (3) (Practice and Procedure) vacation rules and all other enabling provisions of law. It is prayed in the main that we issue a temporary injunction against the respondents to restrain them from demolishing buildings, evicting or interfering with quiet occupation of the suit property until the application and proposed appeal are heard and determined. Further, that the applicant be allowed to reinstate the rural kitchen that was standing on the suit property which had been demolished by the respondents on 25th April, 2021 and that the applicant be allowed to reinstate a rooftop removed from buildings on the suit property and finally, that the whole exercise be overseen by the Officer Commanding Kiamubira Police Station. The application is supported by grounds on its face and also by the applicant's supporting affidavit where it is said in essence that the respondents had invaded the suit property on 25th August, 2021 where they had brought down a kitchen building housing 3 stone fireplace; on the same day the respondents plucked out roofing to the main house erected on the suit property with the intention of evicting the applicant and her siblings; that there was no notice to the applicant and her siblings who had lived on the suit property for over 50 years, and that eviction of the applicant from the suit property would render the intended appeal nugatory.
6. There is no replying affidavit to this Motion and neither of the parties filed written submissions which they had been asked to do in the hearing notice dated 19th January, 2022 at 3.17 p.m.
7. The second application is brought under nearly similar provisions of law to the first application. The prayers are the same – that we grant an injunction restraining the respondents from evicting the applicant from the suit property; that the applicant be allowed to reinstate a kitchen which had been demolished; that a rooftop removed from a house be reinstated and the police supervise that process. The grounds in support of the Motion and supporting affidavit are to the same effect as in the first application and we do not understand why the applicant or her lawyers decided to file 2 applications against the same respondents when one application would have sufficed.
8. In a replying affidavit by one of the 1st respondents Jean Wanjiku Gacheche, she says that she is one of the administrators of the estate of her deceased father; that the deceased was the owner of the suit land



and that upon his demise she, her mother and her late brother applied for letters of administration; they had obtained a grant on 23rd November, 1999 which had been confirmed on 13th June, 2000 with no objection; the estate had then been distributed; the deponent denies that the applicant or siblings ever occupied the suit property. Further, that the applicant had applied for revocation of the grant in Nairobi High Court Succession Cause No. 1869 of 1999 which application had been heard and dismissed; that the applicant then filed Nyeri ELC No. 67 of 2017 seeking same orders as the Nairobi High Court case; that the case was transferred and became Nyeri MCL & E No. 196 of 2018 which had been struck out and no appeal had been preferred against those findings.

9. We have considered the applications which are essentially asking us to stay orders of ELC where the preliminary objection succeeded and the originating summons filed by the applicant struck out. The principles that guide this Court in an application for stay pending appeal or injunction are well known and have been the subject of many judicial pronouncements of this Court such as in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR. For an applicant to succeed he must firstly show that the appeal, or intended appeal, as the case may be, is arguable which is the same as saying that the appeal is not frivolous. Secondly, the applicant must demonstrate that the appeal, if successful would be rendered nugatory absent stay.

What is the position here?

10. The Judge at the ELC found that the parties in the suit before him were the same parties in Nairobi High Court Succession Cause No. 1869 of 1999; they were the same parties in Nyeri MCL & E No. 67 of 2017 and the issue in dispute raised before him was the same issue relating to the suit property which issue had been heard and determined. The Judge found that the suit before him was res judicata and the originating summons was struck out. We are in those premises unable to see any arguable point in the intended appeal the succession cause in Nairobi having been heard on merits as was the case before the Chief Magistrate at Nyeri.
11. Having so found, we need not address the nugatory principle here but we may say in passing that the kitchen having been allegedly demolished and the rooftop removed, the applicant would not be entitled to any relief under rule 5 (2) (b) of the *Court of Appeal Rules*.
12. We agree with the submissions by learned counsel for the respondents that we have no jurisdiction in applications of this nature to quash orders of the High Court in the way that we have been invited to do by the applicant. Both motions fail and are dismissed. Let each party bear their own costs considering the history of the matter.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

D.K. MUSINGA, (P)

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

