



**Mberia v Mbui & 4 others (Civil Application E038 of 2021)
[2021] KECA 153 (KLR) (19 November 2021) (Ruling)**

Neutral citation: [2021] KECA 153 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E038 OF 2021
AK MURGOR, P NYAMWEYA & JW LESSIT, JJA
NOVEMBER 19, 2021**

BETWEEN

WILLIAM GACANI MBERIA APPLICANT

AND

CHARLES KIRIMI MBUI 1ST RESPONDENT

DISTRICT LAND REGISTRAR MERU CENTRAL 2ND RESPONDENT

DISTRICT SURVEYOR MERU CENTRAL 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

(An application from the Judgment of the High Court of Kenya at Meru (L.N. Mbugua, J.) dated 30th September, 2020 in ELC Constitutional Petition No. 6 of 2020)

RULING

1. By way of a Notice of Motion dated 13th May, 2021 the applicant herein, Dr. William Gacani Mberia, has sought a conservatory order to restrain Charles Kirimi Mbui, the 1st respondent herein, the District Land Registrar Meru Central, the 2nd respondent herein, and the District Surveyor Meru Central, the 3rd respondent herein, from interfering with the applicant's user and occupation of the land parcel No. Ntirimiti Settlement Scheme/417 (the subject property) pending the hearing and determination of this application, and Nyeri Civil Appeal No. E 026 of 2020.
2. The application was brought on grounds that the applicant is the registered owner of the subject property, while the 1st respondent is the registered owner of land parcels number Ntirimiti Settlement Scheme/484 2109; and that an access road lies between the subject property and the 1st respondent's properties. It was the applicant's contention that following a claim of the existence of a boundary



dispute between himself and the 1st respondent, the dispute was resolved by the 2nd and 3rd respondents to allow the 1st respondent to occupy a portion of the subject property without any legal justification; that the applicant was aggrieved and filed a Constitutional Petition No. 6 of 2020 which was dismissed by the High Court on a technicality; that undeterred, the applicant filed an appeal in this Court against the High Court's decision that being, Civil Appeal No. E026 of 2020, which he contends has a high chance of success. The applicant's motion was supported by an affidavit and written submissions.

3. By a replying affidavit sworn on 13th July 2021, the 1st respondent deponed that he purchased land parcel Ntirimiti Settlement Scheme/484 from one George Mugambi Gitonga, and that upon taking possession of the property, he found that the applicant had encroached onto his land; that he then sought to have the boundaries retraced, following which the Land Registrar and the County Surveyor together with the parties surveyors visited the land, took measurements where after, the boundaries were retraced and demarcated.
4. It was averred that the applicant was dissatisfied with the demarcation and sought to have the dispute resolved by instituting a suit in the Environment and Land Court at Meru which was dismissed for want of jurisdiction, in view of the available alternative dispute resolution mechanisms stipulated by the *Lands Act*; that the applicant subsequently filed an appeal to this Court, and simultaneously with that, sought for a review by the trial court of its decision which was again dismissed; that the applicant was dissatisfied with the ruling, and has now preferred an appeal to this Court.
5. The 1st respondent further contended that the appeal is not arguable and as such, the motion herein should be dismissed for lack of merit.
6. In so far as applications filed under rule 5 (2) (b) of this Court's rules are concerned, the threshold requirements to be satisfied as exemplified in the case of *Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR*, are that;

The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”
7. On the question of arguability of the intended appeal, the applicant's grievance is that the learned judge determined the constitutional petition on the basis that it was *res judicata* when it was not, and that the learned judge failed to appreciate that the suit filed was in respect of a constitutional petition concerning the hiving off of a portion of the applicant's property for no apparent reason and without his having been compensated, all of which were illegal actions that violated his rights.
8. It becomes apparent that the applicant's appeal is against the trial court's exercise of discretion in dismissing the application for review. Notwithstanding that he will be hard pressed to fault the trial court's exercise of discretion, we are prepared to find that the appeal is arguable.
9. With respect to the second limb, the applicant has not advanced any materials to demonstrate how the appeal would be rendered nugatory in the event that we were to decline to grant the orders and it were to succeed. He has not informed the Court of any eventuality that is likely to befall him or the subject property were the orders sought not granted. In other words, the applicant has not satisfied us that the appeal would in any way be rendered nugatory.
10. In sum, the applicant has failed to satisfy the twin requirements, as a consequence of which, the motion dated 13th May 2021 is unmerited and is hereby dismissed. Costs in the pending appeal.



It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF NOVEMBER, 2021.

A.K. MURGOR

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

